APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 31
HCA/2024/000672/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

NOTE OF APPEAL AGAINST CONVICTION

by

DARREN GLASS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: G Brown (sol adv); Faculty Services Ltd (for Bridge Legal Ltd, Glasgow)
Respondent: Stalker, AD; the Crown Agent

25 July 2025

[1] Leaving aside, for example, questioning by the police under caution, silence by an accused in the face of an accusation can, depending on the circumstances, be taken as an implied admission. Much of the recent jurisprudence has related to the question of whether comments made to an accused can properly be construed as accusations of the crime charged. See for example *CR* v *HM Advocate* [2022] HCJAC 25; 2022 JC 235 and *LC* v *HM Advocate* [2022] HCJAC 47.

[2] Such a difficulty does not arise in the present case, the accusation giving rise to the appeal, if it was made, being clearly of the very criminality which is at the heart of the libel. There is no suggestion that the appellant denied the accusation. The issue is whether the jury should have been directed that they had to be satisfied that he had heard it before they could take account of his reaction to it, or lack of reaction.

Background

[3] The appellant was convicted of five charges.

[4] Charge 1 libelled rape of a complainer T contrary to section 1 of the Sexual Offences (Scotland) Act 2009. Charge 2 was an alleged contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 involving a complainer S.

[5] Charges 4 and 5 libelled rape of S, contrary to section 1 of the 2009 Act.

[6] Charge 6 was one of causing S to look at a sexual image, contrary to section 6 of the 2009 Act.

[7] The jury deleted certain allegations of domestic abuse libelled in charge 2 and acquitted the appellant of charge 3, a further charge of raping S.

[8] The appellant was imprisoned for 8 years. There is no appeal against sentence but the conviction on charge 1 is challenged and it is argued that if charge 1 fell to be quashed the same result would have to follow on the remaining charges.

The evidence

[9] It is unnecessary to go into depth about the details. As far as charges 4 and 5 are concerned, the Crown relied on mutual corroboration, using the evidence on charge 1. Charge 2 stood alone. Charge 1 could be proved by mutual corroboration using the

evidence on charges 4 and/or 5 but the Crown also relied on certain adminicles providing stand-alone corroboration.

The Note of Appeal

[10] The only ground in respect of which leave to appeal was granted is to the following effect. While it appears that the appellant did not deny an accusation of raping the complainer levelled at him by the complainer's mother, L, in a telephone call, the jury ought to have been directed that they required to be satisfied: firstly, that the appellant was accused of raping the complainer; secondly, that he clearly heard that allegation; and thirdly, that he did not deny it. It is suggested in submissions that the jury also ought to have been told that the accusation itself was not evidence but that forms no part of the Note of Appeal and we are not prepared to entertain it. It is misconceived in any event. The trial judge plainly directed the jury's attention to the appellant's reaction or lack of reaction to the accusation and there is no suggestion anywhere that the accusation itself might have evidential significance. The gravamen of the ground of appeal is that in failing to direct the jury that they had to be satisfied that the appellant heard the accusation, the jury were misdirected.

The evidence pertaining to charge 1 and the Note of Appeal

[11] This is clearly set out in the trial judge's report and in any event we have transcripts of the evidence of L and of the accused, as well as of parties' speeches.

[12] The complainer spoke to the libel in charge 1. The appellant was a distant relative and L thought of him as a little brother. On a day when the complainer was due to go to school, the appellant, who had been staying with the family and helping them following the

death of the complainer's father, collected her in his work's van, ostensibly to collect her school stuff from the car used by L. Instead of that, he took her to his flat and had a shower. He left the bathroom wearing only a towel, pushed her onto a bed, pulled down her clothing and raped her. She did not tell anyone what had happened at the time but by June 2022, six or seven months after the incident, she realised that she was pregnant and told L what had happened. The police were contacted. In August 2022 she gave birth to a son and DNA testing confirmed that the appellant was the father. The complainer was 15 at the time of the rape whilst the appellant was 27.

[13] As indicated, the Crown relied on mutual corroboration, using the evidence related to S. In addition, the familial relationship, including the significant gap in ages, showed the inherent unlikelihood of the complainer's having consented, as was the appellant's position. Indeed he went further and claimed that the sex occurred at a different time and place and had been initiated by the complainer.

[14] This brings us to the chapter of evidence under scrutiny. While there was some dispute as to who had phoned whom and who eventually hung up, it is clear that on 7 June 2022, the same day as the complainer made her disclosure, L spoke to the appellant on the telephone. She said that she was sure that she screamed down the phone that he had raped her daughter. His reply, according to her, was "If you want to speak to me, then stop shouting at me". She then said something like "Is that all you've got to say" and told him that the police had been or were going to be contacted. Thereafter, one or other of them hung up. In cross, she agreed that she had been shouting down the phone at the appellant.

[15] The evidence of the appellant was that in the telephone call L was screaming and shouting at him and told him that the complainer was only 15. She was calling him names, such as beast. She asked him how many other girls he had been sleeping with. He was

asked in terms "did she accuse you of raping her daughter?" and he replied "Er, no, she just says something about her daughter. Then she says I got her 15 year old daughter pregnant." His position was that he could not really react. He could not speak. She was always talking over him any time he tried.

The speeches

[16] The advocate depute relied on the telephone call. Unfortunately what she said precisely is, in parts, inaudible. It is clear, however, that she was talking about the appellant's failure to comment on the accusation.

[17] As far as the defence speech is concerned, senior counsel highlighted the dispute as to who phoned and who ended the call but reminded the jury that L was yelling at the appellant, for which he did not criticise her. She had just found out that her daughter was pregnant by him. He went as follows:

> "But the important thing is this. [The appellant] couldn't get a word in edgeways. He said that if she wanted to hear him, she'd have to stop shouting. So the Crown wants you to jump to a conclusion that [the appellant] failed to deny an allegation put to him. What was that allegation? Can you say for certain (inaudible) [L's} evidence? Can you say whether or not [the appellant] would have been able to make anything out other than shouting down the phone towards him?"

The judge's charge

[18] The judge narrated the evidence of L and that of the appellant. He discussed prior inconsistent statements which L had apparently given. He then continued as follows:

> "In the light of that you will consider the Crown submission in relation to this matter as far as it bears on corroboration because in essence it is the Crown submission that the accused was confronted in this phone call with a specific allegation that he'd raped [T] and that he did not deny that allegation. And the Crown say in effect that this amounts to an admission of guilt by him to charge 1. Now, what I can say to you is as a matter of law where an allegation of a crime is made to an accused person

then their reaction to it, or indeed their failure to deny it, can also be evidence against them in the same way as a statement made by them.

That is because silence in the face of an accusation is capable of being construed as an admission of guilt. So, you can consider both what the accused said during the call and if you consider that there was in effect a failure to deny an accusation of rape, the accusation of rape which is now alleged in charge 1, what he did not say. And if, in the light of your assessment, you accept the Crown's interpretation of the accused's response to the complainer's messages but the Crown's interpretation of the accused response to what [L] say and you construe as an admission of guilt then this would be evidence from a second source, i.e. from the accused himself which is capable, which would be capable of corroborating the complainer's evidence in relation to charge 1.

On the other hand, if you don't accept the Crown's interpretation of what was said in the messages, the Crown's interpretation of what was said in the call, if you accept the accused's evidence about that, if you accept the interpretation of what happened during that call, as [senior counsel] addressed it to you, then you will not accept that what the accused did or did not say in that call amounted to an admission of guilt by him and or and therefore as evidence that is capable of corroborating the complainer's account. So, it's all a matter for you, you have to decide what was said in that phone call by [L], what was said by the accused, whether, in the circumstances, what he said and what, and particular what he didn't say can and should be taken to amount to an implied admission by him to an allegation of rape. It's a matter for you to assess in relation to what you find proved on the evidence that you've heard and any reasonable inferences that you feel that you can draw from that."

Submissions for the appellant

[19] At the conclusion of the charge, senior counsel sought to address the judge on the very issue of this appeal but the trial judge refused to revisit his directions. As his report indicates, he concluded that the additional direction was unnecessary. It was not in dispute that failure to deny an accusation could amount to an admission of guilt. However, it was open to the jury to accept that L made the allegation but that the appellant did not hear it. In these circumstances the desiderated direction ought to have been given.

[20] This had led to a miscarriage of justice. The implied admission was an important piece of evidence and even if there was sufficient other evidence, the evidence about the call

would have impacted on the jury's deliberations. The misdirection was material (*Buchan* v *HM Advocate* 1995 SLT 1057). It affected all of the charges, since it bore on the credibility of the complainer and the appellant.

Submissions for the respondent

[21] L had given evidence that in the phone call she accused the appellant of raping her daughter. His response, or lack thereof, was reasonably capable of being interpreted as an implied admission. Whether it should be so construed was a matter for the jury. The appellant's position was that L had not accused him of rape but that she had called him names and that he was said to have got her 15 year old daughter pregnant. There was nothing in his evidence to suggest that he did not hear what she had said. His position was that he could not react to her speaking because she was always talking over him any time he tried to say something. In the context of the trial and the speeches, the directions were comprehensive. It was for the jury to determine the significance of what was said in the phone call. It would have been obvious to them what the factual dispute was and there was no misdirection.

[22] Even if there had been a misdirection it did not result in a miscarriage of justice. It was of no moment. There were additional sources of evidence to corroborate the complainer's account of the offence and entitled the jury to convict on charge 1 (*Wilson* v *HM Advocate* [2017] HCJAC 52; 2017 SCL 783 and *Campbell* v *HM Advocate* [2020] HCJAC 47; 2022 JC 243). By convicting on charges 4 and 5 the jury must have accepted that the evidence of S was corroborated by that of T. They must also have accepted T's evidence on charge 1.

Analysis

[23] As indicated, it is not suggested that the jury would not have been entitled to regard the appellant's silence in the face of an accusation of rape as amounting to an implied admission. The only issue is whether they should have been told that they could not so regard it unless the appellant had heard the accusation. It seems to us that any direction to that effect would simply have been giving the jury a glimpse of the obvious. Juries have to be credited with common sense. They should not need to be told that an accused's reaction to something would be of no consequence if he had not heard it. That in itself would be sufficient to dispose of this appeal.

[24] However, it does not end there. The appellant's evidence was not that he did not hear what was being said. He denied that the accusation of rape was made at all and explained what he said was being said to him. The judge's directions were tailored to the evidence, as they should have been, and not to some hypothetical scenario.

[25] The approach of senior counsel both in cross-examination of the complainer's mother and in his address to the jury was that the appellant could not get a word in edgeways. He asked the jury to consider whether or not the appellant would have been able to make anything out other than shouting down the phone towards him. The trial judge's direction that "if you accept the interpretation of what happened during that call, as [senior counsel] addressed it to you, then you will not accept that what the accused did or did not say in that call amounted to an admission of guilt by him" addressed the very issue which is at the heart of this appeal.

[26] There being no merit in the appeal and no misdirection, it is unnecessary to consider whether or not if there was a misdirection it led to a miscarriage of justice. There was no such misdirection.

[27] The appeal is refused.