APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 35
HCA/2018/000170/XC

Lord Justice Clerk
Lady Paton
Lord Brodie

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

LL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Faculty Services Limited
Respondent: Farquharson AD; Crown Agent

15 June 2018

Introduction

[1] This is an appeal in terms of section 74(1) of the Criminal Procedure (Scotland) Act 1995 ("the Act") against the decision of the judge at a preliminary hearing on 28 March 2018 to refuse an application under section 275 of the Act.

[2] The appellant has been indicted to stand trial in the High Court in respect of two charges:

> "(001) on [a date in July 2016] at [an address] you LL did assault [the complainer] lie in a bed with her, kiss her on the neck, put your arms around her, touch her on the vagina and on the breast, lift her dress, remove her underwear, restrain her, penetrate her vagina with your penis and you did thus rape her to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009.
> (002) on [same date as in charge 001] at [the same address as in charge 001] you LL did sexually assault [the complainer] attempt to kiss her and kiss her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

[3] At the preliminary hearing on 28 March 2018 the appellant pleaded not guilty to both charges. His counsel confirmed that a defence statement and a special defence of consent had been lodged. The defence statement contains the following information:

> "**a. The nature of the accused's defence including any particular defences on which the accused intends to rely:**
>
> The accused denies the acts of criminality alleged in the charges on the indictment.
>
> The accused maintains that any sexual contact that occurred between him and the complainer on the occasion libelled was with her consent and in the reasonable belief that she was consenting.
>
> **b. Any matters of fact on which the accused takes issue with the prosecution and the reason for doing so:**
>
> Any facts that may be inconsistent with the position of the accused as outlined above."

The special defence is in these terms:

> "JONES for the accused LL indicates (sic) that the accused pleads not guilty to the charges on the indictment and specially and without prejudice to said pleas intimates that in respect of both charges on the indictment any sexual contact that occurred between him and the complainer [name specified] on the occasion libelled was with the consent of [the complainer] and in the reasonable belief that she was consenting".

The legislation

[4] Sections 274 and 275 of the Act provide, *inter alia*, as follows:

> **274 Restrictions on evidence relating to sexual offences**
>
> (1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer—
>
> …
>
> (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
>
> …
>
> (2) In subsection (1) above—
> "complainer" means the person against whom the offence referred to in that subsection is alleged to have been committed; and the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature.
>
> **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 …
>
> (b) that occurrence or those occurrences … 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.

…

(7) Where a court admits evidence or allows questioning under subsection (1) above, its decision to do so shall include a statement—

(a) of what items of evidence it is admitting or lines of questioning it is allowing;

(b) of the reasons for its conclusion that the evidence to be admitted or to be elicited by the questioning is admissible;

(c) of the issues at the trial to which it considers that that evidence is relevant.

…

The application

[5] At the preliminary hearing counsel for the appellant made an application under section 275 of the Act in order that evidence might be admitted at trial that:

> "the accused and the complainer knew each other because they had been friends before the incident. Furthermore, following a night out in October 2015 they engaged in consensual sexual intercourse within the address that the accused was living in at the time"

[6] In the written application under section 275 it is stated that the complainer had described the occasion of intercourse in October 2015 in two police statements. The appellant had been asked about it in his police interview. The reasons why the evidence is considered relevant are stated in the written application as being:

> "The accused maintains that the complainer willingly came back to his flat after a night out ... and that any sexual contact that took place within his flat was with her consent. The fact that the accused and the complainer were friends who previously engaged in consensual sexual activity of a similar nature within the accused's address, lends support to the accused's defence and allows the jury to properly consider the full extent of their relationship."

[7] The preliminary hearing judge reports that she asked the appellant's counsel why consent given on a date in October 2015 to sexual intercourse at that time was relevant to whether or not consent was given in July 2016 or to whether there was a reasonable belief that consent had been given in July 2016. Counsel was unable to explain beyond arguing that if evidence of what occurred in October 2015 was admitted the jury would have "the full picture". Counsel accepted that the indictment included an averment that the appellant had restrained the complainer, in other words that it was alleged that a degree of force had been used. However, counsel indicated that there was nothing that she wished to add

beyond a submission that the previous occasion was, in itself, relevant to the appellant's reasonable belief.

[8] The Crown did not oppose the application when it was made at the preliminary hearing. The preliminary hearing judge reports that the advocate depute submitted that the previous occasion might be relevant. She noted that the locus was similar. She did not add anything further to the submission made by counsel for the appellant.

[9] The preliminary hearing judge reports that she did not consider that any justification had been put forward for leading the evidence specified in the written application. In concluding that the requirements of section 275(1)(a) had not been met it appears that the preliminary hearing judge overlooked the implicit comma in that section (*HMA* v *DS* (PC) 2007 SC (PC) 1). However, she also concluded that the evidence was prohibited by section 274 (1)(b) and therefore could only be led if the requirements of section 275 were met, which they were not. The evidence was not relevant to establish whether the appellant was guilty of the offence with which he had been charged. Consenting to intercourse on an occasion in October 2015 shed no light on whether there was consent to intercourse or reasonable belief that there was consent to intercourse in July 2016. Accordingly, in her opinion, the requirements of section 275(1)(b) were not met. However, should she be wrong about that she did not find the probative value of such evidence to be likely to outweigh any risk to the proper administration of justice arising from it being admitted. At best its probative value was weak. Its value did not outweigh the need to give appropriate protection to the complainer's dignity and privacy. The Crown was offering to prove that a degree of force had been used. The judge had not been told of any circumstances which had led to a reasonable, albeit mistaken, belief on the part of the appellant.

Submissions to this court

The appellant

[10] Under reference to the terms of the Note of Appeal, Mr Findlater for the appellant submitted that the preliminary hearing judge had erred in refusing the application. The starting point was to consider whether evidence of a previous consensual sexual encounter between the appellant and the complainer would be admissible as relevant at common law. If it was not that was an end to the matter. What is meant by "relevant" was set out by the Lord Justice Clerk (Carloway) in *M* v *HM Advocate (No 2)* 2013 SLT 380, 2013 SCCR 215 at para 28. Evidence is relevant when it either bears directly on a fact in issue (i.e. the libel) or does so indirectly because it relates to a fact which makes the fact in issue more or less probable. Evidence of the previous sexual encounter between the appellant and the complainer was relevant. It bore on the central issue of the appellant's reasonable belief, why he believed that "consent was in place" on the occasion which was the subject of the charge, and it also bore on the complainer's consent. Leading evidence of the previous sexual encounter was prohibited by the terms of section 274 (1) (b) but it should be admitted in that it met the criteria of section 275(1): it related to a specific occurrence of sexual behaviour (section 275(1)(a)); it was relevant to whether the appellant was guilty of the offence with which he had been charged (section 275(1) (b)); and its probative value, which was significant, outweighed the extremely limited risk of prejudice to the proper administration of justice (section 275(1)(c)). In relation to the final criterion Mr Findlater noted that the complainer had, during her police interviews, volunteered the information that she and the appellant had had a previous sexual encounter. Accordingly leading the evidence would amount to only a limited infringement of her privacy.

The respondent

[11] The advocate depute confirmed that the Crown opposed the appeal notwithstanding the position it had taken at the preliminary hearing. The application should have been opposed then. As would appear from the complainer's statements, there were some similarities in circumstances as between the encounter in October 2015 and the incident in July 2016 which gave rise to the charges but, more significantly, there were dissimilarities. There was no real ongoing friendship between the parties in July 2016. The complainer had gone to the appellant's flat only because, unexpectedly, she required somewhere to sleep that night and it had been on the basis that she would be sleeping in one room and the appellant in another.

[12] The advocate depute submitted that the preliminary hearing judge had been right to refuse the application. The evidence that the appellant sought to adduce, that the parties had had consensual sexual intercourse in October 2015, was simply irrelevant to what were the issues in the forthcoming trial: whether the complainer had given her free agreement to sexual intercourse with the appellant in July 2016 and whether the appellant then had had a reasonable belief that the complainer had given such agreement.

Decision

[13] As Mr Findlater recognised, the starting point for a decision on whether the evidence which the appellant wished to adduce is admissible, is the general principle that evidence is only admissible if it is "relevant" (see *M* v *HM Advocate (No 2)*, Lord Justice Clerk (Carloway) at para [28]). The word appears on no less than five occasions in the portion of section 275 of the Act which is quoted above but what we are concerned with, both generally and when it comes to construction of the Act, is a very familiar, albeit on occasion somewhat

elusive, concept of the common law. As Lord Carloway explained in *M*, evidence is relevant when it either bears directly on a fact which is put in issue by the libel or does so indirectly because it relates to a fact which makes a fact in issue more or less probable. Determination of whether a fact is relevant depends very much upon its context and the degree of connection between what is sought to be proved, or disproved, and the facts libelled. It is a matter of applying logic and experience to the circumstances of the particular case. However, logic and experience (at least in the sense of everyday experience, as opposed to professional forensic experience) does not take one the whole distance. Again, as was explained by Lord Carloway, the question is one of degree; as it was put by Lord President Cooper in *Bark* v *Scott* 1954 SC 72 at 75: "the determining factor being whether the matters … are, in a reasonable sense, pertinent and relevant and whether they have a reasonably direct bearing on the subject under investigation." Thus, not every fact that has some conceivable connection, however distant, with the facts in issue is a relevant matter for enquiry. To an extent weight, or as section 275 of the Act has it, probative value, goes to this question of degree. Davidson in *Evidence*, at para 2.08 observes that a court will exclude from consideration facts which are too remotely connected to the issue before it. He illustrates that by quotation from the judgment of a New Zealand judge, Fisher J, in *R* v *Wilson* [1991] 2 NZLR 707 at 710: "…lack of relevance can be used to exclude evidence not because it has absolutely no bearing upon the likelihood or unlikelihood of a fact in issue but because the connection is considered to be too remote."

[14] In applying logic and experience to the circumstances of the particular case a court which is determining the admissibility of an item of evidence will have regard to the particular circumstances of the case, as they are alleged to be, and its own world-view, in other words its understanding about the usual connections between things; what is often

referred to as common sense. Turning to the present case and applying logic and experience we cannot accept that the fact that the complainer had consensual sexual intercourse with the appellant in October 2015 is relevant, in the sense discussed, to the facts in issue: whether the complainer consented to having sexual intercourse with him in July 2016 or whether the appellant reasonably believed that she was consenting. On this we completely agree with the preliminary hearing judge. We simply do not see why the fact that there was free agreement and reasonable belief as to that agreement on one occasion, makes it more or less likely, as a matter of generality, that there was free agreement and reasonable belief as to that agreement on another occasion many months later. What we would suppose it would be intended to suggest to the jury is that if there was free agreement on the first occasion it might be inferred that there was free agreement on the second occasion. But why is that so? Very significantly, when counsel was asked to identify the basis for such an inference, first before the preliminary hearing judge and then before this court, counsel was unable to do so. That is not to say that there may never be cases where a previous act of intercourse might not be relevant to the issue as to whether the complainer consented on a subsequent occasion or to the issue of whether an accused reasonably believed that the complainer was consenting. However, in such a case particular circumstances would have to be averred to demonstrate what was said to be the connection between what we would see as, *prima facie*, unrelated events. Here there are no such averments. This is not the case in which to consider what is required by way of a defence statement in terms of section 70A of the Act. We confine ourselves to the observation that the written application which has been lodged in the present case is entirely uninformative as to the particulars of the appellant's position. A form of special defence of consent has been lodged but it is equally guarded as to the appellant's version of events. In intimating that "*any* sexual contact that

occurred between him and the complainer" was with the consent of the complainer, the appellant does not appear to concede that the parties did indeed have intercourse. He may have been more candid in his police interview but as far as the court is concerned, it is left in ignorance as to why it said, in the particular circumstances of this case, that the events of October 2015 shed any pertinent light on the events of July 2016.

[15] The position taken in the appellant's written application, in the Note of Appeal, and in submissions on the appellant's behalf, is that, irrespective of the particular circumstances, it must always be the case that evidence of a previous consensual sexual encounter is relevant to resolution of the issues that will arise in a trial on an indictment libelling a charge of rape. We do not accept that position. We have to acknowledge however that there is authority that might be seen as supporting it.

[16] In *Moir* v *HM Advocate* 2005 1 JC 102 at para [6] the Lord Justice Clerk (Gill) said this:

> "The common law rules of evidence in cases of rape, which applied until 1985, entitled the accused to attack the moral character of the complainer (*David Allan*; *James Reid*; *Dickie* v *HM Advocate*) and to establish, to a limited extent, that she had previously had intercourse with the accused or had had intercourse with other men (*Dickie* v *HM Advocate*; Walker and Walker, para 7.7.2)."

At this point in his Opinion Lord Gill was only concerned to provide a brief sketch of the historical background. He was to throw doubt on the intellectual respectability of the common law rules in the immediately following paragraph. We shall return to that paragraph but we would first make some observations on the authorities cited at para [6] of Lord Gill's opinion. One of these is Walker and Walker *The Law of Evidence in Scotland*, in its second edition, published in 2000 (the text of the passage in question remains unchanged in the fourth edition of 2015 - we have placed in parenthesis the citations which appear as footnotes in the original):

> "7.7.2 At common law in cases of rape or similar assaults against women the accused could attack the woman's character for chastity, and could lead evidence that at the time she was reputedly of bad moral character (*Dickie* v *HMA* (1897) 24 R (J) 82), that she associated with prostitutes, but not that her friends were otherwise of bad character (*Webster* (1847) Ark 269) and that she had previously had intercourse with the accused (*McMillan* (1847) Ark 209; Dickson *Evidence* (3rd edit) para 7)"

While all the propositions in this passage reflect what is to be found in the nineteenth century cases, neither *McMillan* nor the paragraph cited in Dickson vouch the proposition that at common law it was admissible to lead evidence that the complainer (the "principal witness" in nineteenth century usage) had previously had intercourse with the accused. For that proposition the most recent support comes from what was said by the members of the court in *Dickie*, an application for suspension of a sentence pronounced by the sheriff following a conviction on indictment for indecent assault. The issue in *Dickie* was whether the sheriff had been correct in refusing to admit evidence that the complainer had had carnal connection with a man other than the accused, but the Lord Justice-Clerk (Macdonald) took the opportunity to state the extent to which it was permissible to attack the character of a woman who claims that she has been indecently attacked, while Lord Adam reviewed the cases and Lord Low concurred with both his colleagues.

[17] The Lord Justice-Clerk begins his opinion in *Dickie* with a paragraph which to the modern reader would appear to be entirely unexceptionable:

> "The right to attack the character of a witness, and to bring evidence in support of the attack, is one which has always been carefully kept within very limited bounds. There are two reasons why this should be so. First, it is the duty of a Court to protect witnesses from attacks which they cannot be prepared to meet, and which they can claim no right to meet by leading evidence to rebut them; and, second, such enquiries, if entered upon, would necessarily interfere with the conduct of judicial proceedings by introducing collateral issues, which would be most inconvenient and embarrassing, and might often protract proceedings and obscure the true issue

> which was being tried. Accordingly, in the ordinary case, while it is competent to ask a witness whether he has been convicted of a crime, the fact cannot be vouched except by an extract conviction, it is not competent to enter upon an enquiry into his general antecedents, and to try to prove that he has committed a crime. It is only competent to inquire into matters directly connected with the subject of the trial then proceeding."

His next paragraph is more problematic:

> "In the case of injuries to women, some specialties have been introduced for obvious reasons. Where a woman maintains that she has been indecently attacked, it is competent, upon notice being given, to attack her character for chastity, and to put questions to her involving the accusation of unchastity. And in such cases it has been held competent for the accused to prove that the witness voluntarily yielded to his embraces a short time before the alleged criminal attack. That such proof should be allowed is only consistent with the clearest grounds of justice, for, in considering the question whether an attempt at intercourse be criminal, and to what extent criminal, it is plainly a relevant matter of enquiry on what terms the parties were immediately before the time of the alleged crime. Further, it seems a relevant subject of enquiry whether the woman was at the time a person of reputed bad moral character, as bearing upon her credibility when alleging that she has been subjected to criminal violence by one desiring to have intercourse with her. Such evidence may seriously affect the inferences to be drawn from her conduct at the time."

Although no authority was cited at the preliminary hearing in this case, counsel who then appeared at the preliminary hearing would be entitled to point to this paragraph in *Dickie* and say that her submission that by leading evidence of the previous sexual encounter between the appellant and the complainer the jury would be provided with "the full picture", was no more than a reflection of Lord Justice Clerk Macdonald's view that it was plainly a relevant matter of enquiry to determine "on what terms the parties were immediately before the time of the alleged crime."

[18] However, while the Lord Justice Clerk goes on to affirm (at 84) that "it is competent to prove a general bad repute at the time of the offence, or to prove that the woman said to have been attacked had yielded her person recently to the same man" he does not explain

why. In context "general bad repute" means a local reputation for being unchaste. To a modern eye the supposed relevance of that (which is vouched by a number of the nineteenth century cases) is especially puzzling, particularly when it is understood that reputation means just that: what people think about the woman in question, and one turns to Lord Adam's opinion to find it beginning (at 84):

> "There is no doubt that it is not a relevant defence to a charge of rape that the person alleged to be injured was unchaste, however bad her character may be in that respect. Neither, as I understand, is it competent to lead evidence to impeach her general character as regards credibility. But cases such as this are exceptional in this respect, that although unchastity is not a relevant defence to the charge, yet nevertheless it is competent, upon due notice given to the prosecutor, to lead evidence to impeach the chastity of the person alleged to be injured".

On the relevance of previous sexual intercourse with the accused Lord Adam provides this explanation (at 87):

> "In that case, however, it appears to me that the evidence is relevant to the question of consent or non-consent, because it is more or less probable that a woman who had been already intimate with a man would not offer a very strenuous resistance to his having again connection with her, while there is no presumption or probability that a woman who may have allowed a particular man to have connection with her, would allow another man, it may be a perfect stranger, to have connection with her."

[19] Lord Adam's reference to presumption or probability and Lord Justice Clerk Macdonald's reference to the inferences that the jury might draw from an account of the complainer's conduct are reminders that although their discussions are about the competence of leading evidence of a particular sort, what is in issue are not legal rules in the sense of points of jurisprudential principle but, rather, the practical utility of items of information in determining discrete matters of fact. What is thought to be useful in determining facts will depend on the world-view of the fact-finder and, as part of that world-view, his expectation of how other people generally behave. Lord Adam thought that

evidence of previous sexual relations between the parties was useful information when determining whether the woman consented on a subsequent occasion because in his view it is more or less probable that a woman who had been already intimate with a man would not offer a very strenuous resistance to his having again connection with her. That may well reflect a general late nineteenth century view (or at least a late nineteenth century judge's view) about how people might be expected to behave. We do not see it as a reliable guide as to how people might be expected to behave in the early twenty-first century. Understandings have changed. This is the point which Lord Gill makes in *Moir*, in the paragraph immediately following his summary of the common law position:

> "[7] Numerous jurisdictions have applied rules of this kind on the view that the complainer's previous sexual experience or adverse sexual reputation makes it more likely that she consented to intercourse and makes it less likely that she is a credible witness (cf *Dickie* v *HM Advocate*, Lord Justice Clerk Macdonald, p 84; *R* v *Seaboyer* [(1991) 83 DLR (4th) 193], McLachlin J, pp 258, 259). In recent years the view has emerged that these justifications reflect 'twin myths' (cf *R* v *Seaboyer*). The policy priorities underlying law reform in this area have generally been to prevent juries from giving undeserved acquittals out of prejudice against the complainer, rather than on an objective view of the evidence, and to protect the complainer from being harassed by questions on intimate matters, in order both to protect her privacy and to prevent victims of such crimes from being deterred from reporting them."

[20] Another reason why the authorities cited in Walker and Walker at para 7.7.2 are unreliable guides as to what is relevant evidence where the charge is one of rape relates to modern developments in the law of rape. The law is now on a statutory footing, the central issue under the Sexual Offences (Scotland) Act 2009 being whether the complainer had given free agreement to the sexual conduct libelled. The common law had also been redefined in *Lord Advocate's Reference No 1 of 2001* 2002 SLT 466. Prior to that decision the crime of rape was constituted by the carnal knowledge of a female by a male person obtained by overcoming her will; the requisite carnal knowledge had to be achieved by

force: Gordon, *The Criminal Law of Scotland* (3rd edit., 2001) para 33.1. In the ordinary case, it was not sufficient that the woman did not consent to intercourse; it had to be shown that the woman's resistance had been overcome by violence such that the reasonable woman would not have been able to resist: Gordon *supra* para 33.09. According to Hume (*Commentaries* vol I p302) "resistance must, therefore, be continued to the last; so that it is by main force only and terror that the violation is accomplished." This consideration is a probable explanation of why Lord Adam justified the relevance of a previous act or acts of intercourse as being that it was more or less probable that a woman who had been already intimate with a man would not offer "a *very strenuous resistance* to his having again connection with her". However, whether or not we are correct in our supposition as to why Lord Adam chose the wording that he did, it does not follow that what might be relevant to raise a doubt as to whether a complainer had in fact continued resistance "to the last" is relevant to the very different question posed by the modern law either at common law or in terms of the Sexual Offences (Scotland) Act 2009.

[21] Our initial view, that evidence of a consensual encounter in October 2015, was irrelevant to determining what may have happened in July 2016 was reinforced as we listened to the advocate depute's submissions. As can be seen from the opening paragraph of his opinion in *Dickie*, Lord Justice Clerk Macdonald was very much alive to the undesirability of digressions into collateral issues. Where there is such a digression, rather than concentrating on the event which is the subject of the charge on the indictment, judge and jury are led into a consideration of another event or events. It may be that Lord Macdonald considered a previous instance of sexual intercourse as something fairly straightforward, requiring little by way of elaboration, readily capable of being admitted or denied and therefore unlikely to "protract proceedings and obscure the true issue which was

being tried". If so, we cannot agree. A sexual encounter is, or may be, quite a complex social interaction, the occurrence and quality of which is potentially dependent on a large number of factors. In the present case we would understand that it is anticipated that the complainer would accept that she had consensual intercourse with the appellant some nine months prior to being subjected to what she alleges was an act of non-consensual intercourse in July 2016. The occurrence of the earlier act is therefore not likely to be disputed. However, we understood from the advocate depute that it is the Crown's position that the surrounding circumstances of the two events were very different and that were the Crown to be faced with having to counter the effect of evidence of the earlier encounter it would be obliged to explore these differences. We accept that. The result of such a process would be just what Lord Justice Clerk Macdonald would, in the ordinary case, wish to avoid, a prolongation of proceedings and an obscuring of the real issues. Rather than concentrating on the issues of free agreement and reasonable belief on the occasion specified in the indictment when the complainer alleges she did not freely agree, the jury would be diverted into a consideration of the similarities and dissimilarities as between that occasion and another occasion which is not specified in the indictment when the complainer accepts that she did freely agree.

[22] On the view we take of the relevance of the evidence which the appellant proposes to lead it is strictly unnecessary to consider the terms of section 275 but were we to do so, while we would be satisfied that the evidence would relate only to a specific occurrence and therefore meet the section 275(1)(a) criterion, we could not be satisfied that proof of this occurrence was relevant to establishing whether the appellant was guilty of the offence with which he is charged. The section 275(1)(b) criterion would not therefore be met. Were the view to be taken that in the context of section 275(1) "relevant" should be given an

expansive definition so as to include anything that might conceivably be seen to be relevant, then we would conclude that the probative value of the evidence was slight in relation to the central issues: the free agreement of the complainer and the reasonable belief of the appellant having regard to the steps he took to ascertain whether there was consent. Moreover, we would see the proposal to lead this evidence as an inappropriate intrusion into the complainer's dignity and privacy. We would therefore conclude that the section 275(1)(c) criterion would not be met

[23] The appeal is refused.