APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 19
HCA/2025/000138/XC

Lord Justice General
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

RS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Lenehan KC, Shand; Paterson Bell (for McQuillan, Glasser and Waughman Solicitors, Hamilton)
Respondent: Dickson KC (Sol Adv), AD; the Crown Agent

5 June 2026

[1] The appellant was convicted after trial of the following charges, involving two complainers, A and B:

Complainer A

(004) a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 on various occasions between 6 October 2010 and

30 September 2016 (at addresses in the Inner Hebrides and Ross-shire), including repeatedly contacting the complainer by telephone and text message;

(005) assault to injury on various occasions between 1 August 2007 and 31 December 2015 (at addresses in the Inner Hebrides and Ross-shire);

(007) anal and vaginal rape contrary to section 1 of the Sexual Offences (Scotland) Act 2009 on various occasions between 1 December 2010 and 31 December 2015 (at addresses in the Inner Hebrides and Ross-shire);

(008) indecent assault at common law on various occasions between 1 January 2004 and 30 November 2010 (at an address in the Inner Hebrides); and

(009) anal and vaginal rape contrary to section 1 of the 2009 Act on various occasions between 1 December 2010 and 31 December 2015 (at addresses in the Inner Hebrides and Ross-shire);

Complainer B

(011) a contravention of section 38(1) of the 2010 Act on various occasions between 1 April 2016 and 31 March 2019 (at an address in the Moray Firth area and elsewhere);

(012) a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 between 1 April 2019 and 16 November 2022 (at the same address in the Moray Firth area and elsewhere);

(013) anal rape contrary to section 1 of the 2009 Act on various occasions between 9 July 2017 and 31 July 2021 (at the same address in the Moray Firth area);

(014) anal rape contrary to section 1 of the 2009 Act on an occasion between 9 July 2017 and 31 July 2021 (at the same address in the Moray Firth area); and

(015) a contravention of section 39(1) of the 2010 Act between 17 November 2022 and 14 December 2022 (at the same address in the Moray Firth area and elsewhere).

[2] There was a docket attached to the indictment with two paragraphs, in the following terms:

"TAKE NOTICE **in terms of the common law** [emphasis added] that the Crown intends to lead evidence at your trial that:

i. on various occasions between 29 October 2015 and 2 November 2015, both dates inclusive, at [an address in Ross-shire] [the appellant] did repeatedly make unwanted contact with [complainer A]…by telephone and text message; and

ii. on 2 August 2015 at [the same address] [the appellant] did shout and swear at [complainer A]… pick up a garden bench and hold same above [his] head whilst threatening to smash a window there."

[3] It would appear that the appellant had been convicted of these matters, hence their appearance in a docket.

[4] At the close of the Crown case the advocate depute withdrew a number of charges and proposed certain amendments, which were allowed. Amongst these was the deletion of paragraph (ii) of the docket. No evidence was led about it, it does not feature in the appeal and nothing more need be said about it.

[5] The complainer spoke to receiving unwanted messages and the appellant denied sending these.

The evidence

[6] Complainer A met the appellant when she was about 14. He was 10 or 11 years older. They formed a relationship but she left the area. She returned in 2004 and rekindled the relationship. He moved into her house in the Inner Hebrides. After a time he started to ask questions about her mobile telephone, with whom she was speaking *et cetera* and told her that he could not trust her. He began accusing her of infidelity and called her vile names. He told her that nobody would want her and made a disgusting comment about her private parts. He became physically abusive especially if he had been drinking. He would seize her by the arm, slap or punch her face and push her. He would say that the

complainer had made him do it. He rebuked her for spending time with her friends. This sort of thing happened at least once every couple of months.

[7] He told her that he had put a tracker on her car so he could see where she was going and had put in a listening device to prove that she had been unfaithful.

[8] She was pressurised into doing sexual things with which she was uncomfortable. He told her that if she did not satisfy him he would find someone else. They had anal sex on some occasions when she had not wanted it to happen and she would complain that it was painful.

[9] They moved to Ross-shire in 2012. She thought of leaving the appellant on many occasions but felt trapped. He controlled all the finances and she felt worthless. He went to work offshore and would telephone her constantly. Occasionally he did so up to 30 times during the day and night. He told her that she had to make herself available to speak to him whenever he called.

[10] On one occasion he punched and kicked her in the presence of her children. He pushed her downstairs. He assaulted her about four or five times, leaving her with bruises. On another occasion she thought her jaw had been dislocated and she had an uneven bite as a result. She woke up on a couple of occasions with the appellant having sexual intercourse with her and on one occasion she awoke to find him ejaculating on her breasts.

[11] Complainer B met the appellant in January 2016. A relationship soon followed. They had a child in 2017 who had to be looked after in a special unit because of health problems. The appellant complained about how long everything was taking.

[12] They would have anal sex but she did not like it. When she flinched or said “ouch” he would tell her to “shh”. He would grab her by the throat and apply pressure. At times they would be having vaginal sex and the appellant would put his penis into her anus, just

as he had done with the first complainer. The complainer could not confront the appellant as she was afraid of him.

[13] He would complain at the lack of sexual intercourse and the complainer feared that he would hit her. He would throw whatever he had been holding, slam doors, back her into a corner and shout in her face. She stopped disagreeing with him about anything for fear he would lose his temper.

[14] When the appellant went out drinking the complainer was not allowed to contact him and he became angry if she asked him where he had been. On the other hand, he needed to know where she was all the time. He would phone constantly when he worked offshore. He would be waiting in his car outside her work saying that was because his previous partner had been unfaithful. She felt suffocated and was constantly bombarded with text messages and telephone calls. He would accuse her of infidelity if she did not answer straight away.

[15] The relationship ended in 2021. That was after the appellant refused to stay with the child when the complainer was invited to her sister's hen party.

[16] After the separation, he had contact with the child but would insist on video contact, knowing that the complainer would have to be present. He would appear wherever she was.

[17] The Crown case was largely based on *Moorov* and the jury plainly accepted the evidence of both complainers, rejecting that of the appellant.

The appeal

[18] Permission to appeal was only granted in respect of one ground. It is to the effect that the directions about the docket did not give "the appropriate guidance on what use of

the docket evidence was permissible and what use of the docket evidence would be impermissible". This left open the possibility that "the jury would utilise the evidence as a form of bad character evidence" and, without a proper direction, "the jury cannot be assumed to know what was permissible and what was not".

[19] The issue giving rise to the appeal was that in the course of her charge the trial judge directed the jury using the sample directions in the Jury Manual which were appropriate to dockets under section 288BA of the Criminal Procedure (Scotland) Act 1995. That relates to dockets which specify any act or omission that is connected with a sexual offence charged in the indictment or complaint.

[20] In this case, both parties were, correctly, at one in submitting that the docket in question did not fall within the scope of the section.

Submissions for the appellant

[21] The docket was correctly narrated in the indictment as being presented at common law. It was not specifiable by way of reference to a sexual offence. Ideally it should have been withdrawn since the events were mirrored by evidence led in support of charge (004) for complainer A. Nothing was made of the docket in speeches. The trial judge's reference to dockets for sexual offences was a misdirection. This would have confused the jury and directed them towards using the evidence as to the docket in connection with the sexual offences. It would have been better had there been no reference to the docket at all. There was a realistic possibility that a different verdict would have been arrived at on the sexual charges had either no direction been given on the docket or the correct direction given in accordance with the common law.

Submissions for the respondent

[22] The advocate depute submitted, at first, that there had been no misdirection. Somewhat belatedly, however, he conceded that the direction was erroneous. The issue therefore was whether there had been a miscarriage of justice. In directing as to *Moorov*, the trial judge had clearly directed the jury that there was a difference between sexual and non-sexual offences. There were striking similarities in the experiences of both complainers. The charge had to be considered as a whole. *Sim* v *HM Advocate* [2016] HCJAC 48, 2016 JC 174. Viewed in the context of the evidence and the trial as a whole, any misdirection was of no moment. *Doherty* v *HM Advocate* [2014] HCJAC 94, 2014 SCL 758; *MacDougall* v *HM Advocate* [2021] HCJAC 32.

Analysis

[23] Section 288BA of the 1995 Act is in the following terms:

> "**Dockets for charges of sexual offences**
>
> (1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.
>
> (2) Here, an act or omission is connected with such an offence charged if it—
> (a) is specifiable by way of reference to a sexual offence, and
> (b) relates to—
> (i) the same event as the offence charged, or
> (ii) a series of events of which that offence is also part."

[24] This is to be contrasted with common law dockets, which have become increasingly prevalent in recent years. In *Nelson* v *HM Advocate* 1994 JC 94 at page 104C-D the Lord Justice General (Hope) said the following:

> "The Crown can lead any evidence relevant to the proof of a crime charged, even although it may show or tend to show the commission of another crime not charged, unless fair notice requires that that other crime should be charged or otherwise

> referred to expressly in the complaint or indictment. This will be so if the evidence sought to be led tends to show that the accused was of bad character, and that other crime is so different in time, place or character from the crime charged that the libel does not give fair notice to the accused that evidence relating to that other crime may be led; or if it is the intention as proof of the crime charged to establish that the accused was in fact guilty of that other crime."

Thus a docket may contain evidence which suggests that an accused is of bad character in the sense that he has done something which is not the subject of a specific charge. The law allows this as long as the appropriate notice is given. This would seem to have been recognised by senior counsel who did not rely on any question of bad character in his oral submissions (although this had been referred to in the written case) but emphasised rather the confusing picture which he submitted was drawn for the jury.

[25] The directions in this case were in the following terms:

> "Before turning to the charges themselves, I just wish to say something about the last part of the indictment. And that's the part beginning, 'Take notice', *et cetera*. The second part of that has now been deleted. Now, the sole purpose of such a docquet is to give notice to the defence that certain evidence which will be led, which might suggest that such actions took place. You can of course consider the evidence led as it is evidence in the case.
>
> Now, normally, evidence is not allowed to be led by the Crown which suggests the accused might have been responsible for a criminal act which is not charged on the indictment. However, legislation has been enacted which allows such evidence to be led in certain limited circumstances. Firstly, the alleged criminal act must be connected with a sexual offence charged on the indictment. And that it relates to the same event as the offence charged or a series of events, which includes the charge in the indictment. In this case, the Crown are alleging continued abusive behaviour. The defence say that the evidence led as a result of this notice is of no significance to the charges, which you have to consider.
>
> As I said to you at the start of the trial, the notice does not comprise a separate charge. And you do not have to consider returning a verdict upon the accused of any of the matters mentioned in the notice. If you consider that any evidence has been led in relation to the notice however, it is evidence in the case and you will have to assess it when considering your verdict on the charges on the indictment to which it is connected. Assuming you accept that there is such a connection. The only matter for you to consider is whether you are satisfied that any witness or witnesses speaking to matters specified in the docquet can be treated by you as credible and reliable."

[26] In the opening directions the judge had told the jury the following:

> "Now, please note you will only be returning a verdict on the charges. The clerk also read a notice which is attached to the indictment. Now, the purpose of this notice is to inform the defence that the Crown will lead evidence relating to it during the trial. What is in the notice is not another charge or charges, and you will not be asked to reach a verdict on those matters. If evidence of the sort mentioned in the notice is led, it may be of relevance to a charge or charges in the indictment. I will tell you more about that at a later stage if necessary."

[27] Unfortunately, what the judge told the jury at a later stage was wrong and amounted to a misdirection. It was, however, only wrong in respect that she referred to the matter as if it was specifiable by reference to a sexual offence as opposed to using a simpler formula which would have been suitable for a common law matter. This could easily have been done by adapting the Jury Manual sample directions.

[28] The advocate depute explained to us why the docket was left on the indictment. Whether that was a correct decision or not, the matter had to be dealt with by the trial judge. We do not consider it would have been appropriate for her simply to ignore it.

[29] The only issue in this appeal is whether the misdirection gave rise to a miscarriage of justice. As the advocate depute pointed out, the judge explained the difference between sexual and other offences for the purposes of *Moorov* but that may have been undermined by the reference to sexual offences in the context of the docket, in the sense that the jury may have thought that the evidence relating to the docket somehow added to the body of evidence they were entitled to take account of when considering their verdict on those offences. This may well have been confusing, but what was the consequence? At best for the appellant, that the jury did take account of the evidence when assessing the sexual elements. What then?

[30] The evidence could not have been used as corroboration in respect of complainer A

on any of the charges since she is the one who provided the docket evidence.

[31] As to complainer B, it was evidence from another source supporting abusive conduct but it did not add in any material sense to the evidence available in the context of charge (004), which was not struck at by the docket direction. In fact, it did not add materially to the evidence available at all. This was a case where the jury must have accepted the gravamen of the evidence of both complainers as set out above, involving serious abusive and sexual offending. It is inconceivable that any weight they may have attached to the docket evidence was sufficient to change what would have been a verdict of acquittal to one of conviction. It is not the fashion nowadays to use Latin but if ever there was something which was *de minimis* (i.e. of no materiality), this is it. The docket evidence was of such little significance that, as we have said, it was hardly referred to in the speeches.

[32] In short, while the direction was infelicitous, it did not give rise to a miscarriage of justice and the appeal must be refused.

Postscript

[33] This case is something of an object lesson. It has been said before, in the context of applications under section 275 of the 1995 Act, that judges should carefully read the papers. A perusal of the indictment would have shown, as was said in terms, that this was a common law docket. Secondly, while the first error (not appreciating that the docket was at common law) led into the second (the erroneous direction) it is another illustration of the principle that juries are entitled to a bespoke charge; *McGartland* v *HM Advocate* [2015] HCJAC 23. The sample directions for dockets will be perfectly suitable for most cases under the statute and will fulfil the requirements desiderated in *HM Advocate* v *Moynihan* [2018] HCJAC 43, 2019 SCCR 61 but they may sometimes require adjustment depending on the circumstances. As

this case shows, their terms are not wholly suitable for common law dockets.

[34] It might be helpful if the Jury Manual Committee considered providing a sample charge for common law dockets given their increasing use. That should not be too difficult a task.