APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 21
HCA/2024/000355/XC

Lord Justice Clerk
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

OLUWATAYO DADA

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson KC, sol adv; Faculty Appeals Unit (for Iain Jane & Co)
Respondent: Glancy KC; the Crown Agent

29 April 2025

[1] On 22 February 2024, a jury at Inverness High Court convicted the appellant of two charges. Charge 1 involved sexual assault of XX at a school between August 2013 and 30 June 2014. Charge 2 involved repeated acts of sexual assault and rape of YY at the appellant's flat contrary to sections 1, 2 and 3 of the Sexual Offences (Scotland) Act 2009 on 19 and/or 20 October 2021. In convicting the appellant on charge 2 unanimously, the jury deleted an averment of oral penetration. At an adjourned diet on 26 June 2024, the trial

judge imposed an extended sentence of 6 years and 6 months on charge 2, comprising a period of 4 years and 6 months imprisonment and an extension period of 2 years. She admonished the appellant on charge 1.

[2] The appellant's ground of appeal, directed only at charge 2, is that there has been a miscarriage of justice on grounds of defective representation, specifically that video footage he took of the complainer on his mobile phone during their encounter ought to have been led in evidence. In his note of appeal, he avers that his defence was not properly prepared and presented.

The evidence

YY

[3] The complainer in charge 2 was a student. She and the appellant were friends. She was a practising Christian who believed she should not engage in sexual intercourse until after marriage. On the evening of 19 October 2021 she visited the appellant at his flat. She lay on his bed working on her laptop. The appellant also sat on the bed watching TV. Without warning, he started to stroke her lower back. She did not want to make a fuss and, in any event, the touching was brief and quickly stopped. His behaviour then intensified. He tried to pull her on top of him and tried to remove her clothing before touching her breasts. She was taken aback and asked him what he was doing, to which he responded that everything was fine, nothing was going to happen and that she should not stress. She attempted to resist his advances and moved further away from him on the bed in order to continue working on her laptop. She told him that she did not want anything to happen between them. He ignored her and proceeded to kiss her.

[4] The complainer told the appellant she was not prepared to have sex with him. She explained in evidence that she felt as though she had to defuse the situation and she did not know how to get out of it. In an attempt to mollify him, she offered to perform oral sex on him despite not wanting to. She felt that this was the only way to get out of having full vaginal sex with him. He seemed to accept and penetrated her mouth for around a minute when the appellant lay back down on the bed and returned to watching TV.

[5] After a while, he began to cuddle the complainer from behind on the bed. He then placed his hand under her leggings and pants and inserted his fingers into her vagina. She was uncomfortable with this but did not say anything while he intensified his approach and began to ask her for sex. She told him that she did not want to have sex with him, but he became increasingly insistent. She felt as though she needed to negotiate with him. He told her that they would not have sex but, instead, he would "rub it on the outside". The appellant had begun to remove the complainer's clothing, telling her to "chill and just relax". Eventually, she gave in to the appellant's advances to the extent that she agreed to him rubbing his penis against her vagina, which he did, on the condition that he would not penetrate her. She repeatedly told him that she did not want to have sex.

[6] Without warning, the appellant put his penis inside her vagina. She was shocked and taken aback. The appellant told her that since he had already been inside her she should just enjoy it. The complainer told him that she ought to leave and tried to get up but he continued, pushing her down on the bed and thrusting hard which was very painful. She froze. She then tried to push the appellant off to no avail. She was silent and he asked her why she was not making any noises and was so tense. He pushed her knees open and continued thrusting for a while. She realised that the appellant was not wearing a condom. She reacted in panic and the appellant agreed to find a condom. As he left the room, the

complainer began to put her clothes back on. However, on his return, he pushed her back onto the bed, took her pants back down and started to have sex with her again. He was thrusting very fast causing her a lot of pain until he ejaculated.

[7] The complainer then got dressed. When she tried to leave the flat, the appellant asked for sex again. She told him no and that she needed to leave. Without warning, the appellant positioned himself behind her, pulled down her leggings and pants, pressed her body down on the bed and had sex with her from behind. She kept trying to stand up straight but each time she did so he pushed her back down onto the bed. Each time she protested he told her to shut up and just enjoy it. He carried on until he decided to stop. She picked up her bag and laptop and left the flat. He walked the complainer to her car before hugging her goodbye.

[8] When safely in her car the complainer phoned her friend NN. She described herself as breaking down over the phone. She told her friend she had said no but the appellant had sex with her. On her arrival home, she noticed that she was in pain and was bleeding. The next day she drove to Dundee to visit NN. The complainer was shaky, nervous and very on edge. She told her friend what had happened to her and who was involved. That weekend, the complainer attended a young adults' weekend away with her church group. There she disclosed what had happened to another friend, XX, the complainer on charge 1, who responded that she knew the appellant from school. XX told her there was an occasion where the appellant had sat next to XX in class and had tried to reach into her pants. The complainer YY further reported the incident to LS, one of the pastors at her church. Whilst explaining to her what had happened, the complainer broke down in tears and was very upset.

[9] In cross-examination, counsel asked the complainer if she had used her telephone during the incident with the appellant. She explained that she had replied to a message on Snapchat, whilst in the flat but that she had not been speaking with any of her friends contemporaneously during the incident.

NN

[10] NN was a student and had been a friend of the complainer's from school. She spoke to receiving either a phone call or a Facetime call from YY at 0234 on 20 October 2021. It was probably a Facetime call as that is what they usually do. The complainer sounded distressed, very shaken up and was stumbling her words. She was really upset and crying about it. It was not like her. The complainer said she had been at someone's flat and had just left. The person there was making sexual advances towards her that she declined. She kept declining and moving away as he tried to touch her but he persisted and eventually he raped her. She could see that the complainer was very shaken up and very disturbed. She said she had been trying to leave and he stopped her from leaving. She was telling him she did not want to do anything but he did not listen to her. He forced himself on her. She kept saying no but he just continued. When she tried to push him off, he forced her back. He raped her multiple times.

[11] The following day the complainer visited NN and gave further detail about what had happened to her. The complainer was upset and crying when speaking about it. NN encouraged her to report what had happened, the rape. The complainer said "Tayo" raped her. He was trying to coerce her into having sex when she did not want to.

XX

[12] The complainer in charge 1 was a secondary school pupil of around 14 during the course of 2013 and 2014. She and the appellant shared a desk in their maths class. On one occasion, the appellant was sitting next to her during a lesson when he placed his hand on her right knee. He moved his hand up her leg, over her thigh and touched her vagina over her pants. She was extremely uncomfortable and was too afraid to say anything to anyone at the time. She pushed his hand away and crossed her legs to try to stop him but he ignored her resistance. She felt extremely embarrassed, belittled and afraid.

[13] She was friends with YY through the same church. In late October 2021, XX had attended a young adults' away weekend with her church along with YY. At one point during the weekend, YY had asked whether she was free for a conversation. YY disclosed that she had agreed to visit a friend and, whilst in his flat, he had made her stand up, take off her trousers and underwear and proceeded to rape her. YY seemed embarrassed, ashamed and very nervous during their conversation and she was crying a lot. YY did not initially name the appellant as the perpetrator. Instead, XX asked YY whether it was the appellant, as XX knew that the appellant and YY knew each other.

LS

[14] LS is a church minister who ran a number of youth groups. She had known YY in this context for several years and then as part of the young adults' group where YY was a leader. In late October 2021, there was a young adults' residential weekend and XX was also there. XX had expressed concern about one of her friends a few days later but did not initially name YY. XX said a friend had been to someone else's house to study and was raped there, saying it was someone that LS knew. LS worked out it could have been YY or

one other woman. She had approached YY, hugged her and noticed she was very rigid and reserved and seemed a bit off. Normally YY was bubbly and lively but she was particularly downbeat and did not seem herself. She had her suspicions and asked XX, who confirmed that YY was the friend concerned. LS went back to YY, who agreed to meet saying she was not "doing too great". Once they were alone, YY's eyes were streaming with tears and said she could really do with some support. YY visited her a few days later and told her what had happened, something of a sexual nature. This was by now the start of November and, in the face of an objection, LS did not go into detail about what the complainer said but she did describe YY's tears and body language. YY was shaky and upset. She encouraged YY to speak to her mother and to report what had happened to the police. They met again a few days later and YY was very unsure how to approach the police so LS made the call and then handed the phone over to YY, who told the police what had happened.

[15] We note that whilst LS's interactions with and observations of the complainer came a little later and were not founded on as corroboration by way of *de recenti* statements or distress, her evidence provided compelling support for the credibility and reliability of the complainer's evidence that she was raped.

ZZ

[16] ZZ gave evidence under reference to a docket stating:

> "on 5 November 2017 at an area underneath a flight of stairs …you did seize ZZ, ...and push same against a wall, repeatedly bite her on the neck and face, force her to the ground, force her legs apart and penetrate her vagina with your penis without her consent;"

[17] On the evening of 4 November 2017 she had gone on a night out with her partner and some friends. ZZ met the appellant that evening in a nightclub and they started talking.

They left the club together because ZZ wanted to catch up with her friends. The appellant suggested that they share a "joint". ZZ agreed and they smoked cannabis together in the close of a block of flats. At this point she was desperate to urinate and told the appellant that. They went underneath a set of stairs leading to an area of street stairs where ZZ relieved herself. As ZZ stood up to pull her trousers up, the appellant suddenly appeared. He grabbed her by the wrists and pushed her against the wall. He started to bite her neck and jawline. The appellant forced her to the ground and she froze. At some point, the appellant removed one of her trouser legs and her underwear. He put his penis into her vagina and had sexual intercourse with her. She recalled lying there and counting to 30 in her head, waiting for it to stop. She was lying near to where she had been urinating. The appellant ejaculated inside her vagina and she scrambled to put her lower clothing back on. The appellant took her mobile phone from her and put his number in. He had subsequently messaged her multiple times. ZZ denied suggestions that this had been consensual and that they had had a prior discussion about having sex. She did not consent.

Joint minute

[18] The joint minute established that sexual intercourse occurred between the appellant and YY on charge 2 and between the appellant and ZZ on the dates and places specified in the indictment.

The appellant

[19] The appellant gave evidence. He denied that he had ever touched XX inappropriately.

[20] He knew YY. They had mutual friends and became friends. They arranged for her to visit his flat in the evening of 19 October 2021. She arrived at the flat at around 2330 when he had been trying to fix his boiler. She got on his bed and worked on her laptop. He then lay on the bed to watch TV whilst she worked. They were chatting and were getting on well. The complainer began to touch him. He placed his hands on her body and she did not resist. She sat on top of him and removed her top. They spoke about relationships, past and present. He kissed her and she was OK with it. As the kissing progressed, she said that they should stop because "she had another guy". He agreed to stop and they went back to chatting. Later on they began cuddling and she was not wearing a top or bra. He began to touch her on the body again. When he asked whether she was OK with being touched she said she was. He began to touch her over her pants on her thighs and her bottom. He touched her vagina and removed his underwear. She offered him oral sex and it lasted a minute or two. Following more touching he began to rub his penis against her vagina. She asked him to put a condom on and, when he returned with one, they had consensual sex.

[21] He went to dispose of the condom and returned to find that YY was still undressed and lying on the bed. She stood on the bed and looked at herself in the mirror. A few minutes later she began to get dressed. He suggested they have sex again. She agreed and they had sex for a second time before she left the flat, laughing and joking, at about 0230. He walked her to her car, they hugged and then he got in his own car and drove off.

[22] The appellant denied the averments in the docket. He recalled being in a nightclub on 4 November 2017 where he met ZZ and they left in the early hours. They entered a secluded area where they kissed and smoked cannabis together. They ended up having consensual and cooperative sex until he perceived they were at risk of discovery by passers-by. They parted on amicable terms.

Routes to verdict

[23] On charge 1, corroboration for the evidence of the complainer lay only in mutual corroboration from either or both of the evidence of YY on charge 2 and ZZ under the docket. Since the jury, by majority, convicted on charge 1, a majority of them must have accepted the evidence of XX. On charge 2, there were two routes to verdict. The jury could find mutual corroboration from the evidence of XX and/or the evidence of ZZ. The jury could also convict the appellant if they accepted her evidence of rape and found corroboration in evidence of her distress and statements *de recenti* as spoken to by NN. Accordingly, viewing all of the evidence together, the Crown case was particularly cogent on charge 2 and the jury's unanimous verdict of guilty, under deletion of references to oral penetration, suggests that is how they found it. The deletion is understandable in light of the complainer's account of making a choice between what she considered the lesser of two evils, even though they would have been entitled to conclude that decision was not the exercise of free agreement.

The footage

[24] The appellant provided a short clip of film taken on his telephone and an affidavit about it. He depones that he took it after they had vaginal sex for the first time but before the second time. It shows YY standing on what appears to be a bed in a darkened room. In the background there is a TV on the wall apparently playing a programme/film. YY had on a pair of glasses. She appears to be wearing only pants and covering her breasts with her left arm and hand. It shows YY holding her phone in front of her face with her right hand such that she appears to be taking photographs and apparently adopting various poses.

Note of appeal

[25] It was defective representation not to use the footage in the trial. The complainer's police statement disclosed that she told them that she took a photograph of herself on Snapchat and messaged a friend whilst wearing only her pants and covering her breasts. The appellant maintains that it shows the complainer in the immediate aftermath of charge 2. He avers that it supports his defence of consent. The complainer was comfortable and not displaying distress whilst behaving as she did in the clip. A further averment is expressed somewhat cautiously:

> "He believes that the message has accompanied the photograph taken and has involved a discussion about the consensual sexual intercourse that just took place. His position is that this is what the complainer indicated in conversation with him when he asked her about the photograph taken and to whom it was submitted."

[26] The trial counsel, now senior counsel, responded to the averments in the grounds of appeal but it is no longer the appellant's position that he filmed the complainer after all sexual activity had finished. He makes it clear in his affidavit that he maintains that this occurred between episodes of sexual intercourse. The appeal was presented on this latter basis.

The response of trial representatives

[27] Senior counsel recalled having seen the footage prior to the trial. His view, shared by the appellant's solicitors, was that the footage was prohibited by section 274 of the Criminal Procedure (Scotland) Act 1995 and would not have met the criteria in s275. He advised the appellant accordingly and the defence did not lodge the footage as a production at trial, nor was any application made under s275 to adduce it.

[28] He was aware of the complainer's account about this in her police statement. He did not recall and did not accept the propositions in the passage quoted at para [25] above from the note of appeal. Had these points been made to him he would have instructed further investigation.

[29] Whilst senior counsel does not refer to it in his response, it is apparent from the transcript that he elicited from the complainer that she was able to message someone during her time at the appellant's flat as she had her mobile telephone. It appears to have been an exercise of his judgment. His purpose in eliciting that the complainer had a mobile telephone was we suspect an attempt, for what little it may have been worth, to show that she could have used it to seek assistance if she was unhappy with the situation. It appears to have been an indirect attempt to undermine her evidence that she did not consent.

Submissions

Appellant

[30] The footage supported the appellant's account that the sexual intercourse between him and the complainer was consensual. It contradicted the complainer's account and impugned its credibility and reliability. It is admissible evidence at common law, real evidence of the encounter that took place between parties. The complainer's behaviour as recorded was not sexual behaviour and thus not caught by s274 of the 1995 Act. No application under s275 was necessary.

[31] In the event that the behaviour does constitute "sexual behaviour" not forming part of the subject matter of the charge, an application under s275 of the 1995 Act was required. The footage was relevant as to whether the intercourse that took place prior to the recording was consensual. The footage struck at the complainer's testimony of a forceful and painful

rape. The probative value of the footage was significant and there was no risk of prejudice to the proper administration of justice from allowing it to be admitted in evidence. Any affront to the complainer's dignity and privacy could have been reduced by pixelating the video to obscure views of the areas of her breasts and pants.

[32] A material part of the defence was not adduced contrary to the promptings of reason and good sense: *McIntyre* v *HM Advocate* 1998 JC 232 at page 240; *Burzala* v *HM Advocate* 2008 SLT 61 at paras [33]-[35]. The appellant was entitled to have his defence properly investigated with a view to its proper presentation: *Garrow* v *HM Advocate* 2000 SCCR 772. A failure in that regard was a denial of a fair trial: *AJE* v *HM Advocate* 2002 JC 215; *BK* v *HM Advocate* 2017 HCJAC 68.

[33] The appellant did not receive a fair trial thus there has been a miscarriage of justice: *Anderson* v *HM Advocate* 1996 JC 29. In disregarding the appellant's instructions to use the recording, the defence was conducted in a manner in which no competent practitioner could reasonably have conducted it: *Woodside* v *HM Advocate* 2009 SCCR 350; *Grant* v *HM Advocate* 2006 JC 205. The footage was not simply a further line of evidence on a collateral issue but a direct and significant attack upon the testimony of the complainer: *Ditta* v *HM Advocate* 2002 SCCR 891 at para [17]. Failing to deploy the recording was a complete failure to put forward an important line of defence: *McBrearty* v *HM Advocate* 2004 JC 122.

The Crown

[34] The footage was inadmissible at common law. For evidence to be admissible it must bear directly on a fact in issue or make a fact in issue more or less probable: *CH* v *HM Advocate* 2021 JC 45 at para [6] citing *CJM* v *HM Advocate* 2013 SCCR 215 at paras [28]-[32]. Evidence that ran parallel to a fact in issue was a collateral issue and was inadmissible:

Walker and Walker: The Law of Evidence in Scotland, 5th Edition (2020) Chapter 7.1.1. The central issue for the jury was whether the complainer consented to intercourse. Footage of her taking a photograph of herself in between occasions of rape did not make it more or less probable that she consented to sexual intercourse at any of the material times. Consent must be contemporaneous to any given sexual act. The footage cast no light on that issue.

[35] Evidence that was inadmissible at common law did not require consideration under ss274 and 275 of the 1995 Act: *HM Advocate* v *JG* 2019 HCJ 71; *CH* v *HM Advocate.* Section 275(1) does not render evidence that is inadmissible at common law admissible under the statutory scheme. Section 275(1) imposes additional criteria on otherwise admissible evidence that require to be met: *DS* v *HM Advocate* 2007 SC (PC) 1. Only if evidence captured by the provisions of s274 of the 1995 Act would otherwise be admissible at common law could the court permit it being led should the evidence in question meet the cumulative tests set out in s275(1)(a) to (c).

[36] Even if the footage was admissible at common law, it was prohibited by s274. The footage contained evidence of sexual behaviour not forming part of the subject matter of the charge: Criminal Procedure (Scotland) Act 1995, s274(1)(b). An application under s275 of the 1995 Act would be required. The court would have to have been satisfied that the conditions in s275(a)-(c) were fulfilled. The probative value of the footage must be significant and likely to outweigh any risk of prejudice to the proper administration of justice arising from it being admitted. Showing members of a jury the footage would have been an affront to the complainer's dignity and privacy.

[37] The appellant's representation was not defective. He was not deprived of his right to a fair trial: *Anderson.* Decisions made by counsel or solicitors about how to present a defence are matters of professional judgment: *Burzala.* Those decisions were reasonable and

responsible judgements. They cannot support an appeal on the grounds of defective representation. His defence was presented according to counsel's professional judgement as explained to the appellant. He accepted that judgement. It cannot be said that his defence was presented in a way that no competent counsel would present it. Nor can it be said that the footage was of such significance that failure to lead it as part of the evidence caused a miscarriage of justice.

Decision

[38] We viewed the recording in preparation for the appeal. The view is not good enough to determine much about the complainer's emotional state but we accept that she was not overtly displaying distress. The appellant's point seems to be that she was acting normally, communicating with a friend on her phone and taking photographs.

[39] Senior counsel conceded that the appellant's defence of consent was before the jury, witnesses were cross-examined accordingly and the appellant gave evidence in support of it. Senior counsel recognised the difficulty this presents for his appeal. We also note that the trial judge reports that in his speech counsel offered the jury reasons why they should prefer the evidence of the appellant to that of the complainers. The appellant's evidence on charge 2 was that everything took place with consent.

[40] The language used by the appellant, that his defence was not *properly* presented, is based on certain observations in cases disapproved in a series of decisions by this court reasserting the approach of the full bench in *Anderson.*

[41] In *Anderson,* the court determined that an accused's fair trial right is to have his defence presented to the court. Counsel must act according to a client's instructions on what the defence is but is not subject to direction as to how it should be presented. That is a

matter for counsel's judgment. Generally, an accused is bound by the way the defence is conducted on his behalf: Lord Justice General (Hope) at page 43 I to 44 B. He further explained, at 44 E-F, that the circumstances in which there can be a ground of appeal arise only in narrowly defined circumstances, adding:

> "The conduct must be such as to have resulted in a miscarriage of justice... It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him."

[42] In *Guthrie* v *HM Advocate* 2022 JC 201, all of the decisions founded on by the appellant were before the court. In delivering the opinion of the court the LJG (Carloway), at paras [39] to [46], examined developments in case-law following *Anderson* and noted that the test in *Anderson* was distorted by the introduction of the qualification of a *properly* presented defence. This did not accord with what was determined in *Anderson*, that an accused is generally bound by the way his defence is conducted. The LJG also noted that in *Grant* the Lord Justice Clerk (Gill) returned to *Anderson* and determined that a miscarriage of justice could only occur if an accused's defence was not presented to the court and he was deprived of his right to a fair trial. This could occur if counsel either disregarded his instructions or conducted the defence in a way in which no competent counsel could reasonably have conducted it. The LJC distinguished this from an allegation that the defence might have fared better if counsel had pursued a certain line of evidence or argument or pursued a different strategy. Leave to appeal should not be granted for such a ground of appeal. In *Guthrie*, the LJG referred to *Woodside,* another opinion delivered by LJC Gill who defined the scope of a defective representation appeal in this way:

> "'[It] is not a performance appraisal in which the court decides whether this question or that should or should not have been put; or whether this line of evidence or that should or should not have been pursued. The appellant must demonstrate that there was a complete failure to present his defence either because his counsel or solicitor-advocate disregarded his instruction or because he conducted the defence as no competent practitioner could reasonably have conducted it …. That is a narrow question of precise and limited scope.'"

[43] References to disregarding an instruction must be read along with the first sentence quoted immediately above and also LJC Gill's determination in *Grant* that leave to appeal would not be granted on an allegation that an appellant might have had better prospects of success if counsel had pursued a certain line of evidence or argument. That was also made clear by LJG Carloway in *Guthrie* at para [39] when he summarised the effect of *Anderson* as being that an accused being deprived of a fair trial can only said to have occurred when a representative's conduct was such that the accused's defence was not presented, continuing:

> "That can happen when the accused's counsel acts contrary to the accused's instruction *on what his defence is* (which is not the case here) or because (at the risk of repetition) he was deprived of a fair trial 'because his defence was not presented to the court'." [Emphasis added]

[44] The appellant's defence on charge 2 was consent. Notice was given and the trial was conducted on that basis. The appellant gave evidence that the complainer consented, his defence was before the jury and the judge directed the jury accordingly, as the transcript of her charge confirms, notably at pages 10 and 11. Accordingly, this appeal cannot succeed and is refused.

[45] Whilst, given our decision it is unnecessary to say more, in deference to the arguments presented we make the following observations. The CCTV footage was, at best, of limited relevance at common law. Arguably, it might be said to depict the complainer showing no sign of overt distress at a time very soon after the earlier episodes of sexual activity had occurred. That, of course, is not necessarily indicative of her not having been

subjected to a distressing experience. It is now well recognised that victims of sexual abuse may react in different ways. Juries are reminded of that, and of the need to beware of rape myths. In any case, the evidence would have had no relevance to whether the complainer consented to the later episodes, or to whether those later episodes caused her to become distressed.

[46] Had counsel wished to adduce the recording then a s275 application would have been required given the definition of sexual behaviour in s274(2); "the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature." The appellant filming a woman naked but for her pants as she sought to cover her breasts with her hands was sexual behaviour. Senior counsel does not tell us so, but if he considered the decision of this court in *P* v *HM Advocate* 2022 SLT 194, and para [19] in particular, he would have found some support for the view that the recording was irrelevant and inadmissible at common law. Nor does he mention the possibility that the jury may have taken a dim view of the appellant filming the appellant without her consent: but that risk is a factor which responsible counsel might be expected to have considered. Even if he had made an application under s275, such limited relevance as there may possibly be would have had fairly weak probative value. It would then have required evaluation against the complainer's privacy and dignity, albeit some adjustments may have been capable of being made to protect her modesty. It would still have had to pass the other aspect of the proportionality test in s275 (1) (c) and (2).

[47] Even if we assumed that the recording was relevant at common law and would succeed under s275, all that the appellant might have gained is a further adminicle of evidence with which to attack the Crown case. This does not demonstrate defective

representation. Counsel, exercising his professional judgment, decided not to seek to elicit that evidence: but he put the appellant's defence of consent squarely before the jury.

Postscript

[48] We were concerned to note that in directing the jury on 22 February 2024 the trial judge, whose charge was otherwise sound, directed on charge 2, rape, (transcript at page 40) that there must be corroboration for both penetration and lack of consent. This was 6 months after the decision in *Lord Advocate's Reference No1 of 2023* 2024 JC 140 where the court confirmed that corroboration is required only on two issues; that the crime was committed and the identification of the accused. Corroboration is not required for each component constituting the offence. The judge had correctly introduced corroboration in standard written directions at the outset of the trial as being required on two essential matters, "that the crime charged was committed and that the accused committed it."

[49] Her later misdirection has no bearing on the conviction of the appellant. It does not feature in the grounds of appeal and would not succeed if it did because it was favourable to the appellant by making the need for corroboration extend more widely than the law requires.

[50] Our purpose is not to criticise the trial judge whose detailed and helpful report allowed us to understand all relevant issues in the case. We wish to remind all judges and sheriffs of the need to ensure that their directions in law accurately reflect the law. The Judicial Institute for Scotland publishes the Jury Manual and generally ensures it is up to date and contains sound specimen directions. Those on rape and corroboration generally were updated in the immediate aftermath of the *Lord Advocate's Reference No 1 of 2023*. Whether this isolated misdirection occurred through use of an outdated version of the Jury

Manual, or the use of outdated directions from another trial, we reiterate that the responsibility to ensure that directions are up to date and apt rests with the trial judge: *McGartland* v *HM Advocate* 2015 SCCR 192; *Miller* v *HM Advocate* 2022 JC 33.