APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 45
HCA/2020/000269/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

STATEMENT OF REASONS

Issued by LADY DORRIAN, the LORD JUSTICE CLERK

In an appeal under Section 74 of the Criminal Procedure (Scotland) Act 1995

by

JL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (sol adv); J C Hughes, Solicitors, Rutherglen
Respondent: Farquharson, QC, AD; Crown Agent

14 October 2020

Introduction

[1] The appellant is charged *inter alia* with a series of sexual offences against A between December 2009 and 2014. These include charges of lewd and libidinous conduct and three charges of rape. In respect of these charges, the appellant has lodged a special defence of incrimination of B, who was separately indicted for, and convicted of, sexual offences against A. No section 275 application was lodged by the defence. The Crown lodged a

minute objecting to the leading of any evidence on the incrimination, including cross-examination of A, as this, relating to "sexual behaviour not forming part of the subject matter of the charge" was prohibited by section 274(1) of the Criminal Procedure (Scotland) Act 1995. The defence argued that the conduct did form part of the subject matter of the charge and so the evidence would be competent without an application. The preliminary hearing judge rejected that argument, which is repeated in this appeal. The Crown oppose the appeal, repeating the arguments which were successful at first instance and relying on the opinion of the preliminary hearing judge.

[2] The charges against the incriminee overlapped in time, and in respect of one locus, the charges against the appellant. It was submitted that the evidence sought to be led in furtherance of the incrimination was "that the complainer engaged in behaviour forming part of the subject matter of the charge", namely the sexual acts specified in the charges, which if they occurred, were committed not by the accused but by another person. It was not intended to go beyond the boundaries of the charge. The evidence thus relates to specific incidents. It was admissible at common law. It related to whether the offence was committed and who committed it. The evidential basis for the questioning was specified as consisting of (i) an undated statement said to be made to the appellant by A that the incriminee had raped her; (ii) a police statement dated 19 February stating that the incriminee was abusing her; (iii) the overlap between the charges against A and those against the incriminee; and (iv) evidence from family members that the incriminee stayed over on occasions in the family home. The evidence was said to be relevant to whether the offences occurred and who committed them. Since it was part of the subject matter of the charge no application was required. Having regard to the policy of the legislation, and the exception for matters forming part of the charge, no application was required where the

evidence related to an incrimination. Further details of the submissions will be apparent from the decision below.

Analysis and decision

[3] We reject the submission that a section 275 application would not be needed in the circumstances of the present case. We would observe as a preliminary that the overlap in the charges is not significant. Three of the offences committed by the incriminee took place at the one address, specified only in charge 4 against the appellant, which also avers conduct at another address. The fourth took place in entirely different circumstances, outside. The overlap in time is only with charge 4. Of the four charges against the incriminee, only charge one relates to conduct on more than one occasion. The charges against the appellant all specify various occasions over lengthy periods of time. It was submitted that evidence in respect of an incrimination was not, as a generality, collateral. That may be so in cases, where there is a clear evidential basis for the incrimination. The evidence referred to in the submissions for the appellant may well be capable of suggesting that the incriminee abused A. But that is not the question in these proceedings, taking proper account of the incrimination. The fact that the incriminee abused A is not in doubt, standing his conviction. It does not follow that the incriminee was the only person to abuse her and that the appellant did not do so. The statements made by A suggest the contrary.

[4] Turning to the main substance of the argument, the subject matter of the charge is criminal behaviour alleged to have been committed by the accused. Sexual behaviour involving someone other than the accused is not sexual behaviour forming part of the subject matter of the charge. The Preliminary hearing judge was therefore correct to recognise:

> "… … the principle that any charge of sexual offending involves the libelling by the Crown of two critical facts for proof at trial, namely: (i) the occurrence of the unlawful sexual act in question; and (ii) the identity of the person who made the complainer subject to that unlawful act. The standard forms of charge in terms of section 64 of the 1995 Act also require a degree of specification of the time and place of the alleged offence. A charge of sexual assault does not, therefore, exist in the abstract. It relates to a particular act, at a particular time and place, by a particular person. That suggests that the proper construction of the words "the subject matter of the charge" in section 274(1)(b) encompasses not only the particular sexual act at a specified time and place but also the identity of its alleged perpetrator."

[5] If the defence is that these specific acts, on these specific dates, and at these specific *loci*, were committed not by him but by an incriminee, then that is evidence which is not part of the subject matter of the charge.

[6] The matter is in our view clear on the simple wording of the section. If there were any doubt, however, it would be dispelled by examining the legislative history of the provisions, as the preliminary hearing judge noted at paragraph 16 of his report, and as the Advocate Depute submitted. The predecessor legislation contained the prohibition that "the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer … (c) has at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge" (section 274, and formerly in section 141A of the Criminal Procedure (Scotland) Act 1975). This was subject to the exceptions, which included that the court could permit such evidence when "the questioning or evidence referred to in paragraph (c)" was "relevant to the defence of incrimination". Accordingly, even at that stage, it was recognised that evidence of the kind sought to be led in the present case was evidence which came within the terms of the prohibition, and could only be allowed if the court could be satisfied that the evidence was relevant to the defence of incrimination. We do not accept the submission that the removal of the words "with any person" supports the defence argument. The revisions to the

legislation which resulted in the current provisions were designed to strengthen rather than weaken their effect.

[7] The context in which the issue arises, and the practical effect of the appellant's argument must also be considered. If correct, the defence would be entitled to put to a complainer any questions about sexual activity with the incriminee so long as these were within the boundaries of the acts asserted in the charge. However, as can be seen by the short description of the differences between those acts committed by the incriminee and those said to have been committed by the accused, it would in reality be artificial to restrict the questioning in this way. In fairness to the witness, the incriminee and the wider public interest, the Crown would not unnaturally wish to explore these differences, thus expanding the scope of the subject matter to include clearly collateral matters, even if the original questions put by the defence did not have such a character, which will often be open to question. All of this would only be apparent at trial, with the spectre of lengthy objections having to be determined at that stage, and late applications having to be made by the Crown during the trial proceedings. Leaving aside the issue of admissibility, with which we are not primarily concerned, the resulting free-for–all would result in chaos, and risk seriously undermining the purpose of the legislation. The only reasonable and practical way to address the issues which might arise is to construe the legislation as we have done, requiring a section 275 application to be made. One can conceive of circumstances where such an application might be granted; but the overall matter would remain under the control of the court. The result is not that the appellant is deprived of leading the evidence or asking the questions, but simply that he would have to satisfy the court that the tests appropriate to the granting of a section 275 application have been met. Without such control there would be a significant risk of the jury being distracted by collateral matters or of a complainer's privacy

and dignity being unduly intruded upon. It is entirely within keeping with the scheme of the legislation that the type of questioning envisaged should be allowed only if it can be shown to serve a relevant and legitimate purpose.