HIGH COURT OF JUSTICIARY

[2109] HCJ 71
IND/2019-562

OPINION OF LORD TURNBULL

in Application under Section 275 of the Criminal Procedure (Scotland) Act 1995

in causa

HER MAJESTY'S ADVOCATE

against

J G

Accused;

Crown: McGuire AD
Accused: Guarino, sol adv; Guarino and Thomson Ltd East Kilbride

16 September 2019

[1] The accused has been indicted for trial in the High Court on five charges, three of which comprise charges of rape contrary to section 1 of the Sexual Offences (Scotland) Act 2009. The charges all concern the same complainer, KL, who was the accused's partner at the relevant times.

[2] On 5 September 2019 I heard submissions in support of an application made on the accused's behalf in terms of section 275 of the Criminal Procedure (Scotland) Act 1995. Amongst other things, that application seeks authority to admit evidence of consensual sado-masochistic sexual conduct engaged in by the complainer with other individuals over a

number of years. It seeks authority to lead evidence of such behaviour between the complainer and a particular named man (DB) prior to her meeting the accused, during the course of their relationship and after it had come to an end. This is a pre-eminent example of the type of evidence which is prohibited by section 274 of the 1995 Act.

The introductory background circumstances

[3] The accused and the complainer appear to have been in a relationship between around May and December 2016. Towards the end of that period they jointly purchased and moved into a house together. This is the locus for certain of the events specified in the indictment. Prior to the end of their relationship, the complainer fell pregnant to the accused and had their child on 9 May 2017.

[4] On about 28 December 2016 certain information was communicated by the complainer to her mother who was a serving police officer. As a consequence, police officers attended at the complainer's home on 28 December and 31 December during the course of which information was provided by her concerning the accused's conduct towards her. Although the complainer mentioned being raped by the accused to a police officer on 28 December, she did not wish to make a formal complaint at that stage. On 31 December she appears to have said that she had exaggerated the situation in her earlier discussion. It is said that it was not until 1 September 2017 that she made a formal complaint to the police.

[5] The accused appeared on petition in March 2018. That petition contained a single charge of rape, now reflected in charge 2 on the indictment. He was indicted to a preliminary hearing on 28 February 2019. At that hearing the court was informed that sensitive enquiries were ongoing which might require an application under section 275 to be lodged. A trial diet was fixed for 17 June 2019, and a continued preliminary hearing fixed

for 14 May. At the continued preliminary hearing there appears to have been further discussion about the ongoing possibility of an application in terms of section 275 on the accused's behalf, however there was still no application before the court. On 6 June 2019, the present application was intimated to the court. The minute for the trial diet of 17 June notes that the Crown advised the court that they would require time to consider the terms of the application and to make necessary investigations. On conjoined motion the court then adjourned the trial diet to 19 September 2019, and fixed a further continued preliminary hearing for 5 September to hear parties on the lodged application.

The Indictment

[6] The terms of the indictment which the accused faced are as follows:

> "(001) on various occasions between 1 May 2016 and 28 December 2016, both dates inclusive, at (...adresses…) and elsewhere, you did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did shout, swear, call (KL) c/o Police Service of Scotland, Windmillhill Street, Motherwell, then your partner, derogatory names and utter threats of violence towards her: CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;
>
> (002) between 1 November 2016 and 30 November 2016, both dates inclusive, at (…addresses…), you did assault (KL), c/o Police Service of Scotland, Windmillhill Street, Motherwell, then your partner, restrain her, force her legs apart, push her knees to her chest and penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009;
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> (003) between 1 November 2016 and 30 November 2016, both dates inclusive, at (… an address…) did assault (KL), c/o Police Service of Scotland, Windmillhill Street, Motherwell, then your partner and having committed the crime libelled in Charge 2 hereof and having placed said (KL) in a state of fear and alarm, did penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009;
>
> (004) on various occasions between 1 December 2016 and 28 December 2016, both dates inclusive, at (…addresses…) and in the course of a car journey from (…addresses…) you did instruct (KL), c/o Police Service of Scotland, Windmillhill Street, then your partner, to make a false report to the Police in which she would

incriminate her former partner as having taken and disclosed intimate images of her without her consent and this you did in the knowledge that said (KL) had consented to the making and disclosure of said intimate images and this you did with intent to pervert the course of justice and did attempt to pervert the course of justice;

and

(005) on 28 December 2016 at (…and address…), you did assault(KL), c/o Police Service of Scotland, Windmillhill Street, Motherwell, then your partner, touch her on the vagina, restrain her, struggle with her, penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

Special cause shown

[7] Section 275B of the 1995 Act provides that, for High Court proceedings, an application of the sort under consideration shall not, unless on special cause shown, be considered by the court unless made not less than seven clear days before the preliminary hearing.

[8] The present application was argued before me some seven months after service of the indictment, a little more than six months after the preliminary hearing and two weeks before the second trial diet.

[9] Mr Guarino informed me that, by May 2018, the accused had informed him that the allegations made against him were linked to the presence of sado-masochistic images of the complainer being available online. By that date the accused had also provided him with a pen drive containing these images, which the accused had downloaded from the Internet.

[10] Certain of these images were said to show the complainer involved in sexual practices with her former partner DB and the accused's understanding was that the images had been taken and uploaded to the Internet by DB. On the face of it then, the accused's solicitors were aware of the material which the present application concerns from a point around nine months prior to the preliminary hearing. From that point onwards, the focus of

the defence concern seems to have been to identify the name of the individual involved with the complainer, as the accused claimed only to know that he was a former partner of hers.

[11] Mr Guarino was in contact with the Crown prior to service of the indictment concerning the content of the pen drive and had further correspondence on the subject in the course of February 2019. In the course of these communications he sought to convey that he was interested in exploring an awkward matter which might result in the need for a 275 application and sought the assistance of the Crown in identifying the name of the complainer's former partner. He was in contact with, and had a meeting with, members of COPFS "at a high level" in the course of these efforts. Perhaps somewhat optimistically, he appears to have harboured the belief that the Crown might view the downloaded material as being destructive of their case. By the date of the preliminary hearing it had become plain that the Crown did not share Mr Guarino's assessment of the impact of the material and they were not prepared to assist with his enquiries.

[12] In the course of March 2018, precognition agents instructed by the defence were able to obtain an address for DB and he was contacted by the accused's solicitors. On 28 March DB communicated to those acting for the accused that he had taken professional advice, was not willing to become involved and was not prepared to provide a precognition. On 10 April Mr Guarino wrote to DB (in his capacity as the accused's solicitor) providing him with a letter setting out the circumstances and citing him to attend as a defence witness at the trial diet of 17 June. The citation was served personally by sheriffs officers.

[13] On 6 May, an application by joint minute under section 75A of the 1995 Act was made to adjourn the forthcoming continued preliminary hearing. This application was made on the basis that DB was an individual who had a connection with the complainer shortly prior to the date of the offences alleged, had been cited to attend at trial however

arrangements to precognosce him had not yet been made. It was said that it was highly unlikely that a precognition would be received in sufficient time to finalise and lodge a 275 application prior to the date of the continued preliminary hearing.

[14] That application was refused. At the preliminary hearing the judge was advised that DB was an essential witness whose evidence required to be obtained prior to an application being lodged. The minute records that:

> "A final attempt would be made prior to the trial to precognosce this person, and if that was successful, the solicitor-advocate for the accused gave an undertaking that the section 275 application would be drafted immediately and lodged along with a minute requesting a hearing for that application to be argued prior to trial."

[15] That same minute notes that the advocate depute had no opposition to the course proposed on the accused's behalf, that the Crown were aware of the investigations being made and of the sensitive nature of the issues.

[16] DB maintained his refusal to cooperate and, on 6 June, the present application was intimated without any precognition ever having been obtained. No minute requesting that the matter be determined in advance of the trial was presented.

[17] At the trial diet on 17 June the court was addressed on some of the background to the section 275 application, however the application itself was not moved or argued. The Crown informed the court that they needed time to consider the terms of the application and make necessary investigations. This position seems to have been adopted despite the fact that; (a) the Crown had been aware of the content of the pen drive since no later than 28 February; (b) on 14 May they informed the court that they were aware of the investigations being made, and; (c) they had been in possession of the application itself since 6 June.

[18] On the face of matters, the need for further enquiry is incomprehensible. Not only were the Crown told about the material by the accused's solicitors prior to service of the indictment, they all along knew about it from the complainer, as is revealed by the terms of charge 4. Being fully aware of the material, and having discussed it with the accused's solicitors, the Crown had taken a stance as at the end of February that they were not interested in assisting the accused to ascertain the identity of the male involved in the images. What had changed by 17 June, and what the Crown intended to enquire into, is not disclosed in the court minute and was not explained to me at the hearing.

[19] On about 3 September, on the Crown's instruction, a police statement was taken from DB which was then disclosed to Mr Guarino.

[20] As I understood it, the position of both the defence and the Crown was that I should be satisfied that special cause had been demonstrated and that I should proceed to consider the merits of the application.

Analysis

[21] Although the application was not argued before me until nearly 3 months after the trial diet, it should be borne in mind that the application which I am concerned with was available to be debated at that time. Why it was not is far from clear.

[22] From the first moment of being informed by the accused about the availability of online images concerning the complainer, the accused's solicitors understood that these images were said to have been uploaded by her former partner and the male observed in some of these was that partner. The entire focus of the defence enquiry thereafter seems to have been devoted to an attempt to identify that individual and seek support from him for

the contention that he was the individual seen to be participating and the person responsible for uploading the images.

[23] Why it matters who the individual involved is, and what relevant evidence it was thought he could contribute, is something which has eluded me entirely. It is accepted that the complainer engaged in intimate sexual conduct with a former partner resulting in images of that conduct being available on certain websites. It is accepted that the accused became aware of this. These facts form the basis of charge 4.

[24] If the accused's position, as I understand it to be, is something to the effect that the complainer fabricated an account of rape by him in light of steps which he proposed to take, having become aware of the presence of these images, I see no reason why an effort to advance that proposition requires, or can benefit from, knowledge of the name of the male person concerned. I cannot see that there is anything of relevance that he can contribute.

[25] The defence seem to have ascertained DB's identify by around the date of the preliminary hearing. I was told that his address had been ascertained by 18 March. The steps which were taken after that were designed to obtain a precognition from him, although the application was eventually lodged without one having been obtained. By the date of the hearing before me, Mr Guarino was in possession of a police statement taken from DB. In advancing his submissions in support of the application no reliance was placed on anything which DB might say or contribute. It therefore seems that in fact nothing has changed since May 2018 when the defence were provided with the pen drive by the accused.

[26] In carrying out the enquiries which he detailed to me, Mr Guarino was of course well aware of the restrictions on the leading of evidence provided for by section 274 of the Act. He was also aware of the circumstances in which an application could be made under section 275 to provide relief from these restrictions. The view seems to have been that what

was important was that the Crown were alerted to the fact of ongoing enquiries and that these might result in an application being made. In other words, that the Crown were not ambushed at a late stage.

[27] That is no doubt part of the purpose behind the time limit which features in section 275B. However, I do not consider this to be the only purpose. A comparison can be drawn with section 78 of the Act which requires notice of special defences, lists of witnesses and lists of productions to be provided not less than seven clear days before the preliminary hearing. The consequence of failing to comply with the provisions of this section can be avoided however if, on cause shown, the court otherwise directs. Time limits of the sort provided for by this section are conceived in the interests of the prosecution (or co-accused) and may competently be waived where the interests of justice are better served by doing so than by insisting on them – see *Lowson* v *HM Advocate* 1943 JC 141.

[28] The important difference to be found in section 275B is the restriction imposed on the power of the court to even adjudicate upon such an application made out of time. The emphasis is quite different and is no doubt deliberately so in order to ensure that a late application does not disrupt the progress of proceedings which are likely to be sensitive and stressful for the complainers concerned. It is also no doubt designed to avoid issues of this sort been raised with complainers at a late stage. In the present case, failure to lodge an application in compliance with the statutory timescale led to a continued preliminary hearing being heard in May and the trial diet being adjourned for a number of months on the day it was expected to commence. Although I was not addressed on this, I expect that the complainer and other witnesses would have built themselves up to giving evidence at that time and that jurors were in attendance.

[29] I should also note that the application is not confined to issues concerned with the images of the complainer. Paragraph (d) concerns nothing more than the proposition that the parties continued in an ordinary and apparently happy relationship from a point after the date on which charges 2 and 3 are understood to have been committed until the end of December 2016. Paragraph (g) concerns another matter entirely unrelated to the images and paragraph (i) concerns the proposition that the complainer remained in contact with the accused after the dates of the alleged offences and engaged in consensual intercourse with him in that period.

[30] Having listened to Mr Guarino setting out the circumstances as explained above, I was left with the distinct impression that the unusual nature of the material which the accused had brought to his attention had resulted in an undue and, in my opinion, unwarranted level of focus being attached to it. The focus on the question of what part the images had to play in presenting the accused's defence seems to have dominated all other considerations and to have led to a situation in which the defence lost proper sight of issues concerning relevance and the import of the statutory context within which all aspects of defence preparation require to be conducted.

[31] In these circumstances my initial impression was that the test of special cause had not been met. However, I recognise that significant efforts were made to persuade the Crown of the perceived value to the defence of this material and to alert the Crown as to the enquiries which the defence considered appropriate. The court was also informed in general terms of what was taking place. There were at least two opportunities before the application was lodged for the court to have exercised greater control and to have examined more closely the question of where the perceived relevance of these enquiries lay. The Crown might also have alerted the court to the need for governance to be applied, since they knew

what was being investigated. It also appears to me, at least with the benefit of hindsight, that there was in fact no reason why the trial diet fixed for June could not have proceeded. As already alluded to, some of the responsibility for this seems to lie with the Crown.

[32] Whilst the lack of opposition from the Crown is not determinative in considering the terms of section 275B, it is a relevant factor to take account of. Giving due weight to the whole circumstances I have concluded that, erring on the side of caution, I should permit the application to be considered.

The Application

[33] The application lodged on behalf of the accused is in the following terms:

> "1. The following evidence is sought to be admitted or elicited:-
>
> (a) That the Applicant and the Complainer, (KL), had commenced a relationship on or about 7th May 2016. For several years prior to the commencement of this relationship, the Complainer had indulged in extreme sado-masochistic sexual practices with like- minded individuals and had been party to online posting of herself involved in these practices both by way of photographs and videos.
>
> She had an online account with two websites in particular Tumblr and Fetlife.com.
>
> (b) The Applicant's relationship with the Complainer finally ended on or about the 2nd March 2017. Commencing in approximately 2015, continuing in 2016 and during her relationship with the Applicant, the Complainer was in a non-romantic relationship with Defence Witness number 2, (DB). This relationship was both online and in person and was solely for the purpose of the Complainer and (DB) indulging together in sado-masochistic sexual practices.
>
> (c) Whereas it is understood the Complainer will allege that Charges 2 and 3 occurred on the evening of 8th November and the morning of 9th November, 2016, respectively, that she was still covertly continuing her relationship with (DB) and that the Applicant had become suspicious of her behaviour. When challenged about this the Complainer invented the allegation now contained in Charge 2 in the full knowledge that the sexual contact which took place

between the parties on 8th November had been with her consent. (reference **Crown Production 13, pages 24 to 30)**

(d) On 9th November until 27th December 2016 the parties continued in a normal, cohabiting relationship including frequent, consensual sexual contact. The Complainer continued to reside with the Applicant in his flat at (…an address…) and that the parties jointly purchased and moved into a new house together on 13th December 2016 at (…an address…) with the assistance of a joint mortgage from Nationwide Building Society. (reference **Crown Production 13, pages 37 & 38, Defence Documentary Production Number 2, pages 4, 6, 7, 8 and 13).**

(e) That from approximately 16th November 2016 the Complainer's mobile phone was not fully operational and she would frequently use the Applicant's phone, in particular, to browse online. On or about 27th November 2016 the Complainer used the Applicant's mobile phone to access sado-masochistic sexual websites and in particular fetlife.com. The Complainer failed to fully clear her browser history and the Applicant challenged the Complainer about this who falsely suggested that the account she had for the website was only to allow her to view same. (reference **Defence Documentary Production number 1 pages 81, 95, 96, 116 & 150)**

(f) In the early hours of 26th December 2016 the Applicant noticed that the Complainer had used his mobile phone to log into more sado-masochistic websites and in particular on Tumblr had been viewing an account held under the username of (…name given …). This account was held by (DB). Upon the Applicant immediately challenging the Complainer on this matter, she became very defensive and aggressive but admitted that (DB) had images and videos of her in various sado-masochistic sexual situations. The Applicant found photographs online depicting the Complainer in these situations. During 27th and 28th December 2016 various discussions between the parties took place culminating in the Complainer stating the photographs and videos had been uploaded by (DB) online without her consent. On 28th December 2016 the Applicant suggested that she immediately report the matter to the Complainer's mother, Crown Witness 2, (…named…) a Detective Constable with Police Scotland attached to the Domestic Abuse Unit stationed at East Kilbride Police Office. The Complainer immediately left the parties' home first of all having deleted her mother's mobile telephone number from the Applicant's phone. (reference **Defence Documentary Production Number 2, pages 9, 10, 11 and 12)**

(g) On or about 27th December 2016 the Complainer covertly recorded a conversation between the parties during which it is understood she will allege that the Applicant admitted his guilt in relation to Charge 2 on the Indictment. The recording provided to Police Scotland by the complainer was a truncated version of a longer conversation whereby the "admission"

has been taken out of context. (reference to **Defence Documentary Production Number 2, page 6)**

(h) On 28th December and 31St December 2016 the Complainer spoke to four Police Officers from Police Scotland (Crown Witnesses 4, 5, 6 & 7) the purpose being to make a complaint about being raped by the Applicant.

She declined to make any such complaint and in particular advised Crown Witnesses 6 & 7 *"I totally exaggerated the situation. Jonathan did not do anything that bad, certainly nothing I want to report to the police .....I do not wish to report anything to the police, my relationship has been good and I want to make it work especially as I am pregnant and I do not feel Jonathan has done anything to report, it has been blown out of proportion".*

(i) From 29th December 2016 to 2nd March 2017 the parties were in constant contact with one another mostly via text and Facebook Messenger and, on occasion, in person. The Complainer persistently declared her love for the Applicant and her desire to reconcile with him. On 12th January 2017 she stayed the night at the parties' house at (…address..) and had consensual sexual intercourse with the Applicant. During this period the Complainer consistently stated that she was attempting to remove all photographs and videos from the websites in question and that she wished to have no further involvement in these matters. The parties relationship finally ended on 2nd March 2017 following a discussion regarding an extremely explicit video recording that the complainer made with (DB) and which had been posted online. (reference **Defence Documentary Production Number 1, pages 167, 175, 186, 188, 189, 196, 229 and 230; Defence Documentary Production Number 2, page 3)**

(j) That the Complainer when approximately six months pregnant with the parties child, (…name and date of birth…), permitted herself to be photographed by (DB) in a sado-masochistic sexual fashion which photograph was thereafter uploaded on to fetlife.com. After the birth of the child she refused to permit the Applicant to have contact to their son. That following the Applicant writing letters to her Solicitor and her mother (Crown Productions 9 and 10) and having been advised that civil proceedings would commence at the instance of the Applicant **(Defence Documentary Production Number 9.1 & 9.2)** for access to the child, only then did the Complainer make a formal complaint to the Police **(Crown Production Number 3).** In her statement to the Police on 1st September 2017 the Complainer failed to make any reference whatsoever to the allegation now contained in Charge 5 on the Indictment this only having been referenced by her when under precognition in the Procurator Fiscal's Office on 11th September 2018.

Following the raising in 2018 by the Applicant of an action for inter alia, contact defences were lodged on the Complainer's behalf **(Defence**

> **Documentary Production 9.5)** wherein again the Complainer makes no reference to Charge 5 and states that the contents of Production 10 were "fabricated".
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> 2. The nature of the proposed questioning is as follows:
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> To elicit the evidence referred to in paragraph 1 hereof in cross-examination of the Complainer, and Crown Witnesses 2-9 inclusive, et separatim, from the Applicant should he give evidence on his own behalf, and Defence Witness Number 2.
>
> 3. The issues at Trial to which the evidence is considered to be relevant are as follows:
>
> Whether the Applicant is guilty of the crimes libelled in all charges on the Indictment.
>
> 4. The reasons why the evidence is considered to be relevant are as follows:
>
> It is submitted that the evidence would be relevant because it would impact on the credibility and reliability of the Complainer in relation to all charges on the Indictment.
>
> 5. The inferences which the Applicant proposes to submit to the Court that it should draw from the evidence are as follows:-
>
> The Jury would be entitled to infer that if the Complainer behaved in the manner described in paragraph 1 hereof that her evidence in relation to all charges on the Indictment was neither credible nor reliable."

The statutory requirements of an application in terms of section 275

[34] Section 275(3) provides that an application of the present sort shall set out certain matters. These include:

(a) the evidence sought to be admitted or elicited;

(b) the nature of any questioning proposed;

(c) the issues at trial to which that evidence is considered 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;

[35] Whilst the application in the present case complies with paragraphs (a) and (b) it does not seem to me that the bald assertions set out in the minute in paragraphs 3, 4 or 5 go anywhere near complying with the statutory requirements of paragraphs (c) (d) or (e). It is plain, in my view, that the application is seriously deficient in form and this makes it all the more difficult for a judge to determine the matter and also results in far more court time being taken up than might otherwise be necessary.

[36] In my opinion, the court would be entitled to refuse to hear an application which is as deficient in form as the present one is. In ordinary circumstances the least it might do would be to require the application to be amended into proper form before considering it. Whilst the court ought to notice any such deficiency for itself, and take appropriate action, there is, in my view, also an obligation on the Crown to draw the court's attention to any obvious failure to comply with the statutory requirements. Given the history of the present mater and the imminence of the second trial diet I decided to take account, as best I could, of the terms of the application as supplemented by the lengthy oral submissions presented.

The merits of the application

Defence submissions

[37] In seeking to persuade me of the relevance of the evidence which he sought to admit Mr Guarino explained that the accused became suspicious of online activity which the complainer was indulging in around the end of October or the beginning of November 2016. Shortly thereafter he required to lend the complainer his telephone as her own was broken and he came to notice browsing history on sado-masochistic websites. On challenging the complainer about this he was given different explanations on different occasions. Eventually, the complainer came to admit that there were postings of her engaged in sexual

activity on certain websites and she gave varying accounts as to how this came about, including that they had been taken and, or, uploaded without her consent. The accused's position is that on this being said he suggested the matter be reported, at least in the first place to the complainer's own mother.

[38] Although the parties separated at around the end of December 2016, they remained in contact and there were ongoing discussions about resuming their relationship. This possibility was abandoned in March 2017, after discussion regarding an extremely explicit video recording which the complainer had apparently made with DB and which had been posted online. I was not told anything about the content or nature of this video recording or when it was thought that it had been made or posted.

[39] The accused understood that a further photograph of the complainer had been taken and posted at a time when she was around six months pregnant, which would have been around February 2017. After their final disagreement in March 2017, there were issues concerning access to the child and following upon letters being written to the complainer's solicitor advising that civil proceedings would commence, the complainer made a formal complaint of rape against the accused to the police.

[40] Mr Guarino's submissions focused entirely on the question of relevance. No reference at all was made to the terms of section 275 subsection (1)(a) or (c).

Crown submissions

[41] The advocate depute explained that he did not oppose the grant of the application in relation to paragraphs 1 (a), (b), (c), (e), (f) or (g). Nor did he oppose the application in respect of paragraph (i) insofar as the passages concerning the suggestion of post separation intercourse and the discussion regarding the explicit video recording were concerned. His

position was that the evidence identified in all of these paragraphs and passages passed the test of relevance. No reference was made to the terms of section 275 (1) (a) or (c).

[42] In relation to paragraphs 1 (d), (h) and paragraph (i), insofar as the references to post separation contact were concerned, the advocate depute's submission was that section 274 was not engaged and no application was necessary. Insofar as paragraph (j) was concerned, he submitted that the evidence identified in the first sentence concerning the photograph comprised a collateral issue and he therefore objected to the granting of the application to that extent.

Analysis

Part 1 paragraph (a)

[43] As framed, the evidence sought to be elicited of the complainer's sexual behaviour with other unnamed individuals over a number of years prior to the commencement of her relationship with the accused, and the posting online of images of this conduct, is entirely irrelevant. The same applies to the proposition that she had online accounts with the two named websites. How any such conduct in the generality could be relevant to the issue of whether the accused is guilty of the crimes libelled in the indictment is not specified in the application and was not identified in any of the submissions advanced. No explanation was provided for the proposition in part 5 of the application that this evidence would entitle the jury to infer that the complainer's evidence in relation to the charges on the indictment was neither credible nor reliable. In any event, the evidence proposed does not relate to specific occurrences of sexual behaviour, as required by section 275(1)(a) and no submissions were advanced to suggest that the requirements of subsection (1)(c) were met. I shall therefore refuse to admit the questioning specified in this paragraph.

Part 1 paragraph (b)

[44] There is no relevance to the accused's defence in the evidence proposed within this paragraph. No statement vouching the relevance of this evidence is contained within part 4 of the application. No explanation is provided for the proposition in part 5, that this evidence would entitle the jury to infer that the complainer's evidence in relation to the charges on the indictment was neither credible nor reliable. Nothing which was advanced in submissions took the matter any further. Even if I had been satisfied that there was some relevant purpose to leading the evidence identified, I would not have been satisfied that it met the requirements of section 275 (1) (a) or (c). I shall therefore refuse to admit the questioning specified in this paragraph.

Part 1 paragraph (c)

[45] This paragraph includes the assertion that the sexual contact between the complainer and the accused which took place on 8 November 2016 (charge 2) was with the consent of the complainer. The defence statement lodged in advance of the preliminary hearing states that:

> "The accused denies all and any of the allegations against him in relation to charges 1-5 on the indictment." (Part (a))
>
> "The Panel takes issue with all of the matters of fact averred in relation to charges 1-5 on the indictment" (Part (b))

[46] Consistent with this position of denial, there is no mention of a special defence of consent in the written record or in the defence statement, and none was intimated on the accused's behalf. At both the preliminary hearing and the continued preliminary hearing the court was informed the defence were prepared for trial. No special defence was lodged

or moved at the trial diet on 17 June. At the end of the hearing before me one was tendered, with the explanation that it had been overlooked.

[47] In submissions, the proposition advanced on behalf of the accused was that the allegations of rape were untrue. They had been fabricated by the complainer as a smokescreen to cover her having been caught having engaged in sado-masochistic videos. How fabricating such allegations might have this effect was not explained and was not obvious to me.

[48] In seeking to establish charge 4, the crown will require to elicit from the complainer that she had permitted her former partner to take and then post online intimate images of her. They will require to elicit evidence that the accused became aware of these facts and discussed them with the complainer. In so far as this involves eliciting evidence of sexual behaviour, it is behaviour which *does* form part of the subject matter of the charge. It is not therefore struck at by section 274.

[49] I can see no need for the Crown to elicit evidence from the complainer about the nature or description of the conduct displayed in these images. The fact they are described as intimate conveys that they were sexual in nature. I see no need to elicit that they depicted conduct which would be categorised as sado-masochistic and there would be no relevance in eliciting detail as to the actual conduct engaged in. If the accused's position is that the complainer has fabricated the allegations which she subsequently made to the police, as a consequence of the discussions which she and the accused had concerning what steps to take in relation to the images falling within the scope of charge 4, he will be entitled to put this to her. There will be no need for the accused to elicit evidence of the nature of the images and there would be no relevant purpose in doing so. Since section 274 is not engaged in leading the evidence which I have identified there is no need for an application

in terms of section 275. I shall therefore refuse this paragraph of the application as unnecessary.

Part 1 paragraph (d)

[50] As reflected in charge 5, the Crown's case includes the proposition that the accused and the complainer remained partners until at least 28 December 2016. In these circumstances the evidence sought to be elicited is not struck at by section 274. There is no need for an application under section 275 to lead evidence of the ordinary incidents of life in a sexual relationship. I shall therefore refuse this paragraph of the application as unnecessary.

Part 1 paragraph (e)

[51] The evidence identified in this paragraph is of an entirely collateral matter and does not meet the test of relevance. No statement vouching the relevance of this evidence is contained within part 4 of the application and no explanation is provided for the proposition in part 5 that this evidence would entitle the jury to infer that the complainer's evidence in relation to the charges on the indictment was neither credible nor reliable. Nothing which was advanced in submissions took the matter any further. I shall therefore refuse to admit the questioning identified in this paragraph.

Part 1 paragraph (f)

[52] The evidence identified in this paragraph again appears to relate to the subject matter of charge 4 and is not engaged by section 274. I shall therefore refuse this paragraph of the application as unnecessary.

Part 1 paragraph (g)

[53] There is nothing to stop the proposition being put to the complainer that there was more to the conversation than features in the recording which is available. There is nothing to stop the proposition being put that the "admission" has been taken out of context. There is no specification of any behaviour by the complainer which would fall within the terms of section 274 (1) (c). I shall therefore refuse this paragraph of the application as unnecessary.

Part 1 paragraph (h)

[54] The proposition identified in this paragraph appears to be that the complainer has said certain things on specified occasions which are different from her anticipated evidence. This is a matter which is governed by section 263 (4) of the 1995 Act. I shall therefore refuse this paragraph of the application as unnecessary.

Part 1 paragraph (i)

[55] This paragraph contains five sentences. The first two sentences identify evidence which is designed to demonstrate that the complainer remained in touch with the accused and persistently declared her love and desire to reconcile. Insofar as this comprises, broadly speaking, evidence of things supposedly said by the complainer which bear on her credibility or reliability, I would not understand it to be engaged by section 274 (*HM Advocate* v *DS* 2007 SCCR 222 Lord Hope at paragraph 46). I shall therefore refuse as unnecessary the first two sentences of this paragraph of the application.

[56] The third sentence identifies evidence which is designed to demonstrate that the complainer has engaged in sexual behaviour not forming part of the subject matter of the

charge (when staying overnight on 12 January 2017). Such evidence plainly engages section 274 and the evidence identified is capable of passing the test of relevance. I accept that the questioning identified would also satisfy the tests set out in section 275 (1). I shall therefore allow the application insofar as this sentence of this paragraph is concerned. The last two sentences of this paragraph concern conduct which is said to have occurred at a time well after the incidents alleged on the indictment. Nothing which is stated in either of these sentences appears to have any relevance to the issues focused in the charges. No statement vouching the relevance of this evidence is contained within part 4 of the application and no explanation is provided for the proposition in part 5 that this evidence would entitle the jury to infer that the complainer's evidence in relation to the charges on the indictment was neither credible nor reliable. Nothing which was advanced in submissions took the matter any further. Although the paragraph concludes with various references to pages within defence documentary productions, no submission was made concerning the content of any of these. There is no reference to any defence production in the written record of preparation or in the defence statement. There is no reference in any of the court minutes to any application to permit defence productions to be lodged out of time. I shall therefore refuse to admit the questioning identified in the last two sentences of this paragraph.

Part 1 paragraph (j)

[57] The first sentence of this paragraph refers to a photograph which the accused claims to have accessed and to be of the complainer. He claims it was taken and posted around February 2017 (when the complainer was 6 months pregnant). I was informed that it is a sado-masochistic image of a woman wearing a mask who is not discernibly pregnant. The

complainer denies that it is of her. The application made on the accused's behalf contains no basis for concluding that leading evidence about this image would be relevant to the charges brought, nor does it provide any justification for the assertion in part 5 that the leading of this evidence would entitle the jury to infer that the complainer's evidence in relation to the charges is neither credible nor reliable. The matter was not advanced in submissions and, as mentioned earlier, the applicant's submissions did not touch upon the terms of section 275(1)(c). Given the nature of the evidence under discussion, one might have thought that the question of whether its perceived probative value was outweighed by the appropriate protection of the complainer's dignity and privacy would have been a matter that was brought into very sharp focus. In my view, the evidence specified in the first sentence of this paragraph is of no relevance to the issues at trial. I shall therefore refuse to admit the questioning specified in this first sentence of this paragraph. The remainder of this paragraph refers to conduct by or on behalf of the accused, the complainer's refusal to permit access to their son, the date of making a (further) complaint to the police and her failure to mention the events of charge 5 in that statement. None of these matters engage section 274. I shall therefore refuse the application in relation to these sentences as being unnecessary.

[58] When considering a section 275 application, it is necessary for the court to determine at the outset whether the evidence proposed to be adduced is admissible at common law. Evidence which does not pass the test of relevance is not admissible at common law. Neither is evidence which concerns a collateral issue. Evidence which is not admissible at common law is not rendered admissible by section 275. The provision was designed to restrict evidence and not to remove common law prohibitions. If the proposed evidence is

not admissible at common law there is no need to consider the terms of sections 274 or 275 (*CJM* v *HM Advocate* 2013 SCCR 215).

[59] In the case of *Judge* v *United Kingdom* 2011 SCCR 241 the European Court of Human Rights was satisfied that the scheme for controlling the admissibility of evidence as encompassed by sections 274 and 275 comprised a reasonable and flexible response to the problem of questioning complainers in sexual offences cases and provided for a legitimate means of achieving the objectives pursued by the legislature when it enacted the provisions. There can therefore be nothing unfair about applying the terms of the provisions.

Decision

[60] Having determined the application according to the rules of evidence, as I understand them to be, and according to the terms of the statutory provisions, I have granted the application in a restricted fashion. I have allowed the questioning as specified in the third sentence of part 1 paragraph (i) of the application. I have refused to give effect to the remainder of the application. My detailed reasons for these decisions are given above.