APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 20
HCA/2025/328/XC

Lord Justice General
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

CMD

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (Sol Adv); Paterson Bell Solicitors (for John Kilcoyne & Co, Glasgow)
Respondent: McKenna (Sol Adv) AD; the Crown Agent

10 June 2026

Introduction

[1] This appeal concerns the adequacy of the standard direction given by the trial judge on the approach the jury should take to evidence which had been led in support of charges that were withdrawn at the conclusion of the Crown case.

[2] On 13 May 2025 a jury at the High Court in Glasgow convicted the appellant of three charges libelling domestic abuse and threatening and abusive behaviour towards two complainers. The charges may be summarised as follows:

> Charge (2) Contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 on various occasions between 15 August 2015 and 31 March 2019 by behaving in a threatening and abusive manner likely to cause fear and alarm by shouting, swearing, behaving in an aggressive manner and sending abusive and threatening messages all towards his partner, AA.
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> Charge (3) Contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 on various occasions between 1 April 2019 and 19 December 2022 involving abusive and violent behaviour towards AA of various kinds including shouting and swearing, monitoring her movements, using threatening and abusive language towards her, behaving in an aggressive manner, taking and restricting her use of her car , repeatedly calling and messaging her, obtaining information to access her private pension account, repeatedly refusing to leave her house when asked, seizing hold of her, pulling her, pushing her, holding her down and on one occasion penetrating her vagina with his penis without her consent and seizing her mobile telephone and punching her on the face to her severe injury; and
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> Charge (4) Contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 on 20 October 2022 by behaving in a threatening and abusive manner likely to cause fear or alarm by shouting at BB and attempting to remove his daughter, CC, from her care.

[3] Subject to certain deletions, the verdicts on charges 2 and 3 were unanimous.

[4] On 11 June 2025 the trial judge imposed concurrent sentences of one year's imprisonment in respect of charge 2 and seven years' imprisonment in respect of charge 3. He admonished the appellant on charge 4.

[5] The indictment placed before the jury at the outset of the trial included a further six charges. Charge 1 was a charge of anally raping AA between 1 July 2014 and 30 June 2015 at a flat in Glasgow. The remaining charges (5, 6, 7, 8 and 9) each alleged breaches of special bail conditions not to communicate with, approach or contact AA. On the fourth day of the

trial, prior to the conclusion of the Crown case, the Advocate Depute moved to withdraw charges 1, 5, 6, 7, 8 and 9 from the indictment. The judge duly acquitted the appellant of the withdrawn charges.

[6] The appellant appeals against conviction on the basis that the trial judge erred in directing the jury that they could consider the evidence led in support of the withdrawn charges insofar as they considered it to be relevant to the remaining charges. He argues that the evidence led in support of the withdrawn charges was irrelevant to what remained on the indictment and was thus unduly prejudicial. The judge should have directed the jury to ignore all the evidence on the withdrawn charges.

Evidence at the trial

[7] The court has had the advantage of considering transcripts of the evidence given by the complainers and the appellant. The pertinent evidence may be summarised for present purposes as follows.

AA

[8] AA explained that she was in a relationship with the appellant from December 2013 until 2017, during which time they had two children together. She described their early relationship as "really good", although that soon changed.

[9] AA described an incident in the spring of 2015 at the appellant's flat. While their elder child was being looked after by the appellant's mother, she and the appellant went out for a meal in the Shawlands area of Glasgow. They were drinking alcohol. When they arrived back at the flat, AA went to bed in the appellant's room but awoke feeling sick. She tried to get to the *en-suite* bathroom, but she began being sick over a pillow and on the carpet

before she could get there. When she made it to the bathroom she started being sick into the toilet. The appellant, who was also awake, started to clean up the sick. He came into the bathroom and grabbed her arm. He took her over towards the bath, pushed down on her back and bent her over the bath before inserting his penis into her anus, which shocked her. She felt the appellant push her down into the bath and he was holding her quite hard. It did not last long before he ejaculated into her anus. He told her "that's what you'll get if you get drunk like that again. That'll be your punishment." She described feeling upset and humiliated, and as though the incident was her fault.

[10] AA next described an incident which occurred in the early hours of 12 August 2022. At that point, she lived in her own house with the two children. She had two older children from an earlier relationship who lived elsewhere. She and the appellant had been separated for some years, although the appellant had been living in her house in a separate bedroom since the beginning of the 2021 COVID-19 lockdown. He had moved into the house to assist with childcare since AA was a key worker. She described being asleep in her bedroom before being woken up by the appellant getting into her bed. She asked him what he was doing, and he replied something along the lines of "can we have a cuddle?" or "can we have sex?" She told him to leave her room. He refused and she got out of the bed and headed towards the door to leave the room. She described the appellant getting out of the bed, grabbing her by her right forearm and pulling her back. She tried to resist him, but he was pulling quite hard with a tight grip. He pulled her to the side of the bed, and she told him to leave her alone at least two or three times. He refused to listen to her and pushed her shoulders down on the bed so that she was facing down. She told him to get off and to let her go. She described the appellant aggressively pulling down her pants before pushing his penis into her vagina. He started thrusting hard and pushing down on her back. She

thought she told the appellant to stop or said "no", but her face was pushed into the bed. She recalled feeling scared and it was painful since he was being aggressive. When he was finished, he pulled his penis out of her and walked back through to his bedroom. She told him that she did not want that to happen again and that she wanted him to leave her house.

[11] Later that day, the appellant had gone to the pub. AA phoned her eldest daughter, ZZ, to invite her to stay the night since she was worried about what the appellant would do on his return from the pub. That evening, when the appellant returned, he came out to the back garden. AA was sitting on a sun lounger, speaking on the phone with a man she was seeing at the time. The appellant asked who she was talking to and he asked her to give over the phone so he could see who she was talking to. She told him that it was her sister, and he tried to grab the phone out of her hand. He took hold of it, but she managed to pull it back. At this point, the appellant punched her on her left cheekbone, causing her head to hit the back of the sun lounger. At one point the appellant took hold of AA's mobile phone. He ran with the phone into the downstairs toilet. AA managed to get the phone back and a struggle ensued, during which the appellant hit a chandelier in the hallway, causing it to smash.

[12] Two or three weeks after the incident, AA attended the Queen Elizabeth Hospital for an examination of the injuries to her face since the swelling had not gone down. She was found to have suffered a closed fracture of the skull and facial bones.

[13] AA described further domestic abuse by the appellant on a variety of occasions. It is not necessary to rehearse all the details. She described an episode when she and the appellant were in the upstairs bedroom of her house. The appellant was in a temper, and he threw her mobile phone before repeatedly stamping on it, causing the phone to be destroyed. Other incidents included times when the appellant would shout and call her

offensive and derogatory names. He sent aggressive and intimidatory text messages to her. On one occasion he sent a text message to her threatening to "boil [her] f…ing head". On another he sent a message saying "If I ever see you again, I will murder you." He accused her of infidelity and he threatened suicide. He would slap her on the back of the head, unprovoked. He often threatened to kill her if she did not come home when she had been out. He would threaten her by saying "just remember I'm a madman".

[14] When the appellant moved in with AA during lockdown, he refused to help around the house, telling her "it's your f…ing house". He used her car every day without her permission such that she could not get to work on her own. When she did use her car, he would phone her and demand aggressively that she return so he could use it. AA described being "always on a time limit". The appellant set up insurance policies for her without her knowledge, including life insurance and critical illness insurance. She only became aware of these policies when the appellant had left. She would not have agreed to the policy arrangements since the premiums were high.

[15] After he had left AA's house, the appellant threatened her by saying that he would move back in and change the locks. The appellant had access to AA's bank accounts. He used the money in the accounts for various transactions without her permission, for example on gambling websites. On one occasion, the appellant transferred all of AA's wages out of her bank account. He kept the details to her various bank accounts, credit card accounts and pension accounts on his phone. After he had moved out, the appellant would contact AA without her permission. He put money into her bank account with transaction references such as "love you". He sent text messages intended for AA to her daughter's phone, and he sent audio messages which would play through her smart TV. Some of the messages were threatening. He would threaten to take the children away from her, saying that he was a

better parent. AA spoke to text messages received by her from her daughters' phones during times when the appellant was looking after them. Some of the messages related to the identities of "step daddies" while others related to AA's mother's funeral.

[16] AA said that the appellant contacted her in breach of his bail conditions. She described an occasion when she collected her daughter from Brownies. The appellant was also there. He stared at her before walking past her towards his car. She explained that there was no reason for the appellant to be there. On another occasion, AA described collecting her children from swimming lessons. The appellant was there. He approached her and started shouting at her. The same morning, AA went to the local church hall to collect her daughter from a class. She saw the appellant's car parked across from the church. She collected her daughter and called the police. AA spoke to another occasion when the appellant was sitting in his parked car outside the children's school with no reason to be there.

[17] In cross-examination, AA denied that she had fabricated being anally raped in 2015 and that she had consented to sexual intercourse with the appellant on 12 August 2022.

BB

[18] BB is AA's aunt. She first described an occasion when she was in Asda with AA. AA answered a phone call from the appellant. She could hear the appellant shouting at AA and asking her when she was coming home. At the end of the call, AA left what she was doing and went home.

[19] BB described a further incident in October 2022. It had been arranged that BB would take the two children to meet the appellant in a car park while AA was in a nearby library. The children were aged between 5 and 8 at the time. One of the children started crying and

saying that she did not want to go with the appellant. When they met the appellant, he told the child to "get in the b…y car now" which caused her to cry some more. The appellant started shouting, and the child grabbed BB's hand. BB next described the appellant coming close to her face and telling her that it was "his family" and to "butt out", while the child was still holding her hand and crying. The appellant grabbed the child and put her into the car before asking BB, "where's the mother?" The appellant then went into the library to see AA. BB described the appellant "roaring" at AA in the library, although she did not hear what he said. BB described feeling scared and shocked by the incident, and some onlookers offered her a cup of tea since she was shaking.

The appellant

[20] The appellant elected to give evidence on his own behalf. He spoke to AA frequently drinking alcohol to excess, which caused difficulties in their relationship. He gave examples of occasions when AA became drunk at social events, which embarrassed him. He said that AA would start talking about their sex life and how "good [he] was in bed". He also described other drunken and erratic behaviour. Her behaviour caused upset and anger, and there were often arguments. He described himself as a quiet person who did not raise his voice. Later in his evidence, he accepted shouting and swearing during arguments with AA, although he denied ever threatening her or doing anything which would cause her any harm. He described the use of derogatory language as "daft humour". He did not accept that he ever tried to punish her for her behaviour. He denied all of the violent conduct alleged by AA.

[21] The appellant denied raping AA on 12 August 2022. He maintained that the sex in the early hours of the morning as described by AA had been consensual. He said that AA

had initiated the sex and that she participated freely, although he denied ejaculating inside her vagina. He said that he was not separated from AA at this point and that they were still together. He described leaving the house in the afternoon to go to the pub and he returned in the early evening to do some work. It was not until later at night that he spoke with AA. AA was outside on her mobile phone, sitting on a deck chair. He described approaching her and asking, "jokingly", who was on the phone. He said that the ground was wet since a paddling pool had been set up in the garden. When he reached over to grab the mobile phone he slipped on the wet ground, causing him to fall on top of AA. He denied hitting AA in a temper and he denied seeing AA with any injuries at the time, although he accepted that she had, in fact, sustained injuries.

[22] The appellant accepted that there had been an incident between him and BB in October 2022 in a car park. He described a series of events which included him being in tears, walking over to AA and telling her that it "doesn't need to be like this" and him texting AA later in the day accusing BB of causing a scene in the car park.

[23] It is clear from their verdicts that the jury rejected most of the appellant's evidence and accepted the substance of the complainers' accounts.

The judge's direction

[24] To convict of any charge the jury would have to accept the evidence of the complainer relating to that charge and find corroboration. To convict on charge 3, the jury had to be satisfied that there was a course of abusive behaviour directed at the appellant's partner or former partner. Abusive behaviour included behaviour which was physically or sexually violent or was threatening or intimidating. Moreover, to convict of charge 3, the jury had to be satisfied that a reasonable person would consider the course of behaviour to

be likely to cause the complainer to suffer physical or psychological harm and that the appellant either intended to cause such harm or was reckless as to whether it had that result. To convict of the sexual conduct averred in charge 3, the jury had to be satisfied that the appellant penetrated AA's vagina with his penis without her consent.

[25] In a short passage early in the charge, the judge gave the jury the standard direction on how they should approach evidence which had been led in support of the withdrawn charges. He said the following:

> "The Crown withdrew a number of charges at the end of their case but the evidence led in respect of those charges remains evidence in the case which you can take into account insofar as you consider it relevant to the remaining charges."

Submissions

Appellant

[26] Evidence in support of the sexual conduct in charge 1 was collateral to the remaining charges and was thus inadmissible at common law following the Advocate Depute's withdrawal of the charge. The evidence of an alleged anal rape in 2015 did not have any bearing on whether the appellant committed the offences libelled in charges 2, 3 or 4. The time gap was too great. While it was accepted that evidence of a charge of which an accused was acquitted might be relevant to another charge on an indictment (*HM Advocate* v *Mair* [2013] HCJAC 89; 2014 JC 137), that evidence had to have a reasonably direct bearing on the subject matter of the charge (*Daly & Keir* v *HM Advocate* [2025] UKSC 38 [38]; 2025 SLT 1253). The same point arose in relation to charges 5, 6, 7, 8 and 9. By allowing the jury to take into account the evidence in support of the withdrawn charges, it opened up a disproportionate inquiry by the jury into matters with which the proceedings were no longer concerned.

[27] The trial judge's approach gave rise to an inequality of arms. The law of evidence prevented the appellant from placing irrelevant and collateral matters before the jury. By directing the jury that they could take into account the evidence in support of the withdrawn charge in their deliberations on the remaining charges, the trial judge gave the Crown an advantage not available to the appellant. It followed that the appellant had not enjoyed a fair trial as guaranteed by Article 6 of the European Convention on Human Rights.

[28] The evidence in support of charge 1 was highly prejudicial and was of a nature more serious than the offending libelled in the remaining charges. It was not possible to determine the weight the jury had attributed to that evidence. In all the circumstances, there had been a miscarriage of justice.

Crown

[29] If a particular passage of evidence was indicative of the commission of a crime, fair notice required that the crime was libelled in the indictment (*Mair*, *per* the Lord Justice Clerk (Carloway) at [9]). It was open to the Crown to libel charges for a purely evidential purpose if the evidence going to that charge was relevant to the other charges on the indictment (*Lauchlan and O'Neill* v *HM Advocate (No 2)* [2014] HCJAC 62, *per* the Lord Justice Clerk (Carloway) at [27] citing *Griffen* v *HM Advocate* 1940 JC 1; *HM Advocate* v *Monson* (1893) 21 R (J) 5; *McIntosh* v *HM Advocate* 1986 JC 169; *Danskin* v *HM Advocate* 2002 SLT 889; and *Mair*). Evidence, in relation to which a charge has resulted in an acquittal, did not become incompetent or inadmissible relative to other offences (*Fisher* v *HM Advocate* [2022] HCJAC 43; 2023 JC 21 *per* the Lord Justice General (Carloway) at [24]).

[30] The evidence led in support of the withdrawn charges was relevant to the remaining charges. It provided important context as to the nature of the relationship between the appellant and AA, in presenting a broader picture of the domestic abuse. In particular, AA's evidence that the appellant had made a threat of future sexual assaults was evidence of an expression of intent on the part of the appellant to carry out further sexual offending against AA.

[31] The judge's direction was appropriate in all the circumstances. The instant case was distinguishable from the circumstances in *AX* v *HM Advocate* [2024] HCJAC 12; 2024 JC 273. In that case, some of the evidence pertaining to the withdrawn charges was necessary in establishing identification in a circumstantial case where identification was the main issue in dispute, but other aspects of the evidence were irrelevant to the issues in dispute. The sheriff in *AX* had failed to direct the jury on how they could properly treat that evidence. In the present case, all of the evidence led in support of the evidential charges was relevant to the issues in dispute.

Analysis & decision

[32] As this court observed in *HM Advocate* v *Mair* [2013] HCJAC 39; 2014 JC 137, evidence available to prove one charge may be relevant also to another charge on an indictment (*per* the Lord Justice Clerk (Carloway) at [9]). Such evidence remains available to prove the remaining charges even if there has been an acquittal on the other charge. That much is commonplace, is an everyday occurrence in our criminal courts and has been the position for many years. In solemn cases the issue is usually and properly dealt with by the succinct standard direction which the trial judge elected to give the jury in the present case. It is left to the jury to decide whether the evidence on the withdrawn charge or charges is

relevant to proof of the remaining charges in the sense that they are prepared to regard it as having a bearing on the charges on which they require to adjudicate. Such a practice is sensible and will usually be the appropriate one for the court to follow.

[33] The evidence on the withdrawn charges must, of course, be capable of being viewed by the jury as relevant to the remaining charges. The test for relevance is a common sense one: does the evidence have a reasonably direct bearing on the matter under investigation (*W Alexander & Sons Ltd* v *Dundee Corporation* 1950 SC 123, 131; *Daly & Keir* v *HM Advocate* at [38]) [2025] UKSC 38; 2025 SLT 1253, [38]).

[34] It follows that the only issue which properly arises in the present appeal is whether the jury were entitled to have regard to the evidence led in support of the withdrawn charges because they might regard the evidence as relevant to proof of the remaining charges. They clearly were entitled to do so in the circumstances of the present case. There was evidence that the appellant anally raped AA in 2015. After doing so, he threatened to rape her again in the future. In 2022 he carried through on that threat. The Crown case was that the appellant was a violent and controlling domestic abuser throughout his relationship with AA. Evidence of a violent sexual attack perpetrated against AA during the relationship was obviously relevant to the issues in the case. Such evidence was capable of being seen by the jury as bearing on the central issues in the case. It was for the jury to decide on the weight that should be given to the evidence on the withdrawn charges, including, for example, the time gap between the anal and vaginal rapes. In this context, it is notable that the appellant restrained AA by grabbing her arm when he raped her in 2015. He did the same in 2022. There was a striking similarity between his conduct on each of the occasions on which he sexually attacked her. To say that the evidence about the anal rape was irrelevant to proof of charge 3, which included an allegation of vaginal rape, is artificial and

unrealistic. Similar fact evidence is often relevant to proof of guilt (*Fraser* v *HM Advocate* [2013] HCJAC 117; 2014 JC 115, *per* the Lord Justice Clerk (Carloway) at [49]). The leading of such evidence does not cause "prejudice" to the accused, nor does it create any unfairness. On the contrary, it is a legitimate part of the proof against him.

[35] The same is true of the evidence led in support of the breach of bail conditions. This chapter of the evidence also supported the Crown case that the appellant was a controlling and obsessive domestic abuser disposed to engage in unwanted contact with AA. Such evidence was strongly linked to the domestic abuse libelled in charge 3.

[36] In short, the evidence led in support of the withdrawn charges was relevant circumstantial evidence; it amounted to evidence of similar abusive conduct before and after the behaviour libelled in charges 2 and 3. The standard direction given by the trial judge was therefore entirely apt and appropriate. It was not necessary and would have been undesirable for him to say any more than he did.

[37] There are unusual cases, of which *AX* v *HM Advocate* [2024] HCJAC 12; 2024 JC 273 is an example, in which specific directions may be required on the use to which evidence led in support of withdrawn charges can be employed. In *AX* some of the evidence on the withdrawn charges was potentially relevant to the single issue in the case, namely identification, whereas other parts of it were obviously of no such relevance. This court held that in those particular circumstances the jury should have been given more tailored guidance on the issue. In the present case, all the evidence led on the withdrawn charges was potentially relevant to those which remained. The direction given by the trial judge was, therefore, correct. It left the jury to decide for themselves what weight should be given to the evidence on the withdrawn charges in their consideration of the charges on which they had to deliberate.

[38] There is no doubt that the appellant received a fair trial. The appellant referred briefly to Article 6 of the European Convention on Human Rights for the first time in his written case and argument. The point did not feature in the note of appeal, as is required by rule 40.2(4) of the criminal procedure rules (Act of Adjournal (Criminal Procedure Rules) 1996, as amended). No attempt was made to show cause why the compatibility issue should be considered despite being raised late. In any event, the attempt to rely on Article 6 adds nothing to the analysis. The adequacy of the judge's directions is a matter for domestic law. No compatibility issue arises.

[39] The appeal is refused.