APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 29
HCA/2024/628/XC

Lord Justice General
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

APPEAL UNDER SECTION 74(1) OF
THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

CH

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Gebbie; John Pryde & Co (for Linden and Co, Coatbridge)
Respondent: MacIntosh, AD; Crown Agent

7 February 2025

Introduction

[1] This is another appeal concerning an application under section 275 of the Criminal Procedure (Scotland) Act 1995.

[2] The appellant is charged with *inter alia* engaging in a course of behaviour which was abusive of his partner contrary to section 1 of the Domestic Abuse (Scotland) Act 2018.

There is a further charge of contravening section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, aggravated in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2018.

[3] The appellant denies the charges. He contends that he was the victim of a course of domestic abuse by the complainer and that the allegations made against him are an extension of the abuse he suffered at her hands.

[4] At a continued preliminary hearing on 22 November 2024, the appellant made an application under section 275. He argued that the proposed questioning and evidence showed or tended to show that the complainer is not of good character and is not a credible or reliable witness. The evidence was relevant to establishing his defence.

[5] The CPH judge refused the application and granted leave to appeal. A diet to take the complainer's evidence on commission has been assigned for 17 February 2025 and a floating trial diet for 16 June 2025.

The section 275 application

[6] The background to the application is somewhat unusual.

[7] At a preliminary hearing on 8 October 2024, the appellant attempted to lodge, as a defence production, a subject access response issued by Police Scotland. The document contained a summary of reports made to the police by the appellant about the complainer. The six page document refers to the following matters said to have occurred at various times: four males were forcing themselves on the complainer; the complainer had been suicidal in the past; on an occasion she had been drinking and taking medication for depression and anxiety; she had said that she was going to kill herself; she had, on occasions, threatened and harassed the appellant and verbally, emotionally and physically

abused him; her family had threatened him; he had kept messages and voice recordings of things she had said; she and her new partner telephoned him to say that he was going to be assaulted; and threats were made by her and by males to stab him, kill him and assault him. The report also notes that he was very hostile towards the police officers and advised that he no longer wished to make a complaint about her. On another occasion the appellant told officers that he was struggling with his mental health and was unable to attend the police station due to his having been drinking vodka all day. The police traced the appellant and found him to be intoxicated, but coherent.

[8] By a preliminary issue minute the Crown opposed the lodging of the document, essentially on the ground that it was irrelevant and collateral to the issues in the case, that it contained inadmissible hearsay and was in any event struck at by section 274 of the 1995 Act. The appellant for his part argued that the document showed a course of conduct by the complainer supporting his position that she had invented the allegations.

[9] The PH judge refused to allow the document to be received. He saw force in the Crown's contention that its contents were irrelevant. In his report to this court he tells us that, with hindsight, he considers that he should have decided the matter there and then. Instead, out of an abundance of caution, he felt it necessary to make clear that a section 275 application would be required.

[10] At the continued preliminary hearing the appellant duly made an application under section 275. In answer to a question from the CPH judge counsel for the appellant said that he wished to lead the whole contents of the police document in evidence. He contended that the application sought to elicit evidence that the complainer had mentally and physically abused the appellant, and that allegations made in the indictment were in fact an extension of such abuse.

[11] The CPH judge determined that there was no evidence in the document which was relevant; it was all collateral to the real issues in the case. A number of the matters stated in the document were wholly unrelated to alleged abuse by the complainer, let alone to the charges libelled. The section 275 application required to contain a full explanation of why the evidence should be admitted, with the requisite detail set out in a comprehensible manner. Bald assertions were not sufficient (*RN* v *HM Advocate* 2020 JC 132).

[12] The CPH judge reasoned that it was open to the appellant to challenge the complainer's evidence in court and put to her whether the allegations in the charges were untrue. This did not extend to allowing the defence to enhance that approach by leading evidence about how she had allegedly behaved towards him in the past. None of the alleged abusive behaviour that the appellant reported to the police (but abandoned all complaints about) related to false allegations by the complainer..

Submissions

Appellant

[13] The charge under the 2018 Act is in the nature of an alleged course of conduct, which does not require to be specific in its averments as to time and place and can be corroborated by evidence that does not specifically address individual averments in the libel. A general denial of the allegations does not enable the defence to present positive evidence that the abuser in this relationship was the complainer and that the allegations in the indictment are simply the continuation of the abusive course of conduct on her part.

[14] The evidence sought to be elicited is relevant at common law because it relates to the essential nature of the charges as being false and to crucial issues of credibility and reliability of the complainer and the appellant. All of the evidence relates to the appellant

and the complainer and does not concern third parties or inferences derived from extraneous matters or persons. It is specific in its terms as it relates to a course of conduct by the complainer on the same basis as the degree of specificity required by a course of conduct alleged by the Crown in terms of charges under the 2018 Act, section 1. The probative value of the evidence is significant and is likely to outweigh any risk of prejudice to the proper administration of justice. The test for admission in terms of section 275(1) is met.

[15] The admission of the evidence is a compatibility issue in respect of the appellant's rights under the European Convention on Human Rights, in particular his right to a fair trial under Article 6(1) and (3)(c) and (d), which encompasses the right to defend himself and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him.

[16] In his oral submissions counsel for the appellant added that all the case law on the meaning and effect of sections 274 and 275 was distinguishable; it did not deal with the present type of case involving abuse perpetrated by the complainer against the accused. It was neither necessary nor possible to sift out from the information contained in the subject access report a focussed summary of the particular incidents where the complainer had abused the appellant and which might have a link to the charges in the indictment. The effect of the statutory provisions or at least the interpretation of them by the courts was, as counsel put it, to exclude the possibility of a proper defence.

Crown

[17] The application was wholly lacking in specification and was irrelevant.

[18] The issue at trial is whether the appellant acted in the manner libelled in the charges. The complainer having acted in an abusive manner towards the appellant may be relevant if such conduct forms part of an alternative account of a particular event. This is markedly different from the type of generalised assertion made in the application.

[19] In the absence of any averred temporal or other link between the claimed abusive behaviour of the complainer and the allegations against the appellant, the assertion that the complainer was "the abuser" is irrelevant.

[20] If the court was to consider the evidence relevant, it remains collateral, and thus excluded on the grounds of expediency. The complainer, who has been precognosced, denies being abusive towards the appellant. If the application were to be allowed it would require exploration by the jury, diverting their time and attention away from assessing the guilt or otherwise of the appellant in accordance with the libel.

[21] If the court was to consider the evidence relevant at common law and not collateral, it is struck at by section 274 of the 1995 Act and requires to meet the cumulative tests set out in section 275 of the 1995 Act. The application, in declining to specify which aspects of the defence production are sought to be admitted, fails to meet the statutory requirement for specificity (section 275(1)(a)). The requirement for relevance to the guilt of the accused in respect of the libel is similarly not met (section 275(1)(b)). The application also fails to meet the requirement that the probative value of the evidence is significant and likely to outweigh the risk of prejudice to the proper administration of justice (section 275(1)(c)). This consideration includes assessment of the evidence being relevant to an issue before the jury, commensurate with the importance of that issue to their verdict.

[22] The common law exclusion of irrelevant and collateral evidence, and the provisions of sections 274 and 275, apply equally to Crown and defence. The admissibility of evidence

does not depend on which party seeks to lead it; rather admissibility of evidence is assessed according to the relevance of that evidence to the issue for trial, which is the guilt or innocence of the accused in respect of the charges brought by the Crown.

[23] Paragraph 1(c) of the application purports to raise a compatibility issue; that paragraph was not the subject of detailed discussion when the application was heard. No compatibility issue minute was lodged with the court of first instance. No compatibility issue was therefore properly before the court, and no such issue was determined. This appeal proceeds upon leave having been sought and granted in respect of the refusal of the section 275 application. The compatibility issue should have been properly raised before the court of first instance (*Kennedy* v *Procurator Fiscal, Aberdeen* 2024 SLT 1375).

[24] The exclusion of the evidence sought to be admitted does not, in any event, amount to a breach of the appellant's right to a fair trial. The CPH judge correctly applied the common law and sections 274 and 275 of the 1995 Act. There is no incompatibility between the provisions of sections 274 and 275 and Article 6 ECHR (*DS* v *HM Advocate* 2007 SC (PC) 1).

Analysis and decision

[25] There is no doubt that the appeal must fail.

[26] The application made under section 275 is fundamentally deficient in specification. The CPH judge would have been entitled to refuse to consider it due to its manifest deficiencies (*HM Advocate* v *MA* 2008 SCCR 84, para [9]; *HMA* v *JG* [2019] HCJ 71, para [36]; *RN* v *HM Advocate* 2020 JC 132, para [26]). An application of this kind must provide a full explanation, with clear reference to the statutory tests, of why the court should admit otherwise prohibited evidence. As this court has repeatedly made clear, bald or sweeping or

generalised assertions will not suffice (*RN, supra).* Specificity and clarity are essential (*MA, supra*). Where it is clear, as it is in the present case, that the application fails these tests the judge should decline to consider it.

[27] The present application falls far short of the requisite standard. For example, in paragraph 1 it refers merely to the allegations in the charges being part of the same abuse and course of conduct by the complainer. There is no detail given of the way in which the complainer is said to have abused the appellant; no specific instances of abuse are identified. In paragraph 2(b) it is asserted that the reports listed in the defence production "comprise just some of the instances of abuse by (the complainer) and that they form part of a course of conduct by her in abusing the (appellant)." There is no specification of how any of the reports listed within the production are relevant at common law. The application does not engage with sections 274 and 275. It fails to say why the evidence is relevant under the common law, to identify the basis on which it is prohibited under section 274, and why it should nonetheless be admitted in terms of the various exceptions allowed for by section 275.

[28] The evidence sought to be elicited is plainly irrelevant and collateral to the true issues in the case, which are simply whether the Crown can prove the charges on the indictment. The proposed evidence does not bear directly on a fact in issue or make a fact in issue more or less probable (*CJM* v *HM Advocate* 2013 SCCR 215). There is no legitimate link between the matters in the application and the charges. It is conceivable that evidence concerning the complainer's conduct towards the appellant might be admissible in his defence if such conduct took place in the course of the particular events libelled on the indictment. That is not, however, the approach taken in the section 275 application, which is framed at a high level of generality and lacks any such specific focus.

[29] The application appears to have been drafted on the misconceived basis that the implication of the Crown's having libelled a course of abusive conduct against the appellant is that this somehow opens the door to his being entitled to lead such evidence as he chooses to lead concerning the behaviour of the complainer towards him during the period of the libel regardless of whether there is any temporal or other link with the allegations featuring in the charges. Such an approach would potentially allow a person facing a charge under section 1 of the 2018 Act to blacken the character of the complainer by dredging up instances of allegedly inappropriate behaviour on her part from the past history of the relationship. This would serve only to undermine the clear policy and purpose of the 2018 Act. The words of the Lord Justice Clerk (Dorrian) in *P(M)* v *HM Advocate* 2022 SCCR 1, para [17] are pertinent in the present context:

> "The heart of the problem here is that the applicant is seeking to introduce evidence which has no relevance at all to the proceedings… and to create relevance by means of impermissible speculation. … There is no link between the two separate facts referred to in this submission—the making of the allegation and the family history—save in the imagination of counsel. There is no evidential basis for suggesting that the history in relation to the child has anything to do with the making of the allegation. There is no evidence to demonstrate a link, and the whole purpose of including this material is to enable counsel to go on a fishing expedition at trial."

[30] The appellant submitted that the respondent's objection would not be available to the defence if the situation were reversed. This misunderstands the principle of equality of arms. The common law rules on admissibility of evidence and the statutory provisions in section 274 and 275 apply just as much to the Crown as they do to the defence. Questions as to the admissibility of evidence do not fall to be determined by reference to which party seeks to lead the evidence.

[31] We observe that it is not clear that all the entries in the production do in fact relate to reports by the appellant of abusive behaviour on the part of the complainer. In particular:

the entry on 1 December 2018 appears to relate to the appellant reporting the complainer being attacked by others; the entry on 16 January 2019 appears to relate to the appellant reporting concern for the complainer's welfare; the entry on 23 September 2019 appears to relate to a discussion about changing his bail address (albeit connected with arguing with the complainer) and the entry on 30 August 2022 appears to relate to the appellant's concern over social media posts made by the complainer which were not regarded by the police as threatening or otherwise unlawful.

[32] No compatibility issue was properly raised before the CPH judge; there was no compatibility issue minute lodged (Act of Adjournal (Criminal Procedure Rules) 1996, rule 40.2(2)). In any event, there is no human rights point. The exclusion of the evidence sought to be led by the appellant in no way undermines his right to a fair trial. There is no incompatibility between the provisions of sections 274 and 275 and Article 6 ECHR (*DS* v *HM Advocate* 2007 SC (PC) 1).

[33] We reject the sweeping assertion advanced by counsel for the appellant in his oral submissions that the effect of the statutory provisions is to exclude the possibility of a proper defence being presented in a case such as the present one. There is no substance at all in this argument. The well-established jurisprudence applies without qualification. The fundamental difficulty is that no attempt has apparently been made to identify the particular aspects of the material referred to in the subject access report which could have a legitimate connection with and be relevant to the charges in the indictment. The failure to bring such an analysis to bear has meant that the section 275 application is drafted in wholly unspecific terms and must be rejected

[34] The appeal is refused.