APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 49
HCA/2026/000055/XC

Lord Justice Clerk
Lord Matthews
Lord Ericht

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

DMY

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: McConnachie KC; Faculty Appeals Unit (for Ross Harper Ltd, Glasgow)
Respondent: Jessop KC (Sol Adv), AD; the Crown Agent

11 November 2026

Introduction

[1] The appellant challenges his conviction on 12 December 2025, following trial, on the ground of defective representation, specifying that his lawyers failed to make a "sexual history" application under the Criminal Procedure (Scotland) Act 1995 section 275 in order to adduce evidence of the complainer MN's sexual and non-sexual behaviour after the incident complained of. Founding on the UK Supreme Court's judgment in *Keir & Daly* v

HM Advocate [2025] UKSC 38, 2025 SLT 1253, he contends that an application would have been granted and his lawyers' failure to make it caused a miscarriage of justice.

[2] The appellant was convicted after trial at the High Court in Edinburgh of an aggravated charge of rape against his former partner, MN. On 14 January 2026, the trial judge imposed a sentence of four years' imprisonment on the following charge:

> "on 1 January 2022 at [an address in central Scotland] you … did assault [MN], your partner… and did touch her on the body and breasts, put your arms around her, kiss her, [*seize her by the wrists and restrain her*], remove her lower clothing, [attempt to sexually penetrate her vagina with your fingers] touch her vagina, [repeatedly *seize her by the throat* and cause her breathing to be restricted, pull her hair, put your hand over her mouth] and repeatedly penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009;
>
> and it will be proved in terms of Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner."

At the close of the Crown case the indictment was amended on Crown motion by deletion of the words underlined above. In convicting the appellant, the jury deleted the italicised phrases. This left a libel averring: touching the complainer on her body and breasts, putting his arms around her, kissing her, removing her lower clothing, touching her vagina and repeatedly penetrating her vagina and raping her.

Evidence

The complainer "MN"

[3] MN, then aged 22, testified on commission on 24 July 2025. She described attending a house party on Hogmanay 2021, when she was about 18, with the appellant, her boyfriend at the time, and some of his friends. She and the appellant returned to his house not long after midnight. At his mother's insistence it was arranged that she would sleep in his bedroom while he slept on the couch. After breakfast, MN and the appellant returned to his

bedroom, got into bed and watched TV. MN was still dressed. She was upset and angry with the appellant for his part in an altercation at the party the previous evening.

[4] Despite this, he started to touch her chest, but she told him "No", pushed his hands away and explained why she was angry. He kept touching and pestering her and she again told him "No". He stopped for a while but then started to kiss her and she realised that he was aroused. She asked him how he could be in the mood for sex after what he had done. He said it was to do with him having ADHD. She agreed to kiss him, but when he tried to touch her intimately, she again told him "No" and "I don't want to do that". The appellant then took hold of both of her wrists and put her hands above her head. He put one hand around her neck, which she did not object to, before pulling off her shorts and underwear. He penetrated her while he was on top of her and she froze. He then moved her into a different position, which was painful, but she stayed still. She was not sure if he was still holding her hands above her head. She was shocked, could not believe what was happening and froze. He carried on raping her for 5 minutes or so until he ejaculated. The appellant then told MN he loved her.

[5] MN confirmed that she kept in touch with the appellant after this and that they continued to exchange messages. She spoke to certain entries in Crown production 13, a cybercrime report concerning the contents of her mobile phone that she had given to the police for examination. It reproduced Snapchat messages between MN and the appellant's account.

[6] A slightly edited exchange dated 3 January 2022 was put to MN in evidence in chief and in cross-examination. The editing removed certain irrelevant references. The messages, as they featured in the evidence, read:

Appellant	"i think a just got to a head of myself thinking u wanted something that u never and a was only thinking about myself at the time but that shouldn't of ever happened and a realised after what a actually done … but a really really did and av never felt that bad in all my life xx"
MN	"but you were fine until i said something xx"
Appellant	"no i wasn't a knew in my head a had done something really bad and a canny live with it xx"
MN	"i never want to be in the position where ive said no to sex and it still happens again [DMY] …what do i even do like how to [*sic*] i even start to forgive you like i don't know where to start because i want to forgive you babe like you're my everything xx"
Appellant	"ur my absolute everything to [*sic*] darling too and i know it shouldn't of ever happened a hate my self more and more since it happened and a canny forgive my self for it. and not wanting you to forgive me right away for it because it's serious what i done. i dk how you would forgive me too because av never done anything like that"

MN confirmed that the Snapchat exchange was about the incident on New Year's Day and that she understood that he was apologising for raping her.

[7] MN explained that her first disclosure of the incident was to her manager at work, OP, a few days before she told her family on 11 January 2022. She had not told anyone before then as she loved the appellant and wanted to forgive him. She wanted to believe that he was sorry and would not be like that again.

[8] In cross-examination, counsel suggested that on an occasion earlier than Hogmanay 2021, they had been together and the appellant had gone out to get drunk, he came back and they argued and this was what the apology was for. MN refuted that suggestion in some detail. She was adamant that his apology was for having sex without consent. MN confirmed that she remained in the appellant's house for a further few hours after the incident before his mother dropped her off at her (MN's) car. She was quiet, but not visibly upset, during the journey. She accepted going to a coffee shop with the appellant, his

mother and his brother the following day. She denied initiating sex with him on New Year's Day, and she denied that she had consented.

Other Crown evidence

[9] OP confirmed that in January 2022 he was MN's manager. He spoke with MN in the first few days back at work in January 2022 when she disclosed that her boyfriend, the appellant, had "forced himself" on her on the morning of New Year's Day. She said that the appellant was trying to touch her vagina, forced her hands above her head and raped her. She told him that she was going to drive the appellant home that day. OP offered to ask the appellant to leave but she declined the suggestion. He had asked MN to text him when she got home safely. When he texted her to prompt her response, she replied, "yes, fine".

[10] QR, MN's mother, said that she and her daughter were very close. She recalled a shopping trip on 11 January 2022 when MN was very quiet and more withdrawn than usual. She was not "smiley" or "giggly" which was unlike her. She asked MN to "pinkie promise" that everything was OK. MN said she could not. Later that day QR asked MN whether there was something wrong. MN became upset, started to cry and explained that she had told the appellant, "No, no, no", but he would not stop. QR asked MN whether the appellant had raped her, and MN assented, explaining that the appellant had put both of her hands above her head and she just had to lie still because she knew he was not going to stop.

[11] In cross-examination, QR accepted that the appellant had been over to her house with MN a few days after New Year's Day.

[12] ST, MN's father, noticed MN behaving differently in early January 2022. While she was ordinarily cuddly, chatty and noisy, she was quieter and less interactive. He recalled a conversation between MN and QR when MN said she had been raped by her boyfriend in

his bedroom. MN was shaking and quiet but seemed relieved that she had told somebody. He, MN and QR were crying and very upset during the conversation. He called the police shortly afterwards.

[13] DC Raegan Cameron spoke to attending at MN's family home on 11 January 2022 and confirmed that MN bore no visible injuries. She had exhibited the Snapchat messages. In cross-examination, DC Cameron confirmed that within Crown production 13 there was a record of 55 telephone calls between the telephone numbers associated with the appellant and MN between 1 January 2022 and 10 January 2022. The report captured various messages sent between MN and the appellant during that period, including a message from MN to the appellant timestamped 23:06:19 on 10 January 2022 which read: "no all i wanted was your attention because i don't get it through the day, but i refuse to beg for you anymore […], good night i love you x".

Appellant

[14] The appellant was aged 22 during the trial. He and his then girlfriend, MN, who he had been going out with for about 6 months, attended a house party on Hogmanay 2021. He was asked to leave after becoming involved in an altercation. When he and MN returned to his house, they slept in different bedrooms. After breakfast they returned to his bedroom where they watched a film. They were in bed together, under the covers. They started touching each other before they had consensual sex. He rejected MN's account that she was not interested in having sex with him that morning. He denied grabbing her arms and holding them above her head and he denied taking hold of her by the throat. He did not rape her. After they had consensual sex, they stayed in bed together for a few hours until MN was asked whether she wanted to stay at the appellant's house for dinner. She

declined, as she had already made plans with her parents. She asked for a lift to her car, which had been left outside the house party, and the appellant and his mother drove her there.

[15] That evening, the appellant and MN spoke by video call. MN told him that she was upset because she was uncomfortable with the sex they had had earlier. She had not expressed to him that she was uncomfortable during the sex, nor had she indicated that she did not want to have sex.

[16] The appellant accepted that he had sent and received the messages. He had apologised in them because MN had said she was upset. The message from MN "you were fine until I said something" was a reference to the conversation they had had over video call on the evening of 1 January 2022. He had accepted in the messages to "do[ing] something really bad" because he did not want to upset her and make her feel bad. He was 18 at the time and MN was his first girlfriend. He apologised for something he had not done because she was upset and he did not want to make her more upset.

[17] He saw MN several times in early January 2022. They went to Dundee together as she had an appointment to have a tattoo and he went with her in his car. He confirmed that she had sent him a message on 10 January 2022 including "I love you" and later in the same exchange she had written "I love you too" in response to his telling her in a message about the strength of his love for her. It was also demonstrated that they spoke in FaceTime calls on 10 January 2022 for separate periods of 25 and 20 minutes. He had a lot of contact with MN.

[18] The appellant's mother testified that there was nothing unusual about MN's demeanour during the car journey on 1 January 2022. When she had coffee at Costa in Kirkcaldy with MN, the appellant and his brother on 2 January, there was nothing about her

that was out of character. MN had been at her house to see the appellant on several other days in early January 2022. On one occasion in early January, MN had been joyful at the prospect of going with the appellant to Dundee to get a tattoo and she confirmed that they had gone to do that. MN was "really happy" afterwards and showed off the tattoo. She confirmed that MN had given the appellant a lift and dropped him off to go drinking with his friends on 7 January and she thought that MN may have been a bit upset at him doing so when he was soon to leave to work in England. He had left for England on 9 January. The witness also confirmed that there had been arrangements for MN and the appellant to see each other on 8 and 9 January, but MN did not turn up on 8 January2022.

Speeches

Crown

[19] MN was a credible and reliable witness who gave her evidence in a measured and concise way. She freely admitted that she loved the appellant and that she wanted to believe he was sorry for what he had done. Her evidence was consistent with the totality of the evidence given by other witnesses, who were all doing their best to tell the truth. That MN continued to have contact with the appellant after the incident was not a blight on her credibility. People could react in many different ways to being raped. The jury could find corroboration for MN's testimony in the evidence of her distress spoken to by OP, QR and ST. The delay in her disclosure could be explained by MN's youth, her admission that she continued to love the appellant and the time it took for her to process what had happened to her. The appellant's explanation in evidence for his apology in the Snapchat exchange of 3 January 2022 was not credible.

Defence

[20] The jury ought to interpret the messages in the Snapchat exchange in light of the parties' youth and inexperience of adult relationships. On one reading, the words used in the exchange allowed the inference that the appellant was apologising for something serious. On another, allowance for naivety and immaturity could permit a reading that he was apologising for something he did not do, to preserve his relationship.

[21] Evidence that MN continued her relationship with the appellant was inconsistent with her testimony that she had been raped. So too were the parties' text exchanges where they frequently said that they loved one another.

[22] There was no evidence of any injuries sustained by MN, notwithstanding her evidence that she was restrained with some force with her hands above her head.

[23] The Crown had failed to prove the appellant's guilt beyond reasonable doubt. The jury should treat MN's testimony with caution and have doubts over her credibility and reliability.

Grounds of appeal

[24] There was evidence available that MN and the appellant had, between 1 January 2022 and 11 January 2022, continued their romantic relationship together. The conduct included: (i) MN attending a coffee shop with the appellant and his family members on 2 January 2022, (ii) MN inviting the appellant to a tattoo appointment during which she held his hand on 3 January 2022, (iii) MN inviting the appellant to meet her family, despite him never meeting them before, on 3 January 2022, (iv) the parties attending a coffee shop on 4 January 2022, where they flirted, (v) MN inviting the appellant to attend the bathroom with her while she showered on 4 January 2022, (v) MN sitting on the appellant and kissing him

while naked, (vi) the parties engaging in consensual penetrative sex on 5 January 2022 during which time MN asked the appellant to choke her; and (vii) MN sending the appellant Tik Tok messages on 11 January 2022 referencing previous sexual conduct between them.

[25] The appellant maintains that this evidence would have been admissible following the UK Supreme Court's decision in *Daly*. He argues that his King's Counsel failed to ensure that his defence of consent was properly put before the jury since he made no section 275 application to permit the evidence being adduced.

"Anderson" response

Gordon Martin KC (Sol Adv)

[26] The appellant's instructions had been that he denied raping MN. The UK Supreme Court had not delivered its judgment in *Daly* by the time of the commission hearing when MN gave evidence. While he was made aware of some of the conduct referred to in the appellant's Note of Appeal, he did not consider it likely that the court would allow a section 275 application to admit evidence of the additional conduct into the trial, even after the judgment in *Daly*. In any event, he made a tactical decision to advance the appellant's position to the jury in other ways.

[27] MN had confirmed that she had been in the appellant's company after the incident. She had been asked about her continued contact with the appellant thereafter. The jury heard from QR that the appellant had been in her home some days after the incident. There was ample evidence available to the jury for them to address the issue of the parties being in contact for a period of around ten days after the incident.

[28] The appellant's real problem lay in his messages to MN where he appeared to concede that he had committed the crime charged.

Submissions

Appellant

[29] Defective representation had caused a miscarriage of justice. It was not unreasonable not to have made a section 275 application to adduce the additional evidence prior to the UK Supreme Court's ruling on 12 November 2025, but Senior Counsel ought to have reconsidered the position before trial. A properly framed application was likely to have been granted by the court after publication of *Daly*.

[30] It was an essential part of the appellant's defence that MN's conduct after the incident was not supportive of her account of being raped but rather of her engaging in consensual sex in the context of the parties' relationship. There was a body of evidence, if accepted, supporting the appellant's position and undermining MN's evidence. Evidence of regular and prolonged contact between the parties, including engaging in voluntary sexual intercourse 4 days after the incident alleged, was arguably inconsistent with MN's account. Only very vague and inconsequential evidence of subsequent contact between the parties was adduced. The Advocate Depute had characterised the contact as "short lived" in her address to the jury.

[31] The credibility of MN's evidence was central to the Crown case. Justice to the appellant required that he ought to have been able to challenge her credibility effectively: *Daly*, Lord Reed at [124]. The failure to lodge a section 275 application prevented that challenge. It followed that the appellant's defence was not properly placed before the jury and a miscarriage of justice had occurred. It was important that in his report to the appeal court, the trial judge had considered that the proposed further evidence might have been significant.

[32] At the appeal hearing, Senior Counsel acknowledged that the case law does not support a failure "properly to place the defence before the jury" and proposed that the failure to make an application was conduct so unreasonable that no reasonable lawyer could have adopted that course and constituted defective representation: *Grant* v *HM Advocate* [2006] HCJAC 42, 2006 JC 205. There was a world of a difference between such evidence as there was before the jury about the ongoing association and affection between the appellant and complainer, and her expressions of love for him, and the fact, as the appellant proposes, that parties had sexual intercourse some days after 1 January 2022. While some of the other evidence in the proposed application was before the jury, what really mattered was sexual intercourse on 5 January 2022. It was notable that in his report, the trial judge had suggested that the proposed evidence would have had a material bearing on the jury's determination of the issue of consent.

Crown

[33] The appellant had to demonstrate that there was a complete failure on the part of his lawyer to present his defence: *Woodside* v *HM Advocate* [2009] HCJAC 19, 2009 SCCR 350; *Guthrie* v *HM Advocate* [2022] HCJAC 21, 2022 JC 201. The appellant must show that Mr Martin KC had either disregarded his instructions on what the defence was or that he conducted the defence as no competent practitioner would reasonably have done: *Grant*. While counsel ought to act according to a client's instructions on what the defence is, he was not subject to direction as to how it ought to be presented since that was a matter of professional judgement: *Dada* v *HM Advocate* [2025] HCJAC 21, 2025 JC 329. It was not enough for the appellant to show that that prospects of acquittal would have been higher

had his lawyer pursued a different line of evidence or argument or pursued a different strategy: *Ditta* v *HM Advocate* 2002 SCCR 891.

[34] The appellant's defence was that MN consented to sexual intercourse. MN was cross-examined and it was put to her that she consented, which she denied. The appellant gave evidence to the effect that he and MN had consensual sex. In his speech to the jury, Mr Martin KC highlighted the evidence that MN continued to keep the appellant's company in the days after the incident and suggested that this did not fit with her testimony that she had been raped. The appellant's defence was placed before the court.

[35] His experienced lawyer had made a conscious decision not to make a section 275 application to adduce the additional material. That was a tactical decision on the appellant's behalf that his lawyer was entitled to make: *Dada*.

[36] In any event, it was highly unlikely that a section 275 application would have been granted. Evidence captured by section 274 of the 1995 Act ought not to be admitted where it is unnecessary to enable an accused to present his defence and may merely prejudice the jury against the complainer: *Daly* at [172]. By the time of the UK Supreme Court's judgment in *Daly,* evidence had already been given on commission including MN's acceptance of a continuing relationship after the incident. The jury knew that the appellant had visited MN at her home, that the parties had gone to Dundee together when she got a tattoo and that they continued to message each other, including MN's statement on 10 January 2022: "I love you too xx". Additional material confirming the ongoing relationship would have been of very little probative value for the purposes of section 275(1)(c). Additional details of specific sexual acts would have been an unnecessary intrusion into MN's dignity and privacy.

[37] In deciding if there was a miscarriage of justice, the court required to take an overall view of the circumstances: *Brodie* v *HM Advocate* [2012] HCJAC 147, 2013 JC 142; *TH* v *HM*

Advocate [2025] HCJAC 46, 2026 JC 58. The jury were plainly aware of the continuing relationship between the parties. The critical evidence before the jury was the Snapchat message exchange of 3 January 2022 in which the appellant had admitted to committing the offence. Whilst that presented the appellant with a serious difficulty, his evidence was that he was apologising for the complainer being upset and not for raping her.

[38] In the whole circumstances, there was no miscarriage of justice.

Decision

[39] The real issue in this appeal is the allegation of defective representation as opposed to any question about the effect of sections 274 and 275 of the 1995 Act. The trial judge's comment founded on by the appellant must be seen in that light. The judge did not purport to analyse the principles on which defective representation could be made out and makes no reference to the explanation given by Mr Martin KC in his response to the grounds of appeal, which was received after his Lordship reported on the appeal.

[40] It was not the operation of the law of evidence that prevented the appellant's desiderated evidence featuring directly before the jury. It was his lawyer's tactical decision, informed by knowing what MN had said at commission, not to make such an application or seek to adduce evidence about ongoing association beyond that already contained in MN's evidence, and, in due course augmented by the appellant and his mother who testified.

[41] The case is an unusual one because there was a relatively clear written admission in an electronic message by the appellant that he raped the complainer. That was his biggest problem in the trial and would not have been materially ameliorated by demonstrating that sexual intercourse occurred consensually between the parties a few days after the rape to which he admitted. The jury heard his attempt in evidence to explain away his messages

and their import. They would have been entitled to note that his explanation in evidence was not the same as that put to the complainer in cross-examination. Given their verdict, it seems obvious that they rejected his explanation for comments that were, in context, clearly an admission of rape.

[42] That is not the only significance of the messages. In the exchange we have set out at para [6] above, particularly the last two messages quoted, MN made it clear that she was upset because she had told the appellant "No", but he penetrated her anyway. Her making the accusation at that time was strongly supportive of the credibility of her evidence that an admitted act of sexual intercourse on 1 January 2022 occurred without her consent. The appellant's reply, as already noted, was an even stronger confirmation of the truth of MN's evidence that she had not consented.

[43] The appellant's defence of consent was before the jury. MN was cross-examined about it, the appellant testified that there was consent and submissions were made to the jury on the appellant's behalf in support of it. The judge directed the jury upon it.

[44] The reason that no further evidence was led about the appellant's version of the full extent of their post-incident interactions was because of the judgement of the highly experienced King's Counsel who conducted the defence. That being so, in the appeal hearing, Senior Counsel accepted that the appeal could only succeed if the court was persuaded that there was defective representation on the basis that the defence had been conducted in a manner so unreasonable that no reasonable counsel would have conducted it in that way.

[45] At best for the appellant, had an application been made, granted, and the complainer recalled to give further evidence either on commission or in the trial, and assented to the proposition that she had consensual sex with the appellant on 5 January 2022 (or those facts

were established by joint minute), the jury would have heard that sexual intercourse occurred on that occasion. How much more would this have assisted the appellant's defence?

[46] The appeal was presented on the basis that had there been questioning about allegedly consensual sexual activity on 5 January 2022, it would have been destructive of the credibility of the evidence of the complainer about events on 1 January 2022 and supportive of the credibility of the appellant's evidence. It was not suggested in the appeal hearing that it bore on the question of consent.

[47] The jury already knew that MN and the appellant interacted both in person and by messaging over the early part of January 2022 and spent time together. They knew from MN's evidence that she continued to be in love with the appellant, told him so and that, in her eyes, they were still in a relationship. They knew of the very large number of messages exchanged between them. Senior counsel, armed with the witness's police statement, knew what the appellant's mother would say when testifying. In these circumstances, we struggle to conclude that questioning about consensual sexual intercourse and the other additional facts specified would be materially more effective than the evidence already before the jury about ongoing interactions and MN's attitude towards the appellant.

[48] In reality, the ground of appeal is no more than:

> "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"

Dada v *HM Advocate* [2025] HCJAC 21, 2025 JC 329 [42] referring to *Grant* v *HM Advocate* [2006] HCJAC 42, 2006 JC 205 [22], referring to *Ditta* v *HM Advocate* 2002 SCCR 891 [17]. It does not amount to defective representation, and the ground of appeal is not made out. There has not been a miscarriage of justice and the appeal is refused.

[49] In our opinion, the tactical decision taken by Mr Martin KC was one reasonably open to him and, indeed, reasonable. On that basis also, the appeal falls to be refused.

[50] We would add that it is far from certain that any section 275 application would have been granted in the unusual situation where the complainer's evidence had been taken and she had acknowledged so much about her ongoing interactions with the appellant, whom she still loved in the aftermath of the rape, as she told him in messages and testified on commission. Those circumstances being in evidence already serves substantially to reduce the probative value of questioning about sexual activity and intercourse. The primary purpose of such questioning would be to show the complainer's feelings towards the appellant after 1 January 2022, but the jury learned about that anyway: from the complainer's evidence on commission, her messages and from the appellant and his mother.

[51] To go further and adduce evidence of specific sexual activity was unnecessary to achieve the appellant's primary purpose of demonstrating the complainer's attitude towards him. It would have been highly invasive of her privacy and dignity. In these circumstances, we do not consider it a foregone conclusion that a judge would have concluded that the administration of justice considerations in section 275(1)(c) were outweighed by the probative value of the evidence proposed.