APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 19
HCA/2019/339/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

CROWN APPEAL UNDER SECTION 74(1) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

RONALD JAMES ALEXANDER ADAMS

Respondent

Appellant: the Lord Advocate (Wolffe QC), AD; the Crown Agent
Respondent: K Stewart QC, Lawrie; JHS Law, Dumfries

30 August 2019

Introduction

[1] This appeal raises the issue of whether the appellant is entitled to libel, in the form of a docket, the occurrence of a penetrative sexual assault and rape in circumstances where the respondent had previously pled guilty in another jurisdiction to part of the docket charge; in

particular the sexual assault. The contention in short is that the respondent would not be able to challenge the facts relative to that episode standing the existence of the plea.

Background

[2] The respondent was indicted to a preliminary hearing on 6 November 2018 at the High Court in Glasgow. The indictment libels five charges, all of which involve GA as the complainer. These are: first, indecent assault to injury at addresses in Dalbeattie and Castle Douglas between 1999 and 2010; secondly, sexual assault to injury, contrary to section 3 of the Sexual Offences (Scotland) Act 2009, again at Castle Douglas in 2011; thirdly, one episode of assault and rape to injury at Dalbeattie in December 1999 or January 2000; fourthly, assault on various occasions at Castle Douglas between 2004 and 2011; and fifthly, penetrative sexual assault, contrary to section 2 of the 2009 Act, at Castle Douglas in August 2011.

[3] Attached to the indictment is a docket, which refers to the penetrative sexual assault and rape of CH in Liverpool on 3 January 2016. The respondent pled guilty to the sexual assault but not to the rape at Liverpool Crown Court on 13 February 2017. These pleas were accepted and the respondent was sentenced on that basis.

[4] The preliminary hearing was postponed on several occasions before the judge made determinations on a preliminary issue minute, which challenged the admissibility of evidence relative to the events libelled in the docket, and a compatibility minute which maintained that leading that evidence would breach the respondent's rights under Article 6 of the European Convention; in particular that in Article 6(3)(d) to examine or have examined witnesses against him. It was submitted that it would be oppressive for the respondent to stand trial on an indictment to which the docket was attached. Contrary to

the position in *HM Advocate* v *Moynihan* 2019 SLT 370, in which the accused had previously been convicted of rape, it was contended that the evidence relied upon in respect of the sexual assault and rape elements in the docket would not be capable of challenge, nor could the respondent give evidence of his innocence of these elements. There would, it was said, be unchallenged evidence of criminal conduct before the jury in support of the docket offence. This would in effect amount to a contravention of the prohibition on the disclosure of previous convictions in section 101of the Criminal Procedure (Scotland) Act 1995 (see *Lewry* v *HM Advocate* 2013 SCCR 397).

[5] The preliminary hearing judge noted that there was a conflict between the first instance High Court decisions in *HM Advocate* v *Murdoch*, unreported, 28 August 2018, Lord Ericht, and *HM Advocate* v *Nicholl*, unreported, 27 June 2017, Lord Burns; the latter having preceded *HM Advocate* v *Moynihan* (*supra*). He reasoned that, if the Crown were allowed to lead evidence of the facts relative to the docket offence, the jury would be unaware that he had previously pled guilty to that offence. The problem arose at the stage of cross-examination. Having pled guilty, the respondent could not, legally or ethically, dispute that evidence. He was therefore at a disadvantage from an accused who had not pled guilty. The leading of evidence, which the respondent could not challenge because he had pled guilty, when he did not know and had not been cautioned that that evidence might be used against him for proof of other charges later, was inherently unfair and oppressive. The judge therefore disagreed with the reasoning in *HM Advocate* v *Murdoch* (*supra*) but agreed with that in *HM Advocate* v *Nicholl* (*supra*). There was a difference in principle between evidence relating to an offence to which an accused had previously pled guilty and evidence relating to an offence of which an accused had been found guilty. In the latter case, the respondent was able to challenge the evidence, but in the former he was not. The judge

therefore ruled the evidence inadmissible. He also considered that the leading of that evidence would be unfair.

Submissions

[6] The appellant maintained that the preliminary hearing judge had erred in holding the evidence to be inadmissible. The evidence was relevant to the offences charged in the indictment and met the statutory criteria relative to dockets in section 288BA of the Criminal Procedure (Scotland) Act 1995. The judge had erred in distinguishing *HM Advocate* v *Moynihan* (*supra*). There was no basis for refusing to admit evidence of an act which had previously been established by virtue of an accused's admission (see *Fraser* v *HM Advocate* 2014 JC 115 at paras 50 and 54). The judge had erred in concluding that there was a difference of principle between leading evidence of facts which had been the subject of a previous guilty plea and evidence of facts which had resulted in a previous guilty verdict. In neither case did the Crown seek to prove or rely on the fact of conviction. The ability of an accused to challenge the evidence, the accuracy of which he admitted, was not a condition of the admissibility of that evidence or the fairness of its admission. The constraint on the accused's ability to challenge the evidence was caused not by the earlier plea or finding of guilt but upon the accused's position on the facts. The judge had erred in relying on the disadvantage at which the respondent was said to be placed, as compared with an accused, such as that in *Moynihan*, who had been convicted. He had erred in relying on the analogy of a confession obtained after police questioning without a caution. He had erred in concluding that the admission of evidence on the docket charge would be incompatible with the respondent's Article 6 rights. The respondent would continue to have ample opportunity to cross-examine the witnesses.

[7] The respondent adopted the reasoning of the preliminary hearing judge in arguing that the libelling of the docket offence was both oppressive and contrary to the respondent's Article 6 rights. The jury would be invited to apply mutual corroboration when the Crown had accepted that, in relation to the libel in the docket, no rape had taken place. The principle of finality was applicable. The respondent was facing an allegation in respect of which the Crown had already accepted a not guilty plea. In England, evidence of the respondent's involvement in the other offence could be excluded if it had an adverse effect on the fairness of the proceedings (Criminal Justice Act 2003 s.101). The respondent could not challenge the complainer in the docket libel. The respondent may be obliged to lead evidence of the previous conviction, contrary to section 101 of the 1995 Act (*Cordiner* v *HM Advocate* 1978 JC 64 at 67). The respondent's counsel would be restricted in his cross-examination because of the previous guilty plea.

Decision

[8] In *HM Advocate* v *Murdoch,* unreported, 28 August 2018, Lord Ericht, evidence of a rape libelled in a docket, to which the accused had previously pled guilty, was allowed despite similar contentions to those which are advanced in the present case. As Lord Ericht reasoned in *Murdoch*, the problems, if any, in the conduct of the defence case arise not from the libel in the docket but from the acceptance by the respondent of his guilt of the offence libelled in that docket. That would present an ethical problem irrespective of a previous plea of guilty (Faculty of Advocates: *Code of Conduct* (6th ed, July 2018) para 5.2.4). The difficulty arises only if the respondent accepts the correctness of the previous plea. In that respect, the situation does not differ from that where an accused accepts his guilt in respect of a part of the libel of an indictment. Even if the respondent does accept the truth of the

plea tendered, that does not preclude him from cross-examining the complainer in the docket, only that he could not do so in a manner inconsistent with the acceptance of the truth of the guilty plea. The respondent is not prevented from presenting arguments that the Crown have failed to prove one or more, or all, of the charges on the indictment or that libelled in the docket or that mutual corroboration should not apply because the applicable legal test has not been met. The court agrees with the reasoning of Lord Ericht in *Murdoch*. There is no material difference between the current situation and one in which the accused has previously been found guilty (*HM Advocate* v *Moynihan* 2019 SLT 370; *Fraser* v *HM Advocate* 2014 JC 115). As distinct from *Cordiner* v *HM Advocate* 1978 JC 64, there is no element of forcing the respondent to reveal the previous conviction. That conviction should not be revealed unless the respondent elects to take that course and present the argument, which Lord Ericht referred to, that his previous plea was indicative of his preparedness to accept guilt but only when he had committed the offence.

[9] The court accordingly allows the appeal and repels both the objection to the admission of the evidence and the contention of unfairness in the compatibility minute.