



**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2026] HCJAC 28  
HCA/2025/000202/XC**

Lord Justice Clerk  
Lord Matthews  
Lord Armstrong

**OPINION OF THE COURT**

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

**APPEAL AGAINST CONVICTION**

by

**JAMIE NELLER**

Appellant

against

**HIS MAJESTY'S ADVOCATE**

Respondent

**Appellant: Munro (Sol Adv); Livingstone Brown, Glasgow  
Respondent: Stalker AD; the Crown Agent**

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24 July 2026

**Introduction**

[1] The appellant was convicted after trial, at the High Court of Justiciary at Glasgow, of three sexual offence charges, against two complainers, comprising rape, sexual assault by

penetration and sexual assault. On 8 April 2025, the trial judge imposed an extended sentence of 13 years with a custodial term of 10 years.

[2] The appellant challenges his conviction, on two grounds. First, he argues that his agents and counsel failed to investigate, prepare and present his defence such that the jury did not hear critical evidence supporting his defence; our decision is found at paras [73]-[78] below. Secondly, he maintains that the trial judge erred by refusing to admit evidence prohibited by section 274(1) of the Criminal Procedure (Scotland) Act 1995 which ought to have been admitted under section 275; see paras [88]-[97].

[3] Evidence was led at the appeal hearing from four witnesses in support of the appellant's first ground of appeal: the appellant, his former counsel, Mr Simon Gilbride and Mr Paul Keenan, together with his former solicitor, Mr Gerard Keenan.

### **Procedure at first instance**

[4] Whilst the appellant faced ten charges, the Crown withdrew charges 2, 6, 8, 9 and 10 and the jury found charges 5 and 7 not proven. He was convicted of three charges:

“(001) on various occasions between 12 November 2012 and 11 November 2016, both dates inclusive, at [various addresses in Greenock], you ... did assault [AA] ... and did observe him naked in a bath, wash his body, touch his penis, rub your body against his body, push and pin him onto a bed, force him onto his knees, lick his anus, penetrate sexually his anus with your finger, penetrate his mouth with your penis, ejaculate semen into his mouth and put your hand over his mouth and thus force him to swallow same and penetrate his anus with your penis and you did thus rape him: CONTRARY to Sections 1, 2 and 3 of the Sexual Offences (Scotland) Act 2009;

(003) on an occasion between 1 September 2015 and 30 September 2015, both dates inclusive at [an address in Greenock] you ... did assault [BB] ... and, while he was under the influence of alcohol and drugs and unconscious and incapable of giving or withholding consent, remove his clothing and penetrate his anus with your penis and you did thus rape him: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009;

(004) on various occasions between 1 September 2015 and 31 August 2021, both dates inclusive at [an address in Greenock] you ... did assault [BB] ... and did remove his clothing, compel him to put your penis into his mouth, penetrate sexually his anus with your finger, attempt to penetrate sexually his anus with a sex toy and penetrate his mouth with your penis and you did thus rape him: CONTRARY to Sections 1, 2 and 3 of the Sexual Offences (Scotland) Act 2009."

[5] In advance of the preliminary hearing on 30 April 2024, the appellant lodged notices of special defences of consent to the conduct in charges 1 and 4, the former under exception of the allegation of penile/anal penetration and the latter under exception of the averments of anal penetration with a sex toy and compelling the complainer to swallow semen, which he denied. The last-mentioned averment was deleted from charge 4 on Crown motion at the close of its case.

[6] The appellant also lodged two applications under section 275 of the 1995 Act seeking permission to adduce evidence captured by section 274 relating respectively to AA and BB. Neither the complainers nor the Crown objected to the applications which the preliminary hearing judge granted on 13 June 2024. The ground of appeal is concerned only with part of the application relating to BB which was confined to the conduct on charge 4. The appellant sought permission to adduce evidence and questioning that, *inter alia*, between September 2015 and August 2021, BB was receiving money from the appellant in exchange for consensual sexual favours; that all of the conduct libelled within charge 4 was part of that financial arrangement; and that between September 2015 and August 2021, BB would frequently contact the appellant to offer to perform sexual favours consensually.

[7] Paragraph 2(d) of the application concerning BB and charge 4 sought to admit the following evidence:

That Defence Production 1 is a book of photographs which contains 13 screenshots of text message conversations between [the appellant and BB] ... The messages are dated between 9 August 2020 and 31 May 2021. The messages refer *inter alia* to [BB] asking if he can visit the [appellant] for sexual favours in exchange for money.

[8] When the case called for trial on 7 February 2025, the Crown moved the trial judge to limit the decision to allow the applications in full under section 275(9). The trial judge limited the applications to some extent. Whilst, concerning BB, he left in place the permission in part 2(b) of that application, permitting evidence and questioning that the conduct libelled in charge 4 occurred in the context of a financial arrangement between the appellant and BB in exchange for consensual sexual favours, he refused, *in hoc statu*, to admit the other evidence within the application. In particular, the trial judge refused to permit the introduction into evidence of defence production 1 (DP 1) per paragraph 2(d) of the application. The judge noted that there had been no editing of a document containing a very large number of messages and no specification of which messages the appellant sought to refer to. The appellant's solicitor-advocate made no suggestion of how questioning could be focussed and proportionate. The judge specified, and it was minuted, that his decision to limit the preliminary hearing judge's allowance of the application was made *in hoc statu*. This left it open to the appellant to seek to revisit the trial judge's decision at any time. Accordingly, it was open to the appellant to invite the judge to reconsider his refusal once BB gave evidence in chief.

[9] For completeness, we note that the appellant made a further section 275 application concerning charges 2-7 which the trial judge granted on 7 February 2025. The gist of it was to permit questioning of BB about written communications between September and December 2023 in which BB offered to retract his evidence in exchange for money and to attend at the appellant's home to discuss the proposal. Accordingly, the jury heard evidence about this.

**Trial evidence**

AA

[10] AA, by then aged 27, explained that he met the appellant when he was 15 or 16 years of age. AA had left school, was estranged from his family, sleeping rough and unable to look after himself properly. He was scavenging for food and his health was poor. He had nowhere to go and was vulnerable.

[11] When AA first met the appellant, he went to his home every now and then by invitation. The appellant gave him food, and money for when he was out on the street. AA thought that the appellant was being kind and helpful. Sometimes he would stay with the appellant for half an hour and sometimes he would stay overnight. The appellant allowed AA to wash in his shower or bath.

[12] The appellant would frequently come into the bathroom when AA was washing. The appellant would chat and be nice to him and take AA's clothes and wash them. Things started to get "creepy". The appellant would watch AA wash and then took to washing him. He would drop his hands all over AA's naked body and touch his genitals making AA feel disgusted and scared. It happened more frequently over time.

[13] Usually, when AA came out of the bathroom his clean clothes would be sitting out for him. On one occasion his clothes were not there. He asked the appellant where his clothes were, to be told they were still in the washing machine. The appellant started to touch him, rubbing his hands all over him and breathing down his neck. He pulled at AA and threw him onto the bed. He locked his hands and raised his knees. AA asked him to stop. The appellant said that AA "owed him". AA described being on his back. The appellant knelt over him and prevented him from moving. He forced his penis into AA's mouth by pulling his head forward. He moved AA's head by grabbing his hair. He took his

penis out of AA's mouth and flipped him over, so he was face down. AA told the appellant to stop and that he did not want this to happen. He described feeling terrified, and that he did not know what would happen if he refused what the appellant wanted. The appellant manoeuvred AA so that his bottom was raised and his face down. The appellant began to lick AA's anus before placing his finger in AA's anus and moving it about. The appellant then put his penis into AA's anus and started thrusting. AA said this was extremely painful and that it felt disgusting and wrong. He repeatedly told the appellant to stop. The appellant took his penis out of AA's anus and ejaculated on AA's face.

[14] AA described other occasions when similar conduct took place. He said that the appellant sometimes ejaculated on his back, and sometimes in his mouth. When he ejaculated in his mouth, he placed his hands over AA's mouth so that he couldn't breathe, forcing him to swallow. Sometimes AA was forced to perform oral sex.

[15] AA was not sure how often this happened, but it went on for about three years. At first, he was a vulnerable person and was getting a meal. He was unable to process what was happening and he did not want to tell anyone about what was going on. The appellant would give him between £20 and £40, AA needed the money to eat and felt "stuck". The abuse ended when AA was 18, when he "eventually clued up that this was wrong and chose to stay away".

[16] In cross-examination, AA denied that he had offered to perform sexual acts on the appellant. He maintained that none of the sexual conduct was consensual. He accepted that he sometimes contacted the appellant. He confirmed that he knew BB.

**BB**

[17] BB was introduced to the appellant in 2015, when he was aged 22, by a friend of a friend. BB lived with his then partner, together with their three children.

[18] BB first spoke to the appellant when he was at a party at the appellant's house.

There were drugs at the party, and BB took an ecstasy tablet, some cocaine and cannabis.

The appellant indicated his sexual interest in BB and kissed him. BB's last memory was speaking to the appellant in the living room before BB blacked out. When he woke up the following morning in a bedroom, he could not recall getting there and found that he was in bed and naked. There were small drops of blood on the white sheet. These had come from BB's anus, which was sore. He felt disgusted and dirty and had no recollection of what had happened. He found his clothes folded up on the bedside next to him, but he had not folded them. The appellant entered the room and gave him £500 - £600. He said, "I'm paying for what I took, great job". BB took the money before the appellant drove him to the station. Later, the appellant texted to say something like "great job". BB was unable to tell anyone, including his partner, what had happened.

[19] The appellant sent BB a video, showing BB passed out and lying face down. A man could be seen inserting his penis into BB's anus and thrusting. The video was taken by the man doing the thrusting. The video was accompanied by a message that photographs would be sent to BB's partner if he did not comply.

[20] BB said that the appellant delivered mail to his address. He sent a photograph of BB's partner's door to him. BB said that he went back to the appellant's house because of the picture, and that he was scared that the appellant would tell his partner what he had done but the Crown did not insist on the associated charge.

[21] The next time the appellant invited BB to his house, the appellant said he “liked street boys” and that he paid them for sexual favours but nothing happened on that occasion. BB described another occasion when he texted the appellant to say “I need money.” The appellant said he wanted to perform oral sex on BB for £300 and that he got a “kick out of paying boys”. BB went along with it because of the photographs sent to him and because of the threats to tell his partner. Half-way through the oral sex he asked the appellant to stop but the appellant persisted and thereafter paid him £300. This happened several times.

[22] BB was paid money by the appellant for various sexual favours, none of which he wanted to do. He felt disgusted by it, but he agreed because of the threats, and he did not want his relationship with his partner to break down. This happened regularly, sometimes every two weeks. It included oral sex, both giving and receiving, and digital penetration of BB’s anus. On one occasion BB was in tears and he asked the appellant to “please stop”. The appellant said he was not paying BB to “stand around” and that he would be doing what he was told. The appellant tried, unsuccessfully, to put a sex toy in BB’s anus.

[23] The abuse stopped when BB went to prison in late 2016 but resumed after his release. BB described taking Valium to “black it all out”. He would pass out to “let [the appellant] get on with it”.

[24] There were occasions when BB asked the appellant for money directly. He would be paid in cash, or sometimes in cannabis.

[25] The abuse finally stopped in 2021 when BB’s partner found photographs, which ended BB’s relationship with her. BB spoke to a therapist in 2022 and divulged what had happened and also spoke to a lawyer who advised him to report matters to the police.

[26] He accepted that he had sent messages to the appellant and asked him for money after the prosecution had commenced.

[27] In cross-examination BB said that he was blackmailed by the appellant. He confirmed that he felt threatened by the appellant throughout their association. The threats were made verbally and not in messages. BB agreed that he and the appellant would send messages to one another in which an arrangement was made about an amount of cash to be paid. He was adamant that he was not consenting to the conduct. It was put to BB that what he had described had never happened, which he refuted. He would say no but the appellant would continue to sexually assault him. He accepted that he was looking for a payout from the appellant and if that had materialised the case would not have come to court.

### *Appellant*

[28] Anything sexual that happened with AA and BB was consensual. The appellant met AA when AA was 18 years old. AA was on the street begging and the appellant invited him home and gave him something to eat. They watched TV before they discussed sex. He took AA to a friend's vacant house in Greenock and performed consensual oral sex on AA there. He denied that he had forced AA.

[29] The appellant and AA met regularly to have sex, instigated by AA contacting the appellant and asking for sex in exchange for money. The appellant denied forcing himself on AA and he denied ever penetrating AA's anus with his penis.

[30] AA would bathe regularly at the appellant's home, but sex never happened in the bathroom; there was a lock on the door.

[31] The appellant did not rape BB while unconscious, nor had he taken a video of him having sex or instructed BB to pose for photographs. He had not used a sex toy on BB.

[32] The appellant accepted that he had paid BB for sexual services, always discussed in advance. He denied threatening BB with contacting his partner.

[33] In cross-examination, the appellant said that he had had an operation on his penis and that he could not have anal sex. He did not have anal sex with AA, adding that he “wasn’t into” anal sex because he could not do it. When asked whether he had told his lawyers about this, he said that he “told Gerry” after his arrest. He denied having anal sex with BB, because of the problems with his penis. There was no anal sex either consented to or paid for. He performed oral sex on BB, but BB did not perform oral sex on the appellant. He did not penetrate BB’s anus with his finger

### **Note of Appeal**

[34] The appellant’s solicitors and counsel failed adequately to investigate, prepare and present the appellant’s defence such that a miscarriage of justice had occurred. An essential strand of the appellant’s defence was that he could not have penetrated a person’s anus with his penis as he suffers from phimosis, rendering it impossibly painful. Certain of the appellant’s medical records recovered by his solicitors supported this account but were incorrectly deciphered. The appellant instructed his solicitors and counsel to advance this line of defence at trial, but they failed to do so. Had this line of defence been advanced, the jury would have been provided with evidence to show that penile/anal penetration was either impossible or highly improbable.

[35] The trial judge erred in refusing to admit DP 1, evidence of text messages between the appellant and BB, demonstrating that BB was seeking to initiate sexual encounters in

exchange for money. The messages were relevant since they could have undermined BB's testimony that he only cooperated with the appellant because he felt pressured and threatened.

### **Ground of appeal 1: defective representation**

#### *Documentary evidence on appeal*

##### *Appellant's affidavit*

[36] In an affidavit extending to some 90 paragraphs, mostly irrelevant to this appeal, the appellant deponed that he underwent an unsuccessful frenuloplasty procedure in 1992 at Ealing Hospital in London. He maintained that his phimosis prevented him from engaging in anal sex as the penetrating partner, since to do so would cause him unbearable pain. He recalled having attempted to engage in anal sex only once in 2006 or 2007, which was unsuccessful because of the pain.

[37] The appellant maintains that he advised his solicitor, Gerard Keenan, at an initial consultation that he was unable to rape anyone as his foreskin was too tight. He was precognosed by a trainee solicitor on 25 April 2024, during which he explained that he was "not into fucking", that his foreskin was too tight and that he had had an unsuccessful operation to make it looser. He said he brought his medical condition to the attention of his junior counsel, Paul Keenan, prior to trial. He signed a mandate for the release of his medical records to his solicitors and provided details of his GP. He was subsequently advised that there was no record of any operation or condition in the medical records. He did not challenge this. He said that he was willing to undergo a medical examination to support his account, but no examination was arranged. His agents and counsel told him that he would be questioned about his condition in evidence. That did not happen. He tried

to mention his condition in cross-examination by the Advocate Depute but was not able to give the full story.

[38] The appellant disagreed with much of the material provided by his previous solicitors and counsel. He denied telling them that he rarely has anal sex. He denied telling his solicitors that the operation was “off the record” since it was arranged through an ex-partner, although he accepted telling them that he was romantically involved with the referring GP and that he might have been “bumped up the queue”. He denied saying that he had performed anal sex with about five partners in the past, by penetrating their anus with his penis. He denied telling his counsel that he had engaged in penile/anal penetration with multiple partners as the penetrating partner.

#### *Medical records and letters*

[39] Parties appear to agree that there is reference within the appellant’s medical records to a failed (frenuloplasty) operation but there is no contemporary record of a frenuloplasty procedure occurring. What excerpts from medical records, lodged in support of the appeal, disclose is that the appellant had been to his GP complaining that he had had that procedure but that it was not successful. The records do disclose a diagnosis of phimosis in 1993. The appellant was referred to the general surgery unit at Basingstoke District Hospital on 10 March 1993, although in a letter dated 16 May 1994, Dr A B Richards confirmed that the appellant had twice failed to attend an outpatient clinic. As we detail below, a contemporary medical examination supports the appellant having undergone a frenuloplasty procedure.

*Precognition of the appellant*

[40] In an undated precognition, the appellant is recorded as saying:

“I have never penetrated [AA’s] anus with my penis. My foreskin is too tight. I had a failed operation. If I do have anal sex, it is rare. I have never had anal sex with [AA]. This has not happened. I would try this with long-term partners. In my whole life I could count on one hand the amount of times I have had anal sex.”

*Notes from Counsel and Agents*

[41] In an email dated 13 July 2025 and appended to the appellant’s affidavit, Paul Keenan, Advocate explained that the appellant’s position was that he did not have intercourse with the complainers and he had only engaged in anal intercourse with specific partners. Mr Keenan noted that the appellant’s position was not that he could not have anal intercourse, but that he did not like it and that it caused him discomfort because his foreskin was too tight. The appellant was clear that it was rare for him to have anal sex. He said he had performed anal sex with certain partners. Mr Keenan explained that the appellant had told his legal team that there was no operation. In such circumstances, it was lead counsel’s view that it was not exculpatory to tell a jury that anal sex was painful and uncomfortable but not impossible. The appellant confirmed he understood this in advance of trial.

[42] The following passage was recorded in a consultation note taken by Paul Keenan dated 20 December 2024:

“The first thing we do today is tell Mr Neller that we have indeed received his medical records and there is no record whatsoever of an operation to cure a tight foreskin. He comes clean and says that he actually knew there would be no record of it because (i) it never happened and (ii) it wasn’t organised via NHS. He apologises and says it was actually through an ex partner (whose name he does not have and whose details he does not have) who was “pulling the strings”. He has no idea which hospital it was supposed to be completed in or who was dealing with it. This was off the record apparently. He says it didn’t happen in any event. He further apologises for the confusion and says, despite what he had previously told us, he can indeed have anal sex. He is not precluded from having anal sex because of his tight foreskin. He has had anal sex with at least five partners over the years but it is just a

bit uncomfortable ... Mr Gilbride asks him to confirm categorically that he can have anal sex and he apologises and says that he can so he does not want to pursue that inquiry any further. Indeed it is accepted that it could not be progressed any further given that he tells us that he can have anal sex, but he chooses not to."

*"Anderson" responses*

[43] The appellant's former agents' response to the Note of Appeal was that the appellant's instructions had been that he suffered from a condition that either precluded penile/anal penetration or rendered it difficult. The appellant's medical records were obtained and delivered to counsel. In a letter dated 13 November 2024, agents indicated to counsel that there was reference to the appellant's condition in the medical records. There was no evidence of any surgical procedure. Instruction of a medical expert was recommended, although on the advice of counsel this was deemed unnecessary given the appellant's position that he had, in fact, engaged in penile/anal penetrative sex and his condition did not preclude this. No further enquiries were undertaken.

[44] Simon Gilbride responded that the appellant denied engaging in anal sex with the complainers. He did not engage in anal sex generally since it was uncomfortable, but not impossible, and he had done so only with a handful of long-term partners. On those instructions, Mr Gilbride took a tactical decision not to pursue this line of defence. This decision was discussed with the appellant and intimated to agents.

*Medical Report*

[45] In support of the appeal, the appellant lodged a report prepared by Mr Ian Dunn, consultant urological surgeon at Monklands Hospital, dated 22 August 2025. On examination, the appellant was confirmed to suffer a moderately severe phimosis and a short and scarred frenulum. The condition prevented the appellant from fully retracting his

foreskin. Phimosis could lead to discomfort, difficulty and pain during sexual activity, often caused by cutting or splitting of the foreskin.

[46] Phimosis could make penile/anal intercourse so uncomfortable as to make it effectively impossible. The condition could make such intercourse so uncomfortable as to make it improbable that the sufferer would engage in such activity.

[47] The appellant's physical presentation was consistent with him having undergone a failed frenuloplasty, with scarring seen on the frenulum.

[48] It was not possible to be certain of whether or not the appellant could engage in penile/anal intercourse. If such intercourse was feasible, it would be likely to cause pain and possible injury to his foreskin due to splitting. It was not possible to say how likely it was for his foreskin to split during penile/anal penetration. Other factors could influence such likelihood, such as the use of lubricants and the tightness of the orifice he was attempting to penetrate.

### ***Parole evidence on appeal***

#### *Appellant*

[49] The appellant adopted the terms of his affidavit. He confirmed that he first informed Gerard Keenan of his medical condition following his arrest. He has always suffered from phimosis. He did not engage in anal sex as the penetrating partner. Attempting to do so would be very painful. He had undergone a frenuloplasty operation in 1992, although it was unsuccessful. When he was precognosed by a trainee solicitor, he told him that he probably had had anal sex on around five occasions, although he had only been the penetrating party on one occasion. Where he had told his lawyers that "I can count on one hand the number of times I have had anal sex", he was not talking about being the

penetrating party. His lawyers appeared to have assumed he was talking about both active and passive anal sex. He denied ever having said that he had had anal sex as the penetrating party on about five occasions.

[50] The appellant denied ever “coming clean” to his lawyers about not undergoing an operation, as suggested by Paul Keenan in his attendance note. He maintained that he suffered from phimosis and that he had undergone a frenuloplasty in Ealing in 1992. He had provided a speculative explanation to his lawyers for why they could find no record of the operation, but he had not “come clean” about anything. He denied ever apologising for misleading his lawyers. He denied ever telling his lawyers that to have anal sex as the penetrating party would be “a bit uncomfortable.”

[51] Simon Gilbride had assured the appellant that he would have an opportunity to tell the jury about his medical condition. He did not recall being advised against instructing a medical expert to carry out an examination. He understood that he would be asked about his condition when giving evidence at trial. In the event, he raised it himself during cross-examination by the Advocate Depute although he was unable to articulate his position fully.

[52] In cross-examination, the appellant confirmed that he had been taking notes during his trial. He raised with his lawyers, during the trial, the absence of any reference to his medical condition. He could not recall whether he raised the issue with the author of the justice social work report.

*Gerard Keenan*

[53] Mr Keenan confirmed that his firm was instructed by the appellant as defence agents. He became aware of the appellant’s medical condition from a precognition taken by a trainee at the firm. The appellant’s condition was identified as a positive line of inquiry

and he considered that the appellant's medical records ought to be obtained. The medical records, when received, provided support for the appellant's position although a further medical examination was necessary. Correspondence was issued to counsel querying whether this approach should be taken.

[54] Mr Keenan recalled that following a consultation with counsel in December 2024, the defence position changed. Where the appellant had previously said that he could not participate in anal sex as the penetrating partner due to his medical condition, he had since explained that he could engage in such activity. It followed that the line of defence was less acute. Counsel's view was that in such circumstances, there was no need for a medical examination.

*Paul Keenan*

[55] Paul Keenan confirmed that he was Gerard Keenan's son and had formerly been a practising solicitor at his father's firm when the appellant's instructions were first received. He commenced devilling (the process of training as an Advocate) in October 2023 and undertook training with Simon Gilbride during the time Mr Gilbride was engaged as the appellant's trial counsel.

[56] Mr Gilbride asked Mr Keenan to obtain a precognition from the appellant additional to that prepared by the trainee solicitor. Mr Keenan did so and confirmed that the appellant denied penetrating BB's anus since his "foreskin was too tight", for which he had a failed operation. Mr Keenan considered this to be compelling and a positive line of defence. At a subsequent consultation, Mr Gilbride asked the appellant whether it was possible for him to have anal sex as the penetrating partner. When the appellant explained that it was not impossible, but it was difficult and caused pain, Mr Gilbride determined not to pursue that

line of defence further and that an expert medical report would not be sought. There was consensus on this between the appellant and the legal team. Mr Keenan thought this approach to be unfair and spoke to Mr Gilbride about instructing an expert through the Faculty of Advocates Criminal Bar Association, but Mr Gilbride told him it would be futile. Mr Keenan said that if he alone had been conducting the case, he would have instructed an expert.

[57] The appellant was consistent in his position throughout his instructions. He had maintained throughout that he had a tight foreskin and that he did not engage in anal sex as the penetrating party. In relation to his email of July 2025, where he had noted that the appellant confirmed that he did not have an operation, this was a misunderstanding. In retrospect, he now understood the appellant to have been saying that he did not undergo a circumcision, while he did undergo an unsuccessful frenuloplasty. He further confirmed that his attendance note of the consultation on 20 December 2024 was incorrect. The appellant had not “come clean” about anything. The appellant had been explaining that he did not undergo a circumcision operation. Mr Keenan apologised for his error.

[58] At the consultation on 20 December 2024, the appellant confirmed that he had had anal sex with around five partners in his life. There was no inquiry into whether this statement referred to the appellant being the penetrating partner, although the context of the discussion indicated that it did. At no point did the appellant instruct his legal team that he found penetrative anal sex to be intolerably painful. He said that he would not engage in such activity and that he was “not into fucking” because his foreskin was too tight.

[59] The appellant’s recollection that he was told by Mr Gilbride that he would have the opportunity to raise his medical condition at trial had a “ring of truth”.

[60] Had he been presenting the case, Mr Keenan would have raised the appellant's medical condition with the jury. In his view, evidence of phimosis was exculpatory. In the event, it was not presented to the jury because Mr Gilbride made the decision not to instruct an expert.

*Simon Gilbride*

[61] Mr Gilbride was instructed as the appellant's trial counsel shortly after the appellant appeared on petition. He received correspondence from his instructing agents containing the appellant's medical records together with a query of whether a medical examination should be instructed. At that time, he understood the appellant's position to be that he had undergone a circumcision operation. When he reviewed the medical records, there was no reference to a circumcision. This led to his conclusion that the medical records were of limited assistance. Looking back, there was reference to a failed frenuloplasty operation in the medical records. This was omitted from his considerations, which he accepted was an error on his part.

[62] During the consultation on 20 December 2024, there was a discussion about whether the appellant had undergone a circumcision. There was some dubiety about this, although there was no suggestion that the appellant was being evasive. Paul Keenan's comment in his attendance note that the appellant had "come clean" did not reflect his memory of the discussion.

[63] Mr Gilbride confirmed that even had he understood the medical records properly as relating to a failed frenuloplasty operation, he would not have altered his approach. He had been unclear on whether the appellant could or could not engage in anal sex as the penetrating party. When he asked the appellant about this, the appellant confirmed that it

was possible for him to engage in such activity, and that he had so engaged in the past.

While it was not expressly articulated whether his questioning related to the appellant being the penetrating party, the context made that clear. The appellant said that he could “count on one hand” the number of times he had had anal sex. Mr Gilbride took that to mean the appellant being the penetrating party.

[64] Mr Gilbride accepted that the appellant’s medical condition was an arguable position to take before a jury, although he disagreed with Mr Keenan that it was “compelling”. He exercised his professional judgement in deciding against advancing the line at trial. The appellant had indicated that penetrative anal sex was something he was capable of and to raise it with the jury would have alerted them of that capability. He did not recall telling the appellant that he would be asked about his medical condition during the trial. It was unlikely that he would have made such a suggestion.

### *Submissions*

#### *Appellant*

[65] The appellant instructed his lawyers to advance a line of defence, to the conduct in charges 1 and 4, that he suffered from phimosis, that he had undergone unsuccessful surgery, that he found penetrative intercourse with his penis intolerably painful and that, accordingly, he would not engage in such intercourse. While there were differences between the accounts of the appellant and his former lawyers as to what his instructions were, all the evidence in the appeal was consistent with the appellant’s basic position that he had a condition affecting his penis which rendered penetrative intercourse painful.

[66] Taken as a whole, the parole evidence and documentary evidence supported the ground of appeal. The lawyers had accepted that the medical records had been incorrectly

deciphered and that there was no basis for Paul Keenan's comment that the appellant had "come clean" about not undergoing an operation. Where there was inconsistency between the accounts of counsel, Paul Keenan's should be preferred. Mr Keenan had confirmed that the appellant's instructions had been consistent throughout and any suggestion to the contrary had been the fault of counsel.

[67] The court had to be satisfied that the appellant's defence was not put to the jury: *Guthrie v HM Advocate* [2022] HCJAC 21, 2022 SLT 938 per Lord Justice General (Carloway) at [39], [45] and [46]. The appellant's case aligns with the circumstances in *K(B) v HM Advocate* [2017] HCJAC 68, 2017 SCL 990. In *K(B)*, the appellant's basic position was denial of the sexual charges against him and that defence was put before the jury. However, the court accepted that a miscarriage of justice had arisen since a more nuanced position, the factual matrix which made the allegations highly improbable, was not adequately advanced. In the present case, the appellant's wider defence of denial was placed before the jury. What was omitted was his explanation for his position, that he suffered from a medical condition which meant the conduct complained of was impossible or highly improbable. *K(B)* could be reconciled with *Guthrie*, albeit there was no reference to *Woodside v HM Advocate* [2009] HCJAC 19, 2009 SLT 371 in *K(B)*, that being an authority relied upon by the court in *Guthrie*. Under reference to *Anderson v HM Advocate* 1996 JC 29, there was a distinction to be drawn between the manner in which a particular aspect of a defence is conducted and a failure to present an active line of defence.

[68] The evidence of Mr Dunn confirmed that the appellant suffered from a moderately severe phimosis which could render penetrative anal intercourse almost impossible. Mr Dunn's evidence corroborated the account of the appellant since it provided support for his position.

[69] That the appellant referred to his condition in cross-examination with little exploration of the underlying circumstances could not be equated with his defence being put before the jury.

***Crown***

[70] The appellant required to demonstrate that there was a complete failure to present his defence: *Woodside; Guthrie*. That could arise either because his counsel disregarded his instruction on what his defence was or because he conducted his defence as no competent practitioner could reasonably have conducted it: *Grant v HM Advocate* [2026] HCJAC 42, 2006 JC 205. The appellant's counsel required to act in accordance with the appellant's instruction on what the defence was, but he was not subject to direction as to how it ought to have been presented, since that was a matter of professional judgement: *Dada v HM Advocate* [2025] HCJAC 21, 2025 JC 329. An appeal could not succeed where the argument advanced was that the prospect of success would have been greater had counsel pursued a certain line of evidence or a different strategy: *Ditta v HM Advocate* 2002 SCCR 891.

[71] The appellant's defence in respect of all allegations of anal penetration was denial. The defence was presented according to Mr Gilbride's's professional judgement which was explained to, and accepted by, the appellant in advance of the trial. It could not be said that counsel's decision not to investigate or present the appellant's medical condition as a line of defence was one which no competent counsel would have taken. In any event, the medical evidence obtained during the appeal process would have been of limited value at trial since Mr Dunn confirmed that it was not possible to say whether or not the appellant could engage in penetrative anal sex.

[72] The account of Paul Keenan in his email of 13 July 2025 was an accurate description of what occurred during the consultation on 20 December 2024. The appellant's account that his reference to having engaged in penile/anal intercourse on a multiplicity of occasions was in relation to both passive and active anal intercourse was incredible. All the witnesses, except the appellant, were clear that the context in which counsel asked the appellant about his ability to engage in anal sex related to him being the penetrating party. Equally, the appellant's account that he was told he would have an opportunity to address the jury on his condition should be rejected. Not only was that inherently unlikely given Mr Gilbride's position, but the appellant did not raise the omission as an issue with his lawyers during the trial.

### **Analysis & decision on ground of appeal 1**

[73] This court had cause to review the leading cases on defective representation appeals in *Dada* and explained:

“[41] In *Anderson*, the court determined that an accused's fair trial right is to have his defence presented to the court. Counsel must act according to a client's instructions on what the defence is but is not subject to direction as to how it should be presented. That is a matter for counsel's judgement. Generally, an accused is bound by the way the defence is conducted on his behalf (Lord Justice General (Hope), pp 43I–44B). He further explained (p 44E–F) that the circumstances in which there can be a ground of appeal arise only in narrowly defined circumstances, adding:

‘The conduct must be such as to have resulted in a miscarriage of justice ... It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him.’

[42] In *Guthrie v HM Advocate*, all of the decisions founded on by the appellant were before the court. In delivering the opinion of the court, the Lord Justice General (Carloway) (paras 39–46) examined developments in case law following *Anderson* and noted that the test in *Anderson* was distorted by the introduction of the qualification of a properly presented defence. This did not accord with what was determined in *Anderson*, that an accused is generally bound by the way his defence is conducted. The Lord Justice General also noted that in *Grant v HM Advocate* the Lord Justice Clerk (Gill) returned to *Anderson* and determined that a miscarriage of justice could only occur if an accused's defence was not presented to the court and he was deprived of his right to a fair trial. This could occur if counsel either disregarded his instructions or conducted the defence in a way in which no competent counsel could reasonably have conducted it. The Lord Justice Clerk distinguished this from 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. Leave to appeal should not be granted for such a ground of appeal. In *Guthrie*, the Lord Justice General referred to *Woodside v HM Advocate*, another opinion delivered by Lord Justice Clerk Gill who defined the scope of a defective representation appeal in this way:

'[It] is not a performance appraisal in which the court decides whether this question or that should or should not have been put; or whether this line of evidence or that should or should not have been pursued. The appellant must demonstrate that there was a complete failure to present his defence either because his counsel or solicitor-advocate disregarded his instruction or because he conducted the defence as no competent practitioner could reasonably have conducted it ... That is a narrow question of precise and limited scope.'

[43] References to disregarding an instruction must be read along with the first sentence quoted immediately above, and also Lord Justice Clerk Gill's determination in *Grant*, that leave to appeal would not be granted on an allegation that an appellant might have had better prospects of success if counsel had pursued a certain line of evidence or argument. That was also made clear by Lord Justice General Carloway in *Guthrie* (para 39) when he summarised the effect of *Anderson* as being that an accused being deprived of a fair trial can only said to have occurred when a representative's conduct was such that the accused's defence was not presented, continuing:

'That can happen when the accused's counsel acts contrary to the accused's instruction *on what his defence is* (which is not the case here) or because (at the risk of repetition) he was deprived of a fair trial "because his defence was not presented to the court".' (Emphasis added.)

[74] We found Mr Gilbride's evidence to be candid, fair, truthful and reliable when he explained his reasoning, the steps he took to clarify the appellant's position and what the

appellant told him about his condition and its impact on the appellant's ability to penetrate the anus of another person. It is supported by the note taken of the consultation on 20 December 2024 and, on this point, by the evidence of Mr Keenan. We prefer their evidence on this point to that of the appellant, whose insistence that he was really talking about being the recipient of anal penetration makes no sense in the context of the issue he was being asked about and was neither tenable nor true. Accordingly, if it was ever the appellant's position that he was unable to penetrate another person's anus with his penis, that was no longer his position in the consultation of 20 December 2024. From that point onwards, it cannot be maintained that it was the appellant's defence, or a line of defence, that a physical condition rendered it impossible for him to do so. On that basis alone, the first ground of appeal must be refused.

[75] The appellant's defence to the charges involved elements of denial and elements of consent. He gave evidence and stated his position to the jury in each respect. Accordingly, his defence was presented to the jury, and it cannot be maintained otherwise. On that basis also, the first ground of appeal must be refused.

[76] Had we required to determine whether to apply the approach in *K(B)*, we would not have done so. The court of three judges was not a permanent bench, did not notice *Woodside* and did not have the benefit of the opinion of the court in *Guthrie*. In any event, if there is any apparent difference amongst three-judge decisions, they are resolved by considering the Full Bench opinion in *Anderson*. The test in *Anderson* is not met by not "properly" advancing the defence, nor is it met merely by failing to advance, "a line of defence."

[77] So far as the averments of perpetrating penile anal penetration are concerned, the appellant's defence was denial. He gave evidence to that effect, and that aspect of his defence was before the jury. Given what the appellant told his counsel on 20 December

2024, it was a perfectly reasonable exercise of professional judgement that it would not assist the appellant to adduce opinion evidence that he had a medical condition that may have made it difficult or painful to anally penetrate another person with his penis but did not make it impossible. It does not constitute the situation, envisaged in *Burzala v HM Advocate* [2007] HCJAC 67, 2008 SLT 61 and *Grant*, of counsel conducting the defence in a way in which no competent counsel could reasonably have conducted it.

[78] Given what the appellant told Mr Gilbride, he could not ethically have invited or facilitated the appellant testifying that it was impossible for him to penetrate another person's anus with his penis. Despite this, as we have narrated above, the appellant did tell the jury, in cross-examination, that he had had an operation on his penis such that he could not have anal sex. Accordingly, this aspect of what he now maintains was his defence, or a line of defence, was before the jury and was not qualified by the lack of certainty inherent in Mr Dunn's report.

## **Ground of appeal 2: section 275 application**

### ***Defence production 1***

[79] This comprises 13 pages of photographs bearing to be of text messages passing between the appellant, designed as "Jamie", and two mobile numbers said to be attributable to the complainer BB. There are 442 individual text messages. Most of the exchanges occurred between February and May 2021, with a few messages exchanged across a 6-day period in August 2020. The PH judge's allowance of the part of the section 275 application relating to charge 4 included part 2(d), set out in para [7] above. The general tenor of most of the exchanges appears to be discussions about the exchange of money for goods and services. While it is not made explicitly clear from the messages what those goods and

services are, it is reasonably clear that they relate to sexual activity generally, including instances of BB apparently offering sexual services in return for money, and sometimes to drugs.

[80] The trial judge prohibited reference to DP 1 by exercising his power of limitation under section 275(9). He reports that no editing had been carried out to exclude any parts of the exchanges between the appellant and BB which were not relevant. The defence application under section 275 had been to elicit evidence from the production in its entirety. It was unclear what purpose the production as a whole would serve. The written application was of limited assistance. To lead all of the messages before the jury would represent an intrusion upon the privacy and dignity of BB. It would have been to countenance a thorough rake over the detail of their prior relationship. He was not addressed on how the evidence could be introduced in a more proportionate manner. In any event, it was not disputed by BB that there had been communications with the appellant about money for sex. That was allowed to be put to him under paragraph 2(b) of the section 275 application. Had BB denied such communications, it would have been open to the defence to renew their application. In any event, prior consent was not an issue at trial. BB's position was that he had agreed to meeting up and to payment for sex but that he later withdrew his consent. The messages had no bearing on whether this was the case and so they were irrelevant.

## **Submissions**

### ***Appellant***

[81] BB's position at trial was that the appellant coerced him into meeting up, under threat that photographs would be shared if he did not. This conflicted with the appellant's

account, where he said that there was a freely entered into agreement, of sex for money. The messages served to cast doubt on BB's credibility since it placed his account in a materially different light. The statutory scheme in section 274/275 of the 1995 Act permitted relevant evidence to be adduced where it had a bearing on the credibility of the complainer: *Daly & Keir v HM Advocate* [2025] UKSC 38, 2025 SLT 1253.

[82] The evidence contained in DP 1 was relevant to the appellant's defence of consent to charge 4. It supported his account that he and BB had consensual sex for money. The tripartite test in section 275 of the 1995 Act had been met since the messages were relevant and had significant probative value. In light of the evidence already given by BB, it was difficult to see why the leading of the messages would infringe on his privacy any further.

[83] In his oral submissions, the appellant's solicitor advocate sought to illustrate the import of some of the messages, identifying the following:

| Date       | Sender    | Recipient | Message                              |
|------------|-----------|-----------|--------------------------------------|
| 14/08/2020 | BB        | Appellant | You want to spend some cash tonite x |
| 22/05/2021 | BB        | Appellant | You free to nite or latter           |
| 22/05/2021 | Appellant | BB        | Monday is earliest I can meet        |
| 22/05/2021 | Appellant | BB        | sorry                                |
| 22/05/2021 | BB        | Appellant | OK OK em much looken for a good wage |
| ...        | ...       | ...       | ...                                  |
| 22/05/2021 | Appellant | BB        | So up for meeting on Monday          |
| 22/05/21   | BB        | Appellant | Fuck yeah                            |
| 28/05/2021 | Appellant | BB        | Wanna come over?                     |
| 28/05/2021 | BB        | Appellant | Yeah much how long                   |
| 28/05/2021 | Appellant | BB        | 100                                  |
| 28/05/2021 | BB        | Appellant | how long                             |

|            |           |           |                                                                                      |
|------------|-----------|-----------|--------------------------------------------------------------------------------------|
|            |           |           |                                                                                      |
| 28/05/2021 | Appellant | BB        | Couple of hours                                                                      |
| 28/05/2021 | Appellant | BB        | No?                                                                                  |
| 28/05/2021 | Appellant | BB        | I can make other plans, but would rather u just said so I have time to do other shit |
| 28/05/2021 | BB        | Appellant | No, its kool I'll give it a miss                                                     |

He accepted that the application did not have the level of specification or detail required by section 275(1)(a) of the 1995 Act, although it remained open to the court to take a selective approach to the messages within DP 1. He acknowledged that section 275(1)(a) requires specificity. Nevertheless, he maintained, somewhat faintly, that exclusion of DP 1 as a whole was significant and led to BB's account on a central issue going unchallenged. This resulted in material unfairness, where the jury were left with only one side of the story. There had been a miscarriage of justice.

### *Crown*

[84] Evidence was relevant if it had a reasonably direct bearing on the matter under investigation: *W Alexander & Sons Ltd v Dundee Corporation* 1950 SC 123. Relevant evidence could be regarded as being either direct evidence of a fact in issue, or evidence of a fact bearing on the probability or improbability of a fact in issue, or evidence of a fact which had a bearing on the admissibility of other evidence, or on the credibility of a witness: *Daly & Keir* per Lord Reed of Allermuir PSC at [38] citing *Walker and Walker, The Law of Evidence in Scotland* (Ross *et al*, 5<sup>th</sup> Edition) at 1.3.1. Relevant evidence could be excluded where it was

collateral, i.e. evidence which concerned a fact which had only an indirect bearing on the subject matter of the case, and would open up a disproportionate inquiry into a matter with which the proceedings were not concerned, with the risk that the jury would be distracted from the proper focus of their attention: *Daly & Keir* at [39]. An accused's right to defend himself did not provide for an unlimited right to use any defence argument: *Y v Slovenia* (2016) 62 EHRR 3. Consent to sexual activity could not be given in advance: *Kirkup v HM Advocate* [2026] HCJAC 11, 2026 SCCR 240; *HM Advocate v MacGregor* [2025] HCJAC 28, 2025 JC 358; *Daly & Keir* at [134].

[85] While it was correct that evidence of prior expressions of a desire to engage in sexual activity could be relevant to a defence of consent, it was important that the evidence should not be admitted where it was unnecessary to enable the accused to present his defence and might merely prejudice the jury against the complainer: *Daly & Keir* at [172]. It was unnecessary for DP 1 to be admitted and placed before the jury. Part 2(b) of the section 275 application permitted the appellant to elicit evidence that there was an agreement between BB and the appellant whereby money would be provided to BB in exchange for sexual acts. That evidence was given by BB during the trial. He accepted that he had texted the appellant asking for money and was thereafter paid £300 for performing oral sex on the appellant. BB also accepted that there was a great deal of communication back and forth between the parties. The appellant was permitted to present his defence of consent in the context of the financial arrangement which was in place. The messages in DP 1 would not have strengthened his position.

[86] DP 1 did not have sufficient probative value to be admitted under section 275(1)(c). The messages only related to a very narrow portion of the libel period. It was not clear

whether the messages related to any of the incidents actually spoken to by BB in his evidence.

[87] There had been no miscarriage of justice. In determining whether there had been a miscarriage, 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 appellant was able to present his defence. He was able to challenge BB's credibility in cross-examination and by giving evidence himself.

## **Decision on ground 2**

[88] It was accepted on both sides, that if evidence was to be led of the content of the messages an application under section 275 was required. Whilst we were referred to *Daly & Keir*, it is not necessary to consider it in detail because the appellant invited us to evaluate his second ground of appeal under the statutory scheme in sections 274 and 275 of the 1995 Act. The Crown did not demur. We also take account of what was permitted under part 2(b) of the section 275 application in relation to charge 4.

[89] Section 275 provides:

“275 Exception to restrictions under section 274

- (1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—
  - (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—
    - (i) the complainer's character; or
    - (ii) any condition or predisposition to which the complainer is or has been subject;
  - (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

- (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.
- (2) In subsection (1) above—
  - (a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature;
  - (b) ‘the proper administration of justice’ includes—
    - (i) appropriate protection of a complainer's dignity and privacy; and
    - (ii) ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies, relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict,
 and, in that subsection and in sub-paragraph (i) of paragraph (b) above, ‘complainer’ has the same meaning as in section 274 of this Act.
- (3) An application for the purposes of subsection (1) above shall be in writing and shall set out—
  - (a) the evidence sought to be admitted or elicited;
  - (b) the nature of any questioning proposed;
  - (c) the issues at the trial to which that evidence is considered to be relevant;
  - (d) the reasons why that evidence is considered relevant to those issues;
  - (e) the inferences which the applicant proposes to submit to the court that it should draw from that evidence; and
  - (f) such other information as is of a kind specified for the purposes of this paragraph in Act of Adjournal.
 ....”

[90] The Act plainly envisages that applications are prepared carefully. Section 275(1)(a) requires specificity. Subsection (3) requires an applicant to set out the nature of any questioning proposed, the issues to which the evidence is considered relevant and the reasons why it is considered relevant.

[91] The application was as follows:

**1. The following evidence is sought to be admitted or elicited:**

- (a) Charge (004) on the Indictment alleges... [the charge is summarised];

**2. The following evidence is sought to be admitted or elicited:**

- (a) That between September 2015 and August 2021, the complainer referred to within Charge 4 was receiving money from the applicant in exchange for

consensual sexual favours. That between the same dates, the applicant would pay funds between £50 to £200 to the complainer referred to within the body of Charge (004) in exchange for consensual sexual relations.

- (b) That on every occasion the applicant and the complainer referred to in charge 4 engaged in sexual activity this was in the context of a financial agreement between the parties whereby the applicant would transfer monetary sums to the bank account of the complainer in exchange for consensual sexual favours.
- (c) That between the same dates referred to at paragraph 2(a), the complainer referred to in Charge 4 would frequently contact the applicant to offer to perform sexual favours consensually for the applicant in exchange for money and that these offers led to consensual sexual activity.
- (d) That Defence Production 1 is a book of photographs which contains 13 screenshots of text message conversations between the applicant and the complainer referred to within the libel of Charge 4. The messages are dated between 9 August 2020 and 31 May 2021. The messages refer inter alia to the complainer asking if he can visit the applicant for sexual favours in exchange for money.
- (e) That between the same dates referred to at paragraph 2(a) above, on one single occasion, the complainer contacted the applicant to ask if he would pay the complainer £2000 for anal intercourse which would enable the complainer to take his girlfriend on a trip to Amsterdam. The applicant did not take the complainer up on the offer.
- (f) That between the same dates referred to at paragraph 2(a) above, the complainer on various occasions was paid money by the applicant to digitally penetrate the anus of the applicant. As part of the same financial agreement, the applicant would masturbate the complainer to ejaculation.

**3. The nature of the proposed questioning is as follows:**

- (a) To put the foregoing evidence referred to in paragraph 2(a)- (f) inclusive from (*sic*) the Complainer in cross-examination.

**4. The issues at the trial to which the evidence is considered to be relevant are as follows:**

- (a) The evidence is relevant to the credibility and reliability of the evidence provided by the Complainer.

**5. The reasons why the evidence is considered to be relevant are as follows:**

- (a) In this case the subject matter of Charge (004) on the indictment referred to at paragraph 1) above is one of rape, penetrative sexual assault and non-penetrative

sexual assault, which are sexual offences for the purposes of Section 288C(2)(a), Section 288C(j)(i) and Section 288C(j)(ii) of the Criminal Procedure (Scotland) Act 1995.

- (b) The evidence which the applicant therefore seeks to lead in paragraph 2(a) and 2(f) above is prohibited by the terms of Section 274(1)(b) of the 1995 Act. That is because it is evidence which shows or tends to show that the Complainer engaged in sexual behaviour not forming part of the subject matter of the Charge.
  - (c) That the evidence which the applicant therefore seeks to lead in paragraph 2(b)-2(e) above is prohibited by the terms of Section 274(c)(i) of the 1995 Act. This is because it is evidence which shows or tends to show that the complainer has, at any time, engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer is likely to have consented to those acts.
  - (d) The leading of the evidence sought to be elicited in paragraph 2(a)-(f) is relevant as it relates directly to facts in issue and is conduct occurring during the alleged rape, penetrative sexual assault and non-penetrative sexual assault libelled within Charge 4 on the indictment.
  - (e) The applicant avers that during the libel period of Charge 4, the applicant did engage in consensual sexual activity with the complainer. The nature and extent of the sexual activity was predicated upon the applicant transferring funds to the complainer. The applicant routinely received messages from the complainer in which sexual favours were offered in exchange for money.
  - (f) The eliciting of evidence referred to within paragraphs 2(a)-(f) and detailed further within paragraph 5(e) above is relevant in respect that it allows the applicant's position to be put to the complainer for his comment and allows the complainer to describe the nature and extent of the interaction between himself and the applicant on the occasions libelled within Charge 4 on the indictment.
6. The probative value of the evidence sought to be admitted at paragraph 2(a)-(f) and further detailed at paragraph 5(e) is significant and likely to outweigh any risk of prejudice to the proper administration of justice from their being admitted, including any inappropriate intrusion on the complainer's dignity and privacy. The leading of the said evidence will enable a fully informed assessment of the credibility of his account to be made by the jury.
- 7. The inferences which the applicant proposes to submit to the court that it should draw from the evidence are as follows:**
- (a) That the sexual activity referred to within the libel of Charge (004) (but for the allegation of anal rape and the allegation that the applicant forced the complainer to swallow semen) took place consensually and that the parties were engaged in an ongoing financial agreement which involved moneys in exchange for consensual sexual favours.

[92] It can be seen that the application did not relate to charge 3 where the appellant's account seemed to be a straightforward denial.

[93] The appellant's solicitor-advocate acknowledged that his showing us particular exchanges of messages was the first attempt at specification of messages in the proceedings. In failing to identify specific entries (or groups) amongst 442 messages, some of which could be of no relevance, the section 275 application did not comply with section 275(1)(a) and (3) and ought to have been refused for lack of specificity in the first place.

[94] The trial judge reported, and it was not disputed in the appeal, that BB accepted in his evidence that he was engaging in sexual conduct with the appellant in exchange for money and that arrangements were made by text communication in advance. Criminal conduct arose when BB withdrew consent or declined to consent to particular activities in the circumstances. If something emerged in the complainer's evidence that defence counsel wished to challenge with reference to a message or messages, the trial judge's ruling *in hoc statu* left it open to counsel for the appellant to revisit the application, and its limitation. It may have been possible, in light of BB's evidence, to identify particular messages to put to him in cross-examination to contradict aspects of his account in a manner capable of passing the tests in section 275. This was not done. We infer that it was not done because trial counsel judged that the broad picture of BB providing the appellant with sexual services for money, and communicating about it in advance, was before the jury and sufficient for counsel's purposes. That was a judgement for trial counsel to make.

[95] Accordingly, it was counsel's judgement that meant that no use was made of the messages in cross-examination of the complainer. The trial judge's decision to limit the allowance of part 2(d) of the section 275 application concerning BB on charge 4, *in hoc statu*, did not inevitably prevent the appellant from adducing such evidence.

[96] Had the application contained an appropriate level of specification, it is possible that reference to specific messages (or groups) could have passed the cumulative tests in section 275 (1)(a)–(c) and become admissible. Nevertheless, we note that the appellant was able to and did present his defence to the jury. The purpose of adducing evidence of messages was to demonstrate the complainer instigating sexual encounters in exchange for money. The complainer candidly accepted this in his evidence. It would be difficult to show that the messages related to the occasions spoken to by the complainer. Accordingly, they seem unlikely to have assisted the appellant much further. The messages can have no direct impact on charge 3, concerning events in September 2015, which the appellant maintained did not occur. They could have only limited impact on charge 4 where the libel extended from 1 September 2015 to 31 August 2021 and the messages span a short time towards the end of this period.

[97] For the reasons we have given, the second ground of appeal is not made out, there has not been a miscarriage of justice on either ground and the appeal is refused.