APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 12
HCA/2020/207/XC

Lord Justice General
Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION AND SENTENCE

by

DANIEL WILSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Hay, Adam; John Pryde & Co (for Turnbull McCarron, Glasgow)
Respondent: Edwards QC AD; the Crown Agent

11 February 2021

Introduction

[1] The appellant originally faced nine charges: (1) and (3) indecent (and physical) assaults on his partner AA; (2) rape of Ms A; (4) assault on Ms A; (5) indecent assaults on JA, the child of the appellant and Ms A; (6) physical assaults on JA; (7) an assault on both complainers (see below); (8) possession of indecent photographs; and (9) a breach of the peace. In advance of the trial, the Crown "deserted *pro loco et tempore*" charges (1) to (4) and

(8) and (9). This was on the basis that Ms A was the sole or decisive witness on these charges and that therefore, in the Crown's view, they could not be proceeded with. This left charges (5) to (7).

[2] On 7 November 2019, at the High Court in Edinburgh, the appellant was found guilty of two of the charges. These libelled as follows:

> "(6) on various occasions between …1994 and …1998, … at … Craigmillar Castle Loan and … Magdalene Gardens both Edinburgh you …did assault [JA], born … 1994 your son, … punch and slap him on the head and body, push him on the body and repeatedly strike him on the head and body, all to his injury; and
>
> (7) on an occasion between … 1996 and … 1998, … at Salisbury Crags or Arthur's Seat, Holyrood Park, Edinburgh you … did assault [AA] your then partner, and [JA], … your son, … seize … [AA] by the clothing while she was holding … [JA], repeatedly push her on the body towards a cliff edge causing her to slip, and hold them at said cliff edge and repeatedly threaten to push them off, placing them in a state of fear and alarm, and to the danger of their lives."

Charge (5), which libelled repeated sexual assaults on JA, was found not proven. On 13 March 2020, the appellant was sentenced to five years imprisonment.

[3] Prior to the trial, the Crown had lodged an application, under section 259 of the Criminal Procedure (Scotland) Act 1995, to admit as proof of fact seven written statements taken by the police in 2014 from AA; a complainer on charge (7) and a witness on charge (6). The trial judge, who, as a preliminary matter, had heard testimony from a consultant psychiatrist and the police officer who had taken the statements, determined that, in terms of section 259(1) and (2)(b), Ms A was, by reason of her mental condition, unfit or unable to give evidence in any competent manner. He therefore determined that the statements were admissible.

[4] The conviction was then based, first, on the hearsay of Ms A, as she was recorded in 2014 as reporting events which had allegedly occurred some 20 or more years previously

and, secondly, on the testimony of Mr A in 2019 about events which he said he had experienced 21 years or more previously, when he was less than 4 years of age. On account of this unusual evidential position, it is important to record *in limine* that the appeal is not based either on a challenge to the decision to admit the statements in terms of section 259 or on a contention of unreasonable verdict under section 106(3)(b) of the 1995 Act. The appeal does not address issues about the competence and relevancy of two witnesses who were adduced by the defence. These were a child psychologist, who spoke, *inter alia*, to the ability of an adult to recall events in childhood, and a curator *ad litem*, who had looked into the circumstances of the appellant and the family during contact proceedings in 2006 and 2007.

[5] The appeal, as framed, is a narrow one. It concerns whether, as a result of the admission of the written statements of Ms A, the trial was unfair in terms of Article 6, and specifically Article 6.3(d), of the European Convention, because Ms A was a sole or decisive witness, whom the defence had not had the opportunity to cross-examine. In addition, there were doubts about the accuracy (or perhaps the completeness) of her statements. Ms A was decisive because Mr A had been aged only 3 or less at the material time. The psychologist, whom the appellant had led, had said that a person's memory of the first two years of life was lost in adulthood and that, from the ages of three to seven years, there was a tendency for the memory of specific events to be lost; even if some memory was retained. The curator *ad litem* had reported that Ms A had lied to her about certain matters. She had been of the view that Ms A's extreme negativity had "fed" Mr A's "own fearful memories".

The Crown Case

JA

[6] Mr A was 25 years of age at the time of the trial. He had stopped living in the same

household as his father, the appellant, when he was "around about three". He had not seen him since then. In relation to charge (6) Mr A said that he "used to get physically hurt" by the appellant. The appellant would punch him. The punching would happen "a lot of the time" in his bedroom, the livingroom or the appellant's bedroom. He was punched on the shoulders, chest and legs. Mr A "just remember[ed] being impacted" by the appellant. This happened on more than one occasion.

[7] Mr A described the Salisbury Crags incident, which was libelled in charge (7), as involving his mother carrying him and the "pram" because the steps on the hill were too small. The appellant threatened to throw him and his mother down the hill because Ms A was going too slowly. Mr A thought that the appellant was going to push him and his mother off the cliff. He still had bad dreams about the incident and remembered it "vividly". Mr A also spoke about being touched in a sexual manner, but, as already noted, the appellant was acquitted of the relative sexual abuse charge.

[8] Cross-examination focused on the likelihood of Mr A remembering the Salisbury Crags episode, which Mr A said must have happened when he was only one or two years of age. The improbability of him recollecting the relevance of the size of the steps was one of the points put. Mr A had said in a statement to the police in 2014, in contrast to his evidence, that he had had "loads of bruises"; explaining that he had been taught what a bruise was in nursery. He denied being influenced by anything that his mother had told him. The appellant had not been talked about, other than on one occasion when Ms A had told his younger brother, KA, that his father was a bad man. The testimony about the alleged sexual abuse was criticised as involving elements which a child of three or under would not understand, far less remember. No sexual abuse had been reported during Mr A's many visits to the doctor, child psychologist, child psychiatrist and social worker. It had

not been mentioned in 2006 and 2007 when the issue of contact with the appellant had been raised and the curator *ad litem* had become involved.

Steven Chalmers

[9] Mr Chalmers was a retired Detective Constable who had taken several statements from Ms A over a three month period in early 2014.

Preliminary Jury Directions

[10] Before the statements taken from AA were introduced, the trial judge explained to the jury that, as an exception to the hearsay rule, a statement of a witness could be admitted when the witness was "unfit or unable to give their evidence" as had happened in this case. The judge reminded the jury that, at the outset of the trial, he had said that there were certain safeguards built into the system in relation to the assessment of testimony. These included the jury's opportunity to see and hear the witnesses, including looking at their body language, and the ability of the parties to cross-examine. Written statements were "second-hand evidence" whose assessment required the jury to "take care". The jury had to "give the accused the benefit of any doubt … in relation to evidence of this sort" because it did not have the safeguards that he had outlined.

[11] The trial judge then, essentially, repeated what he had said by "highlighting" the dangers. The jury would not have the opportunity, that they would otherwise have had, if a witness had come into court, to make the same assessment of their credibility and reliability. The truth and reliability of the statements would not be tested by cross-examination. The jury did not have the opportunity to observe the witness as she gave her statements to the police. What was said to the police was not on oath. The judge said again that the jury had to take care when listening to this evidence because the safeguards were not in place. They

required to "proceed with caution, and give the accused the benefit of the doubt that may arise."

The Statements of AA

[12] Mrs A's written statements were not produced in the appeal process. They were said to be lengthy, but that is not immediately obvious from the transcription of DC Chalmers' testimony. In so far as relevant, they were as follows. On 14 January 2014, Ms A described herself as suffering from PTSD with severe panic attacks. She had "really bad" flashbacks. She had met the appellant when she was 19. On 24 January, Ms A described the night before her wedding (and 21st birthday) on 28 May 1994. She had told the appellant that she did not want to go through with the ceremony. He "went mad". He had thrown JA, who had only been born on 2 April of that year, into his Moses basket. Although no longer libelled, Ms A said that the appellant had punched her on the left eye, so hard that she fell to the ground. She was told to, and did, tell the wedding guests that this had been caused when she had opened a cupboard.

[13] On 27 February 2014, Ms A spoke of an incident when JA had come into the couple's bedroom when he was three years of age. The appellant had slapped him across the face "really hard" and knocked him to the floor. He had struck his face against the floor.

[14] On 20 March 2014, Ms A referred to an incident when JA was about three and a half years old and the family had walked up Arthur's Seat. The going had become too tough for her. She was both carrying JA and pulling the buggy. The appellant had refused to help. He had started to push Ms A on the chest. She kept slipping backwards. She had thought that she and JA were going to die.

[15] On 26 March 2014, Ms A said that the appellant had been violent towards JA from a time when he was only a month old. If he cried, the appellant would slap him "really hard" on his legs or bottom. This left finger marks. On one occasion the appellant had banged the baby's head off the floor when he was in a baby-bouncer. This had caused an egg sized lump on his head. This had been shown to the health visitor; the explanation tendered being that the baby had fallen. The appellant continually hit and smacked JA. He threw him into his cot. He hurt the child's back on his first birthday, leaving a bruise. On one occasion, he hit him on the arm "really hard" with a clenched fist. The child "always" had bruises on his legs and bottom. Once JA was walking, the appellant would push and kick the child and make him fall down. On one occasion when he had been pushed, JA fell onto an electric fire. When the child was two years old, the appellant had thrown him to the floor, where he had struck his elbow and arm. On another occasion, when JA was still aged two, the appellant had pinned him to the floor. The child's trousers were down and the appellant was slapping and punching him on the bottom and back.

[16] On 28 March 2018, Ms A began to describe incidents showing or tending to show that the appellant had been sexually assaulting JA. This appeal is not concerned with these allegations, but the timing of the reports was relevant to the credibility of Ms A. The accounts given involved Ms A finding blood on JA's bed sheets and also on her own sheets after the child and the appellant had been sleeping on them.

Cross-examination

[17] The appellant cross-examined Mr Chalmers extensively (85 pages of transcription). He began by exploring Ms A's personal history, as revealed in a statement of 14 January 2014. At the age of 13, Ms A had been the subject of a place of safety order which required

her to stay in a children's home. She had been sexually assaulted by her step-father and by a friend of his, who was subsequently convicted of offences against her. She had been physically and sexually abused by a member of staff at the children's home. She had been assaulted by her first foster carer. She had run away at times and been in trouble with the police. At the age of 16, she had returned to her family home, but had again been sexually assaulted by her step-father. A later statement of 24 January 2014 referred to Ms A self-harming from the age of 10 by cutting herself with a razor or a knife. She had also taken overdoses of drugs.

[18] The absence of any medical records was raised by the appellant. The method by which DC Chalmers took the statements was covered; it being pointed out that only in the last one (28 March) was there a clause which expressly stated that the statement was true and accurate. The assault on Ms A on her wedding night was revisited. She had said that her parents had been at the wedding. A statement of her mother, in which she said that she had only found out about the wedding a year after it had happened, was put before DC Chalmers. Wedding photographs, which showed the left side of Ms A's face, were shown to him.

[19] Although this was not libelled in the charges which remained for trial, the appellant introduced passages from the statement of 24 January 2014 in which Ms A referred to three episodes, during the first 6 months of her marriage, in which she maintained that the appellant had poisoned her by introducing something, which she referred to as black bean sauce, into her food. On the last of these, the doctor had been called. He had diagnosed salmonella (the meal having been chicken) and had given her an intravenous dose of what she thought had been morphine. The appellant's cross focused on a reference, which Ms A had made, about one of these episodes having occurred when KA was a baby. This would

have been after his birth in May 1996 and therefore not within 6 months of the marriage. DC Chalmers said that he thought that Ms A had been referring to the same incident as she had previously described as occurring within the 6 month period. In explaining the reference to KA, he said (p 25):

> "… we've got to remember that I've taken seven very lengthy statements from her, all of which had a huge amount of information in them. So, therefore, it would be very easy for me, when she mentioned something, not to put that information together".

The absence of a medical record relating to the injection was pointed out.

[20] On the Arthur's Seat episode, DC Chalmers was asked why he had not enquired about the whereabouts of KA, who would have been 18 months old, at the time. Again, although not in the libel for trial, the appellant introduced parts of the statement of 27 January 2014, in which Ms A had referred to the appellant inserting a rolling pin into her vagina two or three times a week, when she was pregnant with JA; yet there was no evidence of any injury to the child on birth. There was a suggestion that there was no injury following the baby bouncer episode, but this was clarified in re-examination as Ms A had mentioned an egg sized lump, which had been seen by the health visitor. It was pointed out that, in relation to blood on sheets, there was no mention of this being on the child's pyjamas or underwear.

[21] Ms A's mental state was revisited under reference to a report from a consultant psychiatrist dated March 2014 in which it was stated that, despite the benign nature of the interview, Ms A had been unable to answer most of the doctor's questions or "engage in dialogue" with her. DC Chalmers was asked to explain why sexual abuse had only emerged in Ms A's last statement. He said that, although it had previously been mentioned, he was

anxious to take the subject matter in order. He had left this aspect to the end. It was extremely uncommon to record statements on video in 2014.

The Defence Case

[22] The appellant did not testify. He did lead evidence from Dr Bryan Tully and Marion Foy.

Dr Tully

[23] Dr Tully is a registered clinical and forensic psychologist. The trial judge does not summarise Dr Tully's evidence, other than to say that Dr Tully was of the opinion that "caution was indicated in relation to the evidence of [JA]". The judge said that Dr Tully "spoke to his report". Exactly what that meant, in terms of what was laid before the jury, is unclear.

[24] According to his report, Dr Tully was given access to psycho/play therapy notes relating to Mr A which had been taken in 2006. He had read the statements of Ms A which, he said, painted a picture of the appellant as an extreme version of "The Abusive Personality". Mr A had a tendency, when aged two, to hurt other children in the nurseries which he attended. This included trying to strangle a little girl. One statement recorded that Mr A understood that his mother's medical conditions had arisen partly as a result of her being "treated violently by his dad". As he had grown older, he had started to remember "bits and pieces" about when he was young. This had occurred when he had been an in-patient with depression at the age of 15 or 16. The statement recorded physical and sexual abuse. Mr A had undergone anger management. From that time on, he began to remember more and more. Dr Tully made reference to the content of Marion Foy's reports in 2007

(*infra*). These proffered the view that some of Mr A's difficulties may have been "fabricated or exaggerated" by his mother.

[25] On the day before he provided a precognition (28 August 2018), the appellant wrote a statement, with the script written tightly together and occupying all the space from edge to edge of the paper. The narrative style was extraordinarily detailed and specific. Since it contradicted Mrs A's account "hugely", one or other must, in Dr Tully's view, be a fantasist or fabricator. If much of the statement were untrue, a relatively rare form of mental condition, namely "paranoid querulousness", was indicated. This was a marker for vexatious litigation.

[26] Dr Tully described a "childhood amnesia curve" as encapsulating a period, during which a child was four years or less, when caution was required in relation to the accuracy of recall. Memories for events in the first two years of life were gradually lost as the person developed into adulthood. Thereafter, from three until seven years of age, there was a continuing tendency for episodic memories to be lost, but some were retained if they involved an enduring or emotionally distressing or otherwise significant event.

[27] Dr Tully considered how the psychological research should be applied to Mr A. He noted that, from the witness statements and the hospital notes, Mr A had his memories elicited and discussed on a number of occasions without there being a clear record of how that process had taken place. Whatever memories may have arisen between the ages of three and four, they were not continuous or stable but had been processed repeatedly. This was "cause for caution". Dr Tully noted the absence of any recorded reports of sexual abuse by the social work department or the curator *ad litem*. He commented that many victims avoid or hide the past, but this was "one more reason for caution".

Marion Foy

[28] All that the trial judge said about the testimony of Ms Foy was that she gave evidence "in relation to reports which she had prepared as curator ad litem". There were four such reports, all stemming from contact proceedings in Edinburgh Sheriff Court in 2006-2007, which, the trial judge added, "can be referred to for their terms if required". The Crown had objected to this evidence on the basis that the appellant was seeking to elicit Ms Foy's views on the credibility and reliability of Ms A. The judge repelled the objection on the basis that the evidence "was an example of the safeguards provided to the appellant by section 259(4) of the 1995 Act." Once more, what was put before the jury is opaque.

[29] By the time of Ms Foy's inquiries, the children had not seen the appellant for about eight years. Ms A had told her that the appellant had "over smacked" Mr A, who had also seen violence occurring in the household. He had experienced insomnia and suffered PTSD as a consequence. Ms A's relationship with the appellant had ended in 1998 when Mr A had reported sexual abuse by the appellant. Ms Foy relayed to the sheriff the views of the social work department, who had been involved with Mr A and his younger brother KA, for several years. Her report includes a reference to the senior social worker regarding Mr A as "authentic when describing experiences in his earlier childhood". Ms Foy had spoken to a child psychiatrist, who had also been involved with the brothers for some time. The psychiatrist thought that "consideration should be given to the possibility that the children have experienced or witnessed violence prior to their parents' separation…". Mr A had told Ms Foy that he:

> "still remembers some of the things that happened when he was young and he still has very bad dreams. …[H]e can remember his father lashing out a lot, at himself… …[H]e remembers being hit and frightened between the ages of one and three…".

[30] Having completed further inquiries, Ms Foy reported that there was:

> "credible evidence to suggest that the [appellant] has …been violent to [Ms A] and that [Mr A] witnessed this."

What had been a vague suggestion of Mr A being sexually abused, when Ms Foy had first met Ms A, had firmed into a positive accusation. Ms A had concealed from Ms Foy the nature of her relationship with another woman; ie that they lived together. Apparently on the basis that she had been lied to on this subject, Ms Foy thought it "necessary to question whether there is any truthful basis for her allegation that [the appellant] had physically and sexually abused [Ms A]". Ms Foy had gleaned certain information from a clinical psychologist, who had been treating Mr A. The psychologist had considered that Mr A had problems arising from his domestic circumstances and his relationship with his mother "rather than all of his problems stemming from historical domestic violence". Ms Foy considered that that was consistent with her own inquiries (unspecified), which indicated that some of Mr A's difficulties may have been fabricated or exaggerated by his mother. Ms Foy was of the view that Mr A's "own fearful memories appear to have been fed by his mother's extreme negativity towards [the appellant]".

Charge to the Jury

[31] The trial judge embarked upon what can only be described as a detailed and repetitive analysis of certain factors which might influence the jury when assessing the credibility and reliability of the witnesses. The judge commenced in general terms by directing the jury that "unreliability" could come from a "whole host of things", including lapse of time, the fact that a witness was a newborn or aged only one, two or three at the time. Lapse of time since then could have a very dramatic effect. The judge pointed to Dr Tully's reference to the amnesia curve. The judge gave the standard directions on taking

into account the manner in which a witness gave evidence, including their body language, and contrasting and comparing what the witness said with other evidence. It was a matter for the jury to assess weight, but that "in relation to a child of zero to 3 you may take the view that you can attach no weight at all to evidence relating to that period."

[32] After an adjournment overnight, the trial judge returned to this subject by telling the jury that he needed to give them "a much sterner warning" in relation to the evidence which they had heard. He gave them what might be described as a *cum nota* plus warning by saying that they required:

> "to look at the evidence of both the main witnesses,… [JA] and [AA], with extreme caution. Extreme caution."

If the jury had "any reasonable doubt about the credibility or reliability … of either [JA] or [AA]" they could not convict of any of the charges. The judge repeated the need to proceed with "extreme caution". In relation to Mr A, at the times in the libel, he had been aged from newborn to three. The jury had heard from Dr Tully about memory loss. They had been addressed by defence counsel on the poisoning of Mr A's mind. There were mental health issues in relation to both Ms A and Mr A and instances (presumably pre trial) when they had not been telling you the truth. There had been a conflation of the evidence.

[33] Once again, the trial judge returned to the absence of the safeguards; the norm being that a witness was brought into court, put on oath, and cross-examined by skilled counsel. The rule in relation to hearsay was there for a very good reason. It was "second best" evidence. The judge repeated, in relation to both Ms A and Mr A, that there were grounds for "extreme caution". The advocate depute had repeatedly made the point that caution was required and defence counsel had emphasised in considerable detail the various reasons that would give rise to that cautious approach.

[34] At a later part of his charge, the trial judge went back yet again to the same topic, by reminding the jury that, prior to the admission of the written statements, he had given them "a warning about the dangers involved…, the dangers involved inherent in evidence of that sort". The starting point was that hearsay was not allowed but there were exceptions. A statement being read out was, according to the judge's directions, "completely different from evidence being given from that witness box". The evidence was second-hand. The judge said again that what was said in the statements had not been given on oath or been the subject of cross-examination. The jury had not had the same opportunity to assess Ms A as a witness as if she had given evidence from the witness box. The jury had to approach these matters with "extreme caution". He listed once more the dangers of the hearsay evidence: the absence of an opportunity to observe the maker of the statement; the absence of cross-examination; the lack of an oath; dangers special to the facts in relation to Ms A's mental health and proof that she had previously lied. There was, in relation to Mr A, a background of "siege mentality" and the poisoning of his mind.

[35] The trial judge directed the jury towards Dr Tully's evidence that it was settled science that memories for events in the first two years of life were gradually lost as the individual developed into adulthood. According to Dr Tully, caution had to be applied in relation to events within the amnesia curve. He had also spoken to: the effect of flashbacks; the evidence relating to Arthur's Seat; and things that were inherently unlikely, in his professional opinion.

Submissions

Appellant

[36] The first ground of appeal, which had been granted leave (ground 2), was that the

trial judge erred in refusing a no case to answer submission that the appellant could not have a fair trial. Mr A had become one year old at the start of the period of the libel in charge (6). The libel in charge (7) started when he was born. Ms A was both the primary and the corroborating source of evidence. Accordingly, her evidence was sole or decisive (*S* v *HM Advocate* 2020 SCCR 403 at para [18], citing *Schatschaschwili* v *Germany* (2016) 63 EHRR 14 at para 116-118, following *Al Khawaja v United Kingdom* (2012) 54 EHRR 23 at para 131). The more important the evidence, the more weight the counterbalancing factors had to carry. These factors could not overcome the unfairness caused by the inability of the defence to cross-examine Ms A. The assessment of a witness's credibility and reliability was a classic function of the jury. Ordinarily that assessment was carried out by comparing the witness's testimony with other evidence, using the jury's collective experience in assessing inherent plausibility, and looking at demeanour.

[37] Had Ms A given evidence, the appellant would have cross-examined her on: the curator *ad litem's* report, in which it was said that she had lied about her relationship with another woman; the evolution of the allegations of sexual abuse; the absence, when contact was ongoing, of any mention to the curator that she had been the subject of sustained sexual abuse; the negative influence that she had on the children and her poisoning the mind of Mr A against the appellant; whether she had lied about her mother being present at her wedding on her 21st birthday; the absence of any bruising shown on photographs; the lack of any medical evidence; and whether she had ever discussed the appellant's behaviour with Mr A.

[38] Ms A's statements contained "multiple hearsay" about what Mr A had said. There had been no opportunity to cross-examine Ms A about this or on whether she had contacted outside agencies. The statements had been given between January and March 2014, when

Ms A's mental health was deteriorating. She had been talking about events that were alleged to have occurred some 15 to 20 years previously. None of the statements contained the usual declaration that the witness had read the statement before initialling or signing it or that the statement had been read back to the witness. Only the last statement ended with the formula that the statement was "true and accurate". The statements must have taken a considerable amount of time to complete. As an example, one of them was recorded as lasting from 09.30 to 12.52. DC Chalmers said that he might not have recorded all of what Ms A said at the time. He conceded that there were several lengthy statements and it would be very easy for him "not to put that information together".

[39] The original indictment had contained nine charges of sexual and physical assaults on both complainers. Prior to the commencement of the trial, the Crown had withdrawn all the charges on which the Ms A was the principal complainer. The Crown conceded, on advice from the Law Officers, that these charges could not proceed. This did not go far enough, given the sole and decisive nature of Ms A's evidence in relation to all of the charges.

[40] On the second ground of appeal (ground 3), the trial judge erred in refusing a defence motion that the section 259 evidence "should not go to the jury". The judge described the case as "somewhat exceptional". The effect of the evidence of the psychologist, and the curator *ad litem*, was to paint a picture whereby Mr A would have remembered very little of the events in the first few years of his life and that over time his mother had poisoned his mind against the appellant.

Crown

[41] The advocate depute replied that there had been no challenge to the admissibility of Mr A's testimony. The evidence of Dr Tully was only relevant for the purpose of assessing

what weight could be attached to that testimony. The jury rejected the suggestion that it was either directly sourced from his mother or the product of a false memory. The evidence of Ms A was therefore not the sole and decisive evidence on either of the charges. She supported that of Mr A. The testimony of one complainer could be corroborated by the hearsay of another (*S* v *HM Advocate* (*supra*) at para [15], citing *Lees* v *HM Advocate* [2016] HCJAC 16 at para [8]).

[42] Even if the evidence of Ms A had been the sole and decisive evidence, its admission did not automatically render the trial unfair. The right of an accused to cross-examine witnesses was not absolute, even where the evidence was decisive. What may be in issue was the weight to be attached to the statements and, in a jury trial, what directions required to be given (*Campbell* v *HM Advocate* 2004 JC 1 at paras [16] and [17]). The court must subject the proceedings to the most searching scrutiny where the hearsay was sole and decisive. Sufficient counterbalancing factors, including the existence of strong procedural safeguards, were required (*Al-Khawaja* v *United Kingdom* (*supra*) at para [147]). Evidence relevant to the credibility or consistency of the maker of the statement could be admitted, even if it would be inadmissible had the maker of the statement given evidence. Section 259(4) of the 1995 Act provided for this. Fairness of the trial was always a consideration. A judge could stop a trial if it was no longer fair (*Beurskens* v *HM Advocate* 2015 JC 91 at paras [30] – [35])

[43] Hearsay evidence was not decisive solely because it was the only direct evidence against an accused or was otherwise necessary to establish the essential elements of the crime. Sufficient safeguards included: (1) the statements being taken by an experienced police officer in a formal setting; (2)) the giving of strong directions to the jury on the limitations of hearsay; (3) the opportunity for the appellant to lead evidence to rebut the content of the statement; and (4) the ability of the appellant to make submissions to the jury,

stressing the hearsay nature of the evidence and any discrepancies (*Graham* v *HM Advocate* 2019 JC 26 at para [43] – [53]; *S* v *HM Advocate* (*supra*) at para [8]). In this case, there were clear and strong directions by the trial judge. The jury were directed on several occasions to apply extreme caution to the hearsay evidence, and to that of Mr A's testimony too. The jury were reminded of the evidence of Dr Tully in that regard.

[44] The appellant had the opportunity to give evidence. The fact that he did not wish to make use of that safeguard did not detract from its existence. He did lead evidence to challenge the credibility and reliability of Ms A by calling the curator *ad litem*. Although the defence referred to a disadvantage in not being able to cross-examine Ms A, her absence was favourable in that she was not able to explain the testimony of the curator. The defence drew the jury's attention to the dangers of accepting the evidence. The appellant took full advantage of the ability to do so and this was commended to the jury by the judge.

[45] The testimony of Dr Tully had not been objected to by the Crown but it was largely inadmissible as unnecessary for the resolution of the issues (*Gage* v *HM Advocate (No 1)* 2012 SCCR 161 at paras [21]-[22]; *R* v *E* [2009] EWCA Crim 1370 at paras 42-43). The evidence of Ms Foy was also inadmissible as collateral (*CJM* v *HM Advocate* 2013 SCCR 215 at paras [38]-[39] citing *McBrearty* v *HM Advocate* 2004 JC 122).

Decision

[46] In *S* v *HM Advocate* 2020 SCCR 403 the court set out the principles to be applied when considering whether there has been a breach of Article 6 of the European Convention, notably Article 6(3)(b), because of the admission of hearsay, as follows:

> "16. .... In *Schatschaschwili* v *Germany* (2016) 63 EHRR 14 the European Court revisited *Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23 . It emphasised (at para 101) that the primary task for the court is to evaluate the overall fairness of the proceedings. The court must have regard to the rights of the defence, notably the

right under Article 6(3)(d) to examine witnesses, but also the interests of the public and victims in seeing that crime is properly prosecuted (*ibid*). The use of police statements was not *per se* inconsistent with Articles 6(1) and 6(3)(b) , provided that the rights of the defence have been respected (*ibid* para 105). This was so whether or not the hearsay was the "sole or decisive" evidence, having regard to the task of examining whether the proceedings as a whole had been fair (*ibid* para 106). The admission of hearsay was an important factor to balance in the scales because of the inherent risks which such admission carried.

17. The court required to examine whether: (i) there was a good reason for the non-attendance of the witness; (ii) the hearsay was the sole or decisive basis for the conviction; and (iii) there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence and to ensure that the trial as a whole was fair (*Schatschaschwili* v *Germany* (*supra*) at para 107). These elements are inter-related and are not to be looked at in any set order (*ibid* para 118). Even if there was no good reason for a witness's non-attendance, that would not automatically amount to a breach of Articles 6(1) and 6(3)(d) , given that the evidence may be neither decisive nor even relevant (*ibid* para 112). Nevertheless, the lack of a good reason was a very important factor to weigh in the balance…

18. Even where it is not clear whether the hearsay was the sole or decisive evidence, the court requires to examine whether there were sufficient counterbalancing factors necessary for the trial to be considered fair (*Schatschaschwili* v *Germany* (*supra*) at para 116). The more important the evidence, the more weight the counterbalancing factors will have to carry. Whether evidence is to be regarded as decisive is to be narrowly interpreted as meaning evidence of such significance or importance as is likely to be determinative of the outcome of the case (*ibid* para 123)…"

19. The counterbalancing factors must permit a fair and proper assessment of the reliability of the evidence (*Schatschaschwili* v *Germany* (*supra*) at para 125). The fact that the court has approached the untested evidence with caution, and given the jury specific directions on this, is an important feature (*ibid* at para 126). A further "considerable safeguard" is the availability of corroborative evidence (*ibid* at para 128). This includes evidence of a comparable offence, especially where the witness testifying to the latter has been tested in cross-examination (*ibid*). Another factor is the opportunity given to the accused to present his own version of the events and to cast doubt on the credibility of the hearsay, including the proffering of any motives which the witness may have for lying."

[47] In relation to both charges (6) and (7), the hearsay evidence of Ms A was neither the sole nor the decisive evidence. As stated at the outset, the appeal is not directed to the reasonableness of the jury accepting the evidence of Mr A on the basis that he was speaking about events when he was aged three or less.

[48] The evidence of young children is a relatively frequent occurrence in the courts. In recent times major steps have been taken to improve the way in which such evidence is taken. The evidence of children has for centuries been accepted as potentially both credible and reliable (Allison: *Practice* 432). There is normally no reason to give the jury a *cum nota* warning in relation to the evidence of a child (*Younas* v *HM Advocate* 2015 JC 180, LJC (Carloway), delivering the opinion of the court, at paras [72] – [74]). Mr A was an adult witness. Whether he could accurately recall what had happened in his earlier years was a matter for the jury to determine having regard to their own experiences of life. The jury would be expected to know how to assess the recollection of adults who are speaking of events deep in their childhood. That is a common occurrence. Once more, there is no obvious need for a *cum nota* warning from the judge, albeit that the parties could make appropriate submissions on reliability based on the lapse of time. In this case the judge did give such a warning. This was heavily in favour of the appellant. The jury nevertheless duly resolved the issue by accepting that Mr A did recall the events libelled; perhaps not surprisingly having regard to their traumatic nature.

[49] As the matter does not arise directly in this appeal, the court reserves its opinion on the competence of Dr Tully giving evidence on the general ability of persons to recall events in very early childhood. That is not because Dr Tully's expertise is in any way questionable, but because, on that topic, it covers areas of comprehension which are within human knowledge and experience. The evidence of a skilled witness is normally only admissible if it is necessary for the proper resolution of the dispute; that is if the jury cannot reach a sound conclusion without it (*Gage* v *HM Advocate (No 1)* 2012 SCCR 161, LJC (Gill), delivering the opinion of the court, at para [22]). That will occur only where there are special features relating to the witness or his testimony that are likely to be outwith the jury's knowledge or

experience (*ibid* citing *HM Advocate* v *A* 2005 SCCR 593 Lord Macphail at para 11). Questions of credibility or reliability are pre-eminently matters for the jury, who, as people of ordinary intelligence and experience, are capable of making the appropriate assessment without expert assistance (*ibid* at para [21]; see also *HM Advocate* v *Grimmond* 2002 SLT 508). In any event, as Dr Tully accepted, an adult may be able to recall traumatic events when he or she was aged three and that is sufficient for present purposes.

[50] Similar considerations apply to the evidence which was adduced from Ms Foy, and to a significant extent many of the matters put to DC Chalmers, about the backgrounds of both Ms A and Mr A. The relevance of such evidence is not immediately obvious. As was made clear in *CJM* v *HM Advocate* 2013 SCCR 215 (LJC (Carloway) at para [39]):

> "Evidence that a complainer suffers from an objectively diagnosed medical condition and that such a condition may, as a generality, have a bearing on a person's ability to know or tell the truth is admissible, but the matter stops there as a matter of expediency. What is not permissible is a public trawl through that person's life history in order to uncover and narrate episodes during which the witness has made particular statements or questionable lifestyle decisions."

The trial judge appears to have considered that section 259(4) of the 1995 permitted a wider exploration of a person's character where what is relied upon is the hearsay of that person. Although the matter is best left for determination when it arises directly for consideration, it is doubtful whether that section has this effect.

[51] Once it is accepted that the hearsay was not the sole or decisive evidence on either charge, the appeal is found to fail. As in *S* v *HM Advocate* (*supra*), the necessity in Scots law terms to have corroboration of Mr A's testimony, and the fact that this came in the form of evidence of the hearsay of Ms A, does not render Ms A's evidence decisive in Article 6 terms.

[52] Even if the hearsay of Ms A's had been decisive, the court is satisfied that, applying *Schatschaschwili v Germany* (*supra*), the appellant did have a fair trial. There were adequate counterbalancing factors present. First, although the statements were not video or audio recorded, they were taken by a police officer and were signed by the witness. Secondly, the appellant was able to, and did, cross-examine DC Chalmers on the manner in which the statements were taken. Thirdly, whether competent or not, the appellant was allowed to introduce aspects of Ms A's background (including her childhood experiences) as supposedly having a bearing on the credibility and reliability of her statements. Fourthly, the appellant was able to cross-examine Mr A in the conventional manner in relation to his testimony on both charges. Fifthly, the jury were able observe Mr A as he gave evidence, and to take into account, so far as they thought appropriate, his body language. Sixthly, the appellant was able to put a series of matters to Mr A concerning his background and character, albeit that the competence and relevance of so doing is unclear. Seventhly, the appellant had the opportunity, although he elected not to take it, to give his own version of events by testifying on his own account.

[53] Finally, as will have been apparent from the description of his directions, both prior to the admission of the statements and in his charge to the jury, the judge went to considerable and repeated lengths to emphasise to the jury what he described as the dangers of hearsay evidence. The jury could have been left with no doubt that they had to approach the statements, with "extreme caution". Whether that was a correct direction is another matter which does not arise for determination in the appeal. It is no doubt appropriate for a judge, who is dealing with evidence of hearsay, to remind the jury of the reasons why hearsay is regarded with suspicion by the law. This was, in traditional terms, not so much because of the absence of the witness from court, or the lack of cross-examination, although

these were factors. It was primarily because of the lack of an oath and, perhaps of more significance in the modern era, the risk that the report of what the witness said was not an accurate, or a complete, account of what the witness did, or did not, say. It was "second-hand" (see generally *Beurskens* v *HM Advocate* 2015 JC 91, LJC (Carloway) at para [16], citing Dickson (*supra*) at para 264).

[54] Although the underlying mistrust of hearsay may have altered its base to one founded upon Article 6 jurisprudence, it remains firmly fixed to the concepts of justice and fairness. When directing a jury on the value of hearsay and the reasons for its general exclusion, but occasional admission, a trial judge may be well advised to direct the jury on these reasons. As ever, when doing so, the judge should bear two general matters in mind. First, in relation to the assessment of credibility and reliability, which is pre-eminently a matter for the jury to determine, it is important not to be condescending to the jury (see eg *Moynihan* v *HM Advocate* 2017 JC 71, LJG (Carloway), delivering the opinion of the court, at para [22]), especially when the issues have already been extensively canvassed in the parties' speeches. There will seldom be any cause for the level of repetition which is prevalent in the trial judge's charge, following the *cum nota* warning already given at the time of the admission of the statements. A judge should take care not to impress upon a jury his or her views on what evidence ought, or ought not, to be accepted. Secondly, in ensuring that a fair trial takes place, the trial judge must have regard not only to the interests of the accused, but also those of the public and the alleged victim in seeing that crime is properly and fairly prosecuted (*S* v *HM Advocate* (*supra*) at para [16], following *Schatschaschwili* v *Germany (supra)* at para 101; *Beurskens v HM Advocate (supra)* at para [33] and authorities therein cited). If a balanced view is to be maintained, a trial judge ought normally to point to those factors which might result in the hearsay being accepted as proof of fact as well as those

pointing towards its rejection for that purpose. In this case, the judge's directions were heavily in favour of the latter and thus the appellant.

[55] For these reasons, the appeal against conviction is refused.

Sentence

[56] The appellant submitted that the sentence was excessive. The evidence of Mr A on charge (6) had been that the appellant had punched him "more than once". There was no further specification. On charge (7), there was no actual danger to life. There was no injury. At the time of the offences, the appellant had been in his early twenties with only one conviction, which was dealt with by way of a small fine, for a contravention of the social security regime.

[58] The appellant was aged 47 at the time of sentencing. While he had since been convicted of further offences, the judge had paid insufficient regard to the appellant's lack of previous convictions at the time of these offences. The appellant was not now in a relationship and had no access to children. He was a serving prisoner. There was limited need to consider the protection of the public (*Greig* v *HM Advocate* 2013 JC 115 at para [11]). He had to be sentenced as an adult offender, but that sentence had to take into account his age, and hence relative immaturity, at the time of the offences (see *H* v *HM Advocate 2003 SCCR 120*). There was no prospect of any repetition of this behaviour. The appellant had led a pro-social life in the intervening period. He had suffered from PTSD. He was receiving therapeutic assistance for that. But for the original charges, the appellant would not have appeared on indictment.

[59] The court notes that the sentence is to run consecutive to one of 15 years imposed at Mold Crown Court in 2015 for five offences of rape of a girl under 15, five of making

indecent photographs of children and one of possession of such photographs. The court recognises that the present offences were committed when the appellant was a relatively young person with a limited record. Although it does not accept that the offences, of which the appellant was convicted, ought to have been prosecuted at a summary level, it does consider it unlikely that they would have been dealt with in the High Court. Although the testimony of Mr A was sparse in relation to the frequency and severity of the assaults upon him, there was evidence from Ms A which did deal with those aspects. No actual injury flowed from the Salisbury Crags' incident, but the jury considered that it was "to the danger of life". In all the circumstances, the court considers that the sentence was excessive. It will substitute for the 5 year consecutive term, one of 3 years consecutive. To that extent the appeal against sentence is sustained.