



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2026] HCJAC 41
HCA/2025/554/XC**

Lord Justice General
Lord Matthews
Lord Clark

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

NAIRN SHARP

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (sol adv); Paterson Bell, Edinburgh (for John Kilcoyne & Co, Glasgow)
Respondent: K Harper KC, AD; the Crown Agent

3 September 2026

[1] The appellant was convicted after trial of a charge of rape in the following terms:

“on 8 December 2020 at [an address in Glasgow] [he] did assault XY ... and did attempt to kiss her on the lips, kiss her on the body, touch her on the body, pull down her lower clothing, touch her vagina, bite her on the body, spit on her body, penetrate her vagina and anus with [his] fingers, penetrate her mouth, vagina with [his] penis, and ejaculate in her mouth and [he] did thus rape her, to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009.”

[2] The jury deleted a number of specific averments of violence as follows:

“pull her hair, restrain her ... strike her on the head and body ... attempt to force her legs apart ... place [his] hands around her neck and compress same thereby restricting her breathing ... attempt to penetrate her anus with [his] penis ... and ... penetrate her anus with [his] penis.”

[3] Furthermore, an aggravation that the rape was to the danger of the complainer’s life was deleted.

[4] Having obtained a Justice Social Work Report, the trial judge imprisoned the appellant for 6 years.

[5] Leave to appeal against sentence was refused but was granted in respect of conviction.

[6] The basis of the appeal against conviction was the refusal of a preliminary hearing judge to allow certain evidence to be led in terms of a section 275 application.

The section 275 application

[7] The bulk of the application (paras 1 to 22) relates to sexual activity outwith the terms of the libel, constituting the appellant’s version of events. In paragraph 23, reference is made to evidence designed to show, in effect, that the complainer manufactured her distress and fear of the appellant. All of this was allowed by the preliminary hearing judge.

[8] The appellant was allowed, for example, to lead evidence that the complainer told him that she liked to be sexually submissive, to be tied up and to be dominated. He was also allowed to lead evidence that he suggested a safe word, “lemons”, which she agreed to use. It is not necessary to go into details of the physical and sexual activity about which evidence was allowed.

[9] Paragraph 24 gives rise to the subject matter of the appeal. It is in the following terms:

“(24) That the complainer made sexual remarks to the accused shortly before the subject matter of the charge and as such this evidence comes within section 274(1)(b) of the Criminal Procedure (Scotland) Act 1995. The evidence sought to be admitted is as follows:-

- (a) That the complainer sent the accused a message with a heart shaped emoji, and the words ‘punish me daddy’. This was around three hours before the subject matter of the charge. The complainer accepted she sent a message like this in her police statement on 26/3/21.
- (b) That the complainer made jokes about rape to the accused including a joke about the accused raping his own sister. This was within the locus of the charge and around one and a half hours before the subject matter of the charge.”

[10] The issues to which the evidence was said to be relevant were as follows:

“In relation to paragraphs 1 to 23 the credibility and reliability of the complainer’s evidence in which she is expected to say that the accused without consent committed the acts libelled in the charge. This is compared to the accused’s defence that everything they did sexually was with the complainer’s consent including the sexual acts he asserts also happened with the complainer’s consent but not included in the libel. The issues of credibility and reliability between the accused and the complainer will be the most important issue in the trial.

In relation to paragraph 24 the issue at trial to which the evidence is relevant is to explain why the accused made reference to ‘rape fantasy’ in his own 999 call to the emergency services, which the prosecution may rely on as admission. This is contained within production number 28.”

[11] The reasons why the evidence was considered to be relevant were as follows:

“The reasons why the evidence in paragraphs 1 to 23 is relevant is to demonstrate that the complainer was a willing participant in the sexual activity that took place on the occasion in the charge, and that the complainer’s evidence she was not a willing participant is untrue. In paragraph 24 the evidence is relevant to explain the reason why the accused made reference to a ‘rape fantasy’ in the 999 call”.

The preliminary hearing judge’s treatment of the application

[12] According to his report, the preliminary hearing judge was told in relation to paragraph 24 that:

“...shortly after the appellant and the complainer had sexual relations the complainer went to the bathroom. The appellant heard her crying and making a telephone call during which she said she had been raped. The appellant went outside the flat and telephoned the emergency services. During that call he indicated that he and the complainer had had sex and that he ‘thought it was somewhat of a slightly kind of rapey fantasy she was going for’. If he gave evidence the appellant would no doubt be asked to explain why he had said that. The appellant’s explanation was that he was trying to make sense of the complainer’s telephone call and what had happened between them. That was why he wished to make reference to the matters referred to in paragraph (24). The complainer accepted that she sent the message referred to in paragraph (24)(a). That matter was instantly verifiable.”

[13] The advocate depute confirmed that the complainer accepted she had sent the message referred to in paragraph 24(a) but had not made the jokes referred to in paragraph 24(b). It was not suggested that what had taken place was the consensual acting out of a rape fantasy or that the appellant reasonably believed that to have been the case. Rather the suggestion seemed to be that a rape fantasy was the explanation for the complainer making her complaint.

[14] The preliminary hearing judge had regard to section 275(1)(c) of the 1995 Act. He was not satisfied that the probative value of the evidence was significant. The matters were not said to be relevant to the issue of consent and their relevance was peripheral. It was said to be confined to explaining why the appellant said what he did during the telephone call. As far as the jokes were concerned, these were disputed and would have distracted the jury’s focus from the critical issue, namely whether the complainer consented. Despite what is asserted now on behalf of the appellant, the preliminary hearing judge would have come to the same conclusion after *Daly and Keir v HM Advocate* [2025] UKSC 38; [2026] SCCR 18.

The evidence

[15] It is unnecessary to go into this in any great depth. The parties had never met before. The arrangement to meet was made online using a dating app and the appellant came to the

complainer's flat, where they were going to watch a film. As it happens, it was the complainer's birthday. During the course of the evening, there was some touching of the complainer over her clothing, to which she consented. When the appellant tried to go further, she moved his hand, told him to stop or tried to push him off or move out of the way. It appears that this sort of behaviour went on repeatedly for a little time until the appellant raped her in the manner specified in the charge. The appellant accepted that the complainer had told him before they met that nothing was going to happen and that she had said "no" and "stop it" or words to that effect throughout the encounter. His position was that she thereafter effectively came onto him. It was as if there was some sort of game. The parties agreed that he suggested a safe word, "lemons", but they were not at one as to the circumstances in which that came about. He insisted that if she told him to stop he would have done so, whether she used the safe word or not. There was a special defence of consent but it did not contain any suggestion of reasonable belief.

[16] There was corroboration by way of distress, which the jury could hear for themselves in a 999 call made by the complainer, and *de recenti* statements. In addition, there was evidence of bruising to her buttocks. She complained that the appellant had bitten her there and his DNA was found there. It could have come from saliva.

[17] The appellant denied inflicting any injuries and said that he had only slapped her playfully across the buttocks with what he described as appropriate force, meaning that he was not intending to cause her bodily harm. She already had the injuries to her buttocks before he struck her. The level of force was not something that he had discussed with her but he thought it was something she would like, due to a conversation they had had where she said she was submissive. She agreed she had said that but in the context that the appellant had raised the idea of being dominant and asked what she was. She said that she

would be more submissive but she never talked, according to her, about wanting to be tied down or dominated, although that was his evidence.

The question of consent

[18] Before we deal with the submissions, it is appropriate to say something about a matter which was raised in the Note of Appeal. Included in it was a suggestion that the remark “punish me daddy” and the alleged jokes had a bearing on whether or not the complainer consented to the sexual acts of which the appellant was convicted. Counsel attempted to develop this in her submissions. She suggested, as we understand it, that the case of *Daly and Keir* required us to look more generously at the context in which evidence was sought to be led but she did not explain how that case would allow us not only to ignore the words of the section 275 application itself but to proceed on a basis which completely contradicted them. If it had been desired to pray in aid the desiderated evidence for the purpose of demonstrating that the complainer consented, the application would have had to say so: Criminal Procedure (Scotland) Act 1995, section 275(3)(b), (c), (d) and (e); *RN v HM Advocate* [2020] HCJAC 3. It did not, as we have indicated above.

[19] The question of consent does not arise in this appeal and we say no more about it.

Submissions

Appellant

[20] The excluded evidence provided an explanation for the appellant’s comment about a “rapey fantasy” when he was speaking to police in the call referred to in the application and about which evidence was led. While it was accepted that the appellant was allowed to give evidence that the complainer said she liked to be sexually submissive and liked to be tied up

and dominated, the evidence about the messages and the jokes would have added to that. The complainer had been joking about rape and had indicated an interest in punishment and submission. Her complaint of rape could have been inferred by the jury to have been part of the fantasy about submission and domination. The exclusion of the evidence meant that the appellant was not fully able to present his defence and his explanation about his comments and there was thus a breach of the fair trial requirements of Article 6. If the jury had heard about the message and the jokes, it would have supported the appellant's account that he was confused about what was going on.

The Crown

[21] The preliminary hearing judge had applied the appropriate tests and he came to the correct result. Had the section 275 application been granted in full the Crown had a second application listing certain matters in response. In particular, it sought to lead evidence that the parties exchanged light-hearted messages where the complainer made it clear that there would be "no sexy time" and she genuinely wished for nothing to happen. The appellant had responded, "what if you see me and change your mind". The evidence put the reference to "punish me daddy" in its proper context, which was a discussion about the complainer having broken the Covid regulations and was plainly nothing to do with sex. Since the relevant parts of the defence application were refused, the Crown one was not moved, although the minutes indicate that it was in fact refused.

[22] The heart-shaped emoji and "punish me daddy" messages were separate messages. They had no significant probative value and could not be said to relate to a "rapey fantasy". Neither could the alleged jokes about the appellant raping his sister. These were collateral issues. The preliminary hearing judge was correct in finding paragraph 24 to have

contained nothing of any significant probative value. If the matter had been explored, it would have shown that the complainer had not complied with Covid regulations, which would have been a significant intrusion into her dignity and privacy.

[23] As it happens, the appellant was able to lead evidence about the complainer allegedly saying she liked to be sexually submissive, liked to be tied up and liked to be dominated together with the discussion about a safe word. He was able to explain his reference to a “rapey fantasy”, by saying that she would say no and then would seem “up for it” and it would start again.

[24] Given the jury’s deletions of many of the violent elements of the rape the defence was to some extent successful.

[25] There was no breach of Article 6 and no miscarriage of justice.

Analysis

[26] The only basis upon which this evidence could have been authorised would have been to allow the appellant to explain why he used the phrase “rapey fantasy” in his call to the emergency services. That is what the application asked for. An exploration as to whether or not the complainer told a joke or jokes about the appellant raping his sister would reveal nothing about this issue. Any evidential weight it might have had would have been minimal. As to “punish me daddy” we agree with the Crown that there was no heart-shaped emoji linked to this comment. It says nothing about sexual activity. When it is put into the context of the discussion about Covid, as can be seen from production 33, it is plain that it had no bearing on sex at all. At most, it might indicate an interest in discipline of some sort but the appellant denied doing anything to cause the bruising and denied most of

the physical assaults. He did not suggest that he carried out these assaults as part of any fantasy.

[27] He was able to provide an explanation for his comments during the course of his evidence, relying on the parts of his section 275 application which were allowed. He was asked in terms both by his own counsel and by the Crown in cross-examination what he meant by the phrase “rapey fantasy”. He said amongst other things that when he spoke on the phone it was a “bit of panicked ramble”. He had said in the call that he thought it was a “fucking kinky thing” the complainer was doing because he assumed that she was comfortable with the vigorous sex that had taken place at that point. He went on to say in evidence that he thought the complainer had wanted him to take the lead. He was asked about the part of the call which included the “rapey fantasy” comment and said the following:

“Em, so what I meant by that, em, was again like I say, because she had want – I had thought in that moment that she wanted me to take the lead and dictate to her. Not physically, not coercively, not violently, but just, em, you know, dictate to her what, eh, how the sex would, would em would carry out, kind o’ thing. I would, so, eh, I just thought that she wanted me to, as I say, initiate and sort of lead her, lead her through it.”

[28] In cross-examination, he accepted that the complainer had said that she did not want sex before he arrived. Had he thought otherwise he would have brought contraception. This is important since it makes it plain that having read the message “punish me daddy” he did not assume that it related to sex or a “rapey fantasy”. He accepted that he did not ask the complainer if he could strike her bottom.

[29] He explained why he thought she was doing a “kinky thing”. He thought the sex they had just indulged in was within the parameters of the complainer being more sexually submissive and his taking the lead. He spoke of the complainer saying no and then they

would stop and it would start again. In connection with the words “rapey fantasy”, the following exchange in cross-examination is significant:

“You’ve described certain events to us, you’ve given us your account, Mr Sharp. – Mh hm.

And you say you were verbally checking-in with her. – Mh hm.

That she was always consenting, aside from when she moved your hand away a couple of times. – Mh hm. Mh hm.

And she said ‘no’ once. – Mh hm.

You’re in no doubt about the fact that she was consenting; you were not physically manipulating her in any way; what part of that description of events that you have given, is a ‘rapey fantasy’?

- I wouldn’t suggest that the sex that took place would resemble a rapey fantasy; however, however, given the nature of the accusation and the, em, the sounds coming from the bathroom that I could hear, and I could hear some of what was being recounted to officers, em, again, it’s a poor choice of words in the moment, eh, on the call to the operator but trying to articulate what I meant to the operator at the time with the accusations going through my head, em, I have to say that, sorry, I have described it again, em, with probably a poor choice of language.

Okay. But what you’ve said is, ‘I thought it was somewhat of a slightly kind of rapey fantasy she was going for’. Would you agree that you’re telling the operator about your impression of events?

- No, it’s – again instead of, eh, ‘rapey’, em, again, a better word would probably have been submissive, say a ‘submissive fantasy’ but again, because I had just been accused of rape by [the complainer], again, that, in that moment, trying on the phone to the police officer, on to the operator sorry, trying to find those words with that running through your head, em, was a challenge, and, em, again, it’s probably just a poor choice of words in that moment. But I don’t think it accurately describes the events of the night.

The jury might understand, Mr Sharp, that in high pressure situations sometimes people do mis-speak to some extent, but would you normally confuse another word for the word ‘rapey’?

- When you’ve literally just been accused of a particularly violent rape, em, potentially, I certainly can’t speak for anybody else, but...

A ‘rapey fantasy’. That’s how you’ve described it?

– Eh, on the phone to the operator, that is a, as I say, a poor, a poor choice of words to describe the events that had just taken place.

Right. So was any of this like a ‘rapey fantasy’ to you?

- No. No.

Was any of this a submissive fantasy to you, because that’s the word that you just suggested?

- Not so much to myself, but during sex I thought it was for [the complainer], potentially.

So what part of it did you think was the submissive fantasy part?

- Again her moving into whatever position I suggested that she did.

Mr Sharp, is it not the case that you did think it was some sort of rapey fantasy, because that’s what you’ve wanted to happen? That’s what you thought was happening?

- That’s again categorically not true, otherwise I wouldn’t have sought consent verbally. Em, you know, it slightly is, em, a bit of a, I don’t know what the word would be, but it’s, it’s – what’s the word I’m looking for, for something that contrasts, em, but you can’t have a rapey fantasy that also includes sought verbal consent. I think those two contradict, sorry, em, again, words aren’t coming to my mind.

I understand what you’re saying.”

[30] In other words, the appellant gave evidence that the words “rapey fantasy” were a poor choice. A better description would have been a “submissive fantasy”. That being so, the words “punish me daddy” on his account could not have been an explanation for the use of the words “rapey fantasy”. It was the only basis upon which the application sought to lead evidence about the messages. It is noteworthy that the appellant suggested that it was during sex that he thought it was a “submissive fantasy” to the complainer. That was long after the reference to “punish me daddy” and, assuming the jokes were told, sometime after that happened.

[31] The appellant cannot now seek to pray in aid the messages or the jokes to explain his use of the words “rapey fantasy”. That would fly in the teeth of his evidence, where he said that those words were not really a proper description of what was going on. Even if the application should have been granted, there has been no miscarriage of justice. The appellant gave an explanation for his use of the words which was to the effect that they were infelicitous when he was in a state of panic. He cannot now be heard to say, since he was asked directly about the matter, that his answer would have been something else, such that the words were deliberately chosen because of something in an exchange of messages or in a conversation.

[32] There has been no miscarriage of justice. The appeal is refused.