APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 21
HCA/2020/4/XM

Lord Justice General
Lord Justice Clerk
Lord Menzies
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the petition to the *nobile officium*

by

RR

Petitioner

against

(First) HER MAJESTY'S ADVOCATE; and (Second) LV

Respondents

Petitioner: Bain QC, Harvey; Urquhart's (for Livingstone Brown, Glasgow)
First Respondent: The Lord Advocate (Wolffe QC), R Charteris and A Cameron; the Crown Agent
Second Respondent: CM Mitchell QC; MTM Defence
Interveners (Rape Crisis Scotland): Gilchrist, V Mori;

7 October 2020

Introduction

[1] The petitioner is the complainer in criminal proceedings in which the second respondent is charged with, *inter alia*, raping her on occasions between 13 and 15 August

2018 at a hotel in Pitlochry. The second respondent made an application under section 275 of the Criminal Procedure (Scotland) Act 1995. It was heard during the course of a preliminary hearing at the High Court in Glasgow on 2 October 2019. The petitioner was not advised that the application had been made. She was only told of it some four months later, after it had been granted in part, when the Crown sought to precognosce her.

[2] The petitioner has applied to the *nobile officium* of the court for orders: (i) declaring the decision to grant the section 275 application to have been "wrong, unjust and contrary to law"; (ii) quashing the decision; and (iii) refusing the application. Much of the petition involves a challenge to the merits of the decision at first instance. It addresses its competency under reference to Article 8 of the European Convention. It then avers that, in terms of section 1(3)(d) of the Victims and Witnesses (Scotland) Act 2014, the petitioner had, and has, a right to participate effectively in the proceedings. That right required that she be advised of the application in advance in order to enable her to discuss her position with the Crown and to challenge the application. The latter would, at least in certain circumstances, include a right to appear at the hearing of the application.

[3] The petition raises an important issue of principle in relation to a complainer's right to participate in criminal proceedings. The court accordingly convened a Full Bench to consider it. The court intimated to parties that, if the court considered that there was such a right and there had been a failure to afford the petitioner that right, it would simply quash the first instance decision. A re-hearing, at which the petitioner's views would be heard, would follow. Although the petitioner's preference was for this court to decide the merits of the application, this was not considered appropriate. The petitioner's primary remedy, as set out in the petition, would have been granted. It was not for this court, on a petition to the *nobile officium* of this nature, to determine the merits of the section 275

application as if it were hearing a criminal appeal at which the petitioner had a right to appear to contest the merits.

The European Convention on Human Rights

[4] The European Convention provides:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private … life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society … for the protection of the rights and freedoms of others."

Statutes and Directives

***The Criminal Procedure (Scotland) Act 1995* provides:**

[5] "274 *Restrictions on evidence relation to sexual offences.*

(1) In the trial of a person charged with [a sexual] offence … the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer –

(a) is not of good character (whether in relation to sexual matters or otherwise);

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer-

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; …

…

275 *Exceptions to restrictions under section 274.*

(1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that-

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating-

(i) the complainer's character; …

(b) that occurrence or those occurrences of behaviour or facts are

relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

(2) In subsection (1) above-

(a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature;

(b) 'the proper administration of justice' includes-

(i) appropriate protection of a complainer's dignity and privacy; and

(ii) ensuring that the facts and circumstances of which a jury is made aware are … relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict …

…

(4) The party making such an application shall, when making it, send a copy of it-

(a) when that party is the prosecutor, to the accused; and

(b) when that party is the accused, to the prosecutor and any co-accused.

….
."

The Directive 2012/29/EU of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of Crime and replacing Council Framework Decision 2001/220/JHA (the Victims' Rights Directive)

[6] The Victims' Rights Directive provides:

"CHAPTER 1

GENERAL PROVISIONS

Article 1

Objectives

1. The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.

Member States shall ensure that victims are recognized and treated in a respectful … manner, in all contacts with … a competent authority, operating within the context of criminal proceedings. …

…

CHAPTER 3

PARTICIPATION IN CRIMINAL PROCEEDINGS

Article 10

Right to be heard

1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. …

2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.

CHAPTER 4

PROTECTION OF VICTIMS AND RECOGNITION OF VICTIMS WITH SPECIFIC PROTECTION NEEDS

Article 18

Right to protection

Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims … from secondary and repeat victimisation, from intimidation … including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying …

…

Article 21

Right to protection of privacy

1. Member States shall ensure that competent authorities may take during the criminal proceedings appropriate measures to protect the privacy …

…

Article 22

Individual assessment of victims to identify specific protection needs

1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures …

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; … victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of … gender-based violence, violence in a close relationship, sexual violence … shall be duly considered.

…".

The Articles are preceded by a large number of recitals, including the following:

"(20) The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending

on the national system, and is determined by one or more of the following criteria: whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system.

…

(41) The right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing."

The Victims and Witnesses (Scotland) Act 2014

[7] The 2014 Act provides:

"1 *General principles*

(1) Each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) ….

(2) The persons are-

(a) the Lord Advocate,

(b) the Scottish Ministers,

…

(d) the Scottish Courts and Tribunals Service,

…

(3) The principles are-

(a) that a victim or witness should be able to obtain information about what is happening in … proceedings, …

(d) that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the … proceedings.

1A *Further general principles applicable to victims*

(1) Each person mentioned in section 1(2) must have regard to the principles mentioned in subsection (2) ...

(2) The principles are-

(a) that victims should be treated in a respectful … manner,

…

(e) that victims should be protected from-

(i) secondary and repeat victimisation,

(ii) intimidation …".

Background

[8] The second respondent was indicted to a Preliminary Hearing on 17 July 2019 at the High Court in Glasgow on three charges as follows:

> "(01) on various occasions between 13… and 16 August 2018… during the course of a journey from London to the … Hotel, Pitlochry, at said hotel and elsewhere, you … did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear and alarm in that you did act in an aggressive manner, shout and utter derogatory comments towards [the petitioner]… and threaten her with violence: 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;
> (02) on various occasions on 13… and 14 August 2018 at…Hotel, Pitlochry, you… did assault [the petitioner]… and seize her head and penetrate her mouth with your penis and you did thus rape her; CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009; and
> (3) on 15 August 2018… at… Hotel, Pitlochry, you… did assault [the petitioner]… and seize her head, repeatedly penetrate her mouth with your penis and you did thus rape her, repeatedly strike her on the buttocks, pull her hair, seize her by the throat, threaten to penetrate her anus with your penis and repeatedly penetrate her vagina with your penis and you did thus rape her, all to her injury; CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

[9] The original PH was postponed until 11 September and then until 2 October 2019, when the second respondent made an application under section 275 of the 1995 Act. The petitioner was not told about this application and was not precognosced upon its terms. The second respondent sought to lead the following evidence at trial:

> "a) That on 3 July 2018 the applicant and the complainer… met each other at the Wimbledon Tennis Tournament. They socialized and went for a drink together. They exchanged mobile telephone numbers.
>
> b) They began a relationship online that developed. They exchanged messages. They discussed sex. She said that she loved hard sex and was adventurous.
>
> c) They agreed that the applicant would travel to London to see the complainer. The applicant travelled to London on 22 July 2018 to see the complainer.
>
> They spent the day together. They sat on a bench in Kensington Gardens and kissed each other intimately. The applicant touched her face and put his fingers in her mouth. The complainer sat with her legs across the applicant's lap. They touched each other's bodies. The applicant kissed her breasts and touch (*sic*) her

upper thighs close to her vagina. When anyone approached, they stopped. The complainer was giggling and smiling. She said 'we're crazy what we are doing'. They spoke about 50 shades of grey. She said that she liked to be spanked hard on her buttocks.

d) The applicant returned to Germany and they continued their relationship. They arranged to go on holiday together.

e) The applicant arrived in London on 11 August 2018. He and the complainer arranged to meet that evening at around 1830 hours. They spent time together alone then met the applicant's sister and her husband for dinner. The applicant and the complainer were smiling and joking and holding hands during dinner.

f) The applicant was staying with his sister and her husband at their home that night and after dinner he and the complainer returned to the house with the applicant's sister and her husband. She and the applicant retired to the guest bedroom where they participated in consensual sexual intercourse. When the complainer left at around 0120 hours, she messaged the applicant from the taxi and they continued to message each other for around an hour.

g) On 13 August 2018, they met and travelled to Scotland together. They walked from the railway station in Dunkeld to the hotel holding hands.

h) On 14 August 2018, they had breakfast together in the hotel. They went for a hike together up Ben Vrackie. At the top, they were holding hands and kissing each other. They returned to the hotel and showered and changed before going for dinner together. They held hands as they walked to the restaurant.

They returned to the hotel and participated in consensual sexual activity. After the sexual activity they cuddled in the bed together.

i) On 15 August 2018 they travelled to Perth and rented a car. They travelled in the car together to St Andrews. They walked to the beach and sat on the sand together. She sat in front of him between his legs and he had his arms around her. They were cuddling. They were sharing binoculars to watch people and laughing together. The applicant fed her biscuits. He carried her across water on the beach. She was laughing. They walked beside the beach holding hands.

They returned to Dunkeld and went for a drink before returning to the hotel.

j) At the hotel, the applicant had a bath and invited the complainer to join him in it which she did. They were kissing. They participated in consensual sexual activity including intercourse that began in the bath. In the bath, the applicant was behind the complainer. They were standing. The complainer told the applicant to spank her buttocks hard. She told him to pull her hair hard. Afterwards, they kissed each other and cuddled in the bed."

[10] The PH judge refused paragraphs a), d), e), g) and i) as unnecessary. By this, the judge meant that evidence of this conduct would be admissible. It did not bear upon the petitioner's character. It was not sexual behaviour and did not tend to show that the

petitioner had consented to sexual intercourse. In paragraph b) he allowed only the words "She said that she loved hard sex and was adventurous". In paragraph c) the first two sentences were refused as unnecessary but the judge allowed "The applicant touched her face and put his fingers in her mouth" and "She said that she liked to be spanked hard on her buttocks". The reference to Fifty Shades of Grey, and the sexual activity in the park, was excluded. Paragraph f) was excluded. In paragraph h) only the sentences "They returned to the hotel and participated in consensual sexual activity. After the sexual activity they cuddled in bed together" were allowed. Paragraph j) was allowed in its entirety.

[11] On the basis of the PH judge's decision, therefore, the second respondent will be able to cross-examine and lead evidence intended to demonstrate the development of the relationship between the second respondent and the petitioner from early July 2018. This would include references to (undated) messages or discussions in which the petitioner said she loved "hard sex" and was adventurous. The evidence or cross-examination would cover the second respondent and the petitioner meeting again in London by arrangement on 22 July and engaging in intimacy, falling short of intercourse, but including that the petitioner stating that she liked to be spanked. It would encompass them meeting once more in London on 11 August and engaging in consensual sex, travelling to the hotel in Pitlochry on 13 August and having consensual sex there on 14 August. It would cover engaging in consensual sex again on 15 August and include a request from the petitioner to be spanked and to have her hair pulled hard. The second respondent's special defence of consent includes a concession that the sexual activity in charges (02) and (03) took place.

[12] The petitioner takes issue with the admissibility of those parts of paragraphs 1b (messages about hard sex and adventurousness) and 1c (erroneously referred to as 1d in

the petition; conversation about spanking).

Submissions

Petitioner

[13] The petitioner submitted that the petition was competent because it was the only means by which the petitioner could obtain recognition that she had the right to be heard before the PH judge. The High Court had the power, in the exercise of its *nobile officium*, to grant such orders where the circumstances were extraordinary or unforeseen and where no other remedy or procedure was provided by law (*Anderson* v *HM Advocate* 1974 SLT 239 at 240; *Wylie* v *HM Advocate* 1966 SLT 149 at 151; and *Wan Ping Nam* v *Minister of Justice of the Federal German Republic* 1972 JC 43; *Express Newspapers, Ptnrs* 1999 JC 176 at 178 – 179). The petitioner's circumstances were extraordinary or unforeseen and no other remedy or procedure was provided. Although the *nobile officium* was not available, where its exercise would conflict with the provisions of a statutory scheme, there was no such conflict here. There was no legislative impediment to a complainer being heard at a section 275 hearing.

[14] There was no general right for victims to be direct participants in criminal proceedings (*Scottish Criminal Cases Review Commission* v *Swire* 2016 JC 38 at para [21]; and *Porch* v *Dunn* 2016 JC 101 at paras [34]-[36]). The petitioner did not assert such a right; only one to be heard at a section 275 hearing. This was because, in terms of the section 1(3)(d) of the Victims and Witnesses (Scotland) Act 2014, it was both appropriate and necessary to enable a complainer to participate effectively in the proceedings. There was no difference between the petitioner's case and the situation in which there was an attempt to recover a complainer's medical records (*WF* v *Scottish Ministers* 2016 SLT 359). Both engaged a complainer's Article 8 rights (see also *AR* v *HM Advocate* [2019] HCJ 81 at paras [8] and [9]).

[15] Similarly, under Article 10 of the Victims' Rights Directive, the petitioner had the right to be heard during criminal proceedings. This was necessary to ensure there was no breach of the other rights under the Directive, including the right not to be questioned unnecessarily about a complainer's private life. Although Recital (41) to the Directive stated that the right of a victim to be heard was fulfilled when a complainer was permitted to make statements or "explanations" in writing, that would not amount to effective participation in a section 275 application. A preamble to a Directive could not be relied on either as a ground for derogating from the Directive or as a means of interpreting it in a manner contrary to the wording (C-134/08 *Hauptzollamt Bremen* v *JE Tyson Parketthandel GmbH hanse j.*, unreported, CJEU, 2 April 2009, at para [16]).

[16] As both respondents accepted, the petitioner's Article 8 rights were engaged (*Y* v *Slovenia* (2016) 62 EHRR 371, at paras 105 and 107-116; and *R* v *T (CA)* [2002] 1 WLR 632 at para 38). Section 275 directed the court to consider whether the probative value of the evidence outweighed the need for appropriate protection of the complainer's dignity and privacy. If the petitioner were not given an opportunity to be heard, how was the court to carry out the balancing exercise? Given the Crown's practice of not precognoscing complainers about the contents of section 275 applications, the court cannot know whether the matters averred were accepted as true. It would be unable to determine one of the key issues; whether the evidence raised a collateral issue. The complainer's interests and those of the Crown would not always align. The court must apply the test in section 275 for itself, even if the Crown did not oppose the application (*RN* v *HM Advocate* 2020 JC 132 (at para [20]). The Crown were not always correct in their assessment of whether an application should be opposed (*LL* v *HM Advocate* 2018 JC 182, at para [8]). The court may be left weighing a complainer's Article 8 rights, without having heard any representations about

those rights.

[17] Even on the weaker provisions of Article 3 of the earlier Framework Decision, there were certain minimum rights, including an opportunity to express an opinion as well as giving evidence (C-483/09 and C-1/10, *Gueye and Sanchez* [2012] 1 WLR 2672; Council of Europe *Convention on preventing and combating violence against women and domestic violence* (the *Istanbul Convention*) Art 56). Where there was a right to be heard as a matter of EU law, observance of the right was required, even where applicable national legislation did not expressly provide for it (C-249/13 *Khaled Boudjlida* v *Préfet des Pyrénées-Atlantique*s, unreported, CJEU, 11 December 2014, at para 39).

[18] There was no need for legislation. The right to be heard could, as with the right in *WF* v *Scottish Ministers* (*supra*), be accommodated within the Preliminary Hearing/First Diet system. Even if legislation was necessary, it already existed in the form of section 1(3)(d) of the 2014 Act. When the Cabinet Secretary for Justice gave evidence to the Justice Committee on 14 May 2013 (Col 2756), he confirmed that the Bill related to the Directive. The petitioner's position was precisely what the Cabinet Secretary had in mind.

[19] Ireland had incorporated a right to be heard in respect of applications to cross-examine on sexual history (Sex Offenders Act 2001) and before counselling records could be disclosed (Criminal Evidence Act 1992 s 19A). In Canada there was a right to be heard in respect of counselling records (Canadian Criminal Code paras 278.1 to 278.91) and the admission of evidence of previous sexual behaviour (para 276). The complainer had the right to appear at admissibility hearings on sexual activity evidence (s 278.94(2)).

[20] The Gillen report on serious sexual offences in Northern Ireland had surveyed the position in European and common-law jurisdictions. It concluded that, in the common-law jurisdictions, there was a "clear discernible trend" towards the provision of representation

to complainers (para 5.42). It recommended that there should be a right to appear to object to the disclosure of private material and the introduction of evidence of previous sexual history (see chapter 5, para 5.73). The availability of representation for victims was the norm in continental European countries (*Raitt*: *Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings*, 2013 Crim LR 729).

Interveners

[21] The interveners adopted the petitioner's argument. Complainers were deterred from reporting rape because of a fear of not being believed or having their credibility attacked under reference to their previous sexual history (*R* v *A* [2002] 1 AC 450). Although a judge was entitled to prevent cross-examination which intruded upon a complainer's dignity and privacy, cross-examination remained gruelling and humiliating. Section 275 applications were made in 72% of cases. These were invariably allowed (Scottish Government Research: *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*) at para 10).

[22] An alleged expressed desire for "rough sex" was often used as an explanation for injuries sustained by a complainer. Seeking to elicit evidence of a complainer's sexual history, in an attempt to alleviate the culpability of an accused, represented an affront to a complainer's privacy. Some complainers had described the process as worse than the rape itself. Complainers talked about feeling ambushed and ill-prepared for the questions they were asked in court.

[23] The Crown could not take instructions from a complainer or prioritise her interests. The Crown did not consult with complainers on the terms of applications. Complainers' views were not sought and they were not given any advice. The Crown often decided not to

oppose applications (eg *LL* v *HM Advocate* (*supra*); *RN* v *HM Advocate* (*supra*); *HM Advocate* v *JG* [2019] HCJ 71). Section 275 applications required a balancing exercise between the rights of the accused and those of the complainer. Effective participation meant that a complainer should: be informed that an application has been made; have the ability to oppose an application; be legally represented at any hearing; and have a right of appeal.

First Respondent

[24] The first respondent submitted that the petition was incompetent. The *nobile officium* of the High Court was available to address circumstances of injustice which were extraordinary or unforeseen and where no other remedy was provided for by law. It had been exercised, for example to provide a remedy: (a) in circumstances where it was clear that Parliament's intention had been to provide such a remedy (*Wan Ping Nam* v *Minister of Justice of German Federal Republic* (*supra*) at 48; *Lloyds and Scottish Finance* v *HM Advocate* 1974 JC 24 at 27); or (b) for third parties affected by criminal proceedings (*Kemp, Petnr* 1982 SLT 357; *Smith, Petnr* 1987 SCCR 726; *BBC, Petnrs (No. 3)* 2002 SLT 2; *A* v *Harrower* 2018 JC 93). In *JC, Petnr* 2020 SCCR 151, a complainer was allowed to challenge, by way of a petition to the *nobile officium*, a decision to order the recovery of her medical records. The *nobile officium* could not be invoked where to do so would conflict with statutory intention (*Anderson* v *HM Advocate* (*supra*) at 240; *Lang, Petnr* 1991 SLT 931 at 933; *Black, Petnr* 1991 SCCR 1).

[25] The statutory regime in the 1995 Act and specifically that for applications under section 275, did not give a complainer a locus to appear. Neither the European Convention nor EU law required a complainer to be given such a right. The exercise of the *nobile officium* would be incompatible with the statutory intention reflected in the 1995 Act. The petition was therefore incompetent.

[26] The parties to criminal proceedings were the prosecutor and the accused. Complainers did not have a right to participate directly (*Scottish Criminal Cases Review Commission* v *Swire* (*supra*) at paras [20]-[21]; *Porch* v *Dunn* (*supra*) at paras [34]-[36]). Any modification of that central tenet of criminal procedure would be a matter for the legislature.

[27] Sections 274 and 275 of the 1995 Act envisaged that the only parties to the proceedings would be the prosecutor and the accused (s 275(4)). There was no statutory provision requiring, or providing for, notice to be given to a complainer or permitting a complainer to make submissions. When an application was made during the course of a trial, the legislation required the application to be made in the absence of the complainer (s 275B(2)). The first respondent explained that it was Crown policy to advise complainers of section 275 applications and the subsequent decisions. This had not happened in the petitioner's case. That was regrettable. It was not routine to precognosce complainers on section 275 applications; this being a matter for the allocated advocate depute.

[28] In appropriate cases, the fair trial guarantees in Article 6 had to be balanced against the protections given to the interests of witnesses and victims by other provisions of the Convention (*Doorson* v *Netherlands* (1996) 22 EHRR 330). The Court's primary concern had been to evaluate the overall fairness of the proceedings having regard to the rights of the defence and the public, victims and witnesses (*Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23 at para 118). Sections 274 and 275 were a reasonable and flexible response to the problem of questioning of complainers. They were compatible with Article 6 (*Judge* v *United Kingdom* (2011) 52 EHRR SE17 at paras 27-34). *Y* v *Slovenia* (2016) 62 EHRR 371 set out what was required in order to protect a victim's rights. It did not support the proposition that a complainer had a right to appear and to make submissions on admissibility.

[29] Criminal procedure incorporated features which provided robust protections for the

Article 8 rights of victims. They included: (i) the power to prohibit the conduct of the defence by the accused (1995 Act, s 288F); (ii) special measures (1995 Act, s 271(1)(c)(i) and 271A); (iii) restrictions on the admissibility of evidence (*CJM* v *HM Advocate* 2013 SCCR 215; *HM Advocate* v *CJW* 2017 SCCR 84 at para [7]); (iv) limits on the questioning of complainers (1995 Act, ss 274-275); (v) the professional responsibility of legal practitioners (*Donegan* v *HM Advocate* 2019 JC 81, at para 56); and (vi) the court's power to intervene to control questioning (*Dreghorn* v *HM Advocate* 2015 SCCR 349 at paras 38-40) and to observe appropriate restraint in posing questions (*SG* v *HM Advocate* 2020 SCCR 79).

[30] Questioning or evidence which would engage the Article 8 rights of complainers had to satisfy the common law requirements for admissibility (*RG* v *HM Advocate* 2019 SCCR 172; *RN* v *HM Advocate* [2020] HCJAC 3 at para [22]). Material which was collateral to the issues would not generally be admissible (*CJM* v *HM Advocate* 2013 SCCR 215 at paras [28] and [55]-[56]). Evidence of either good or bad character was, in general, inadmissible (*HM Advocate* v *CJW* 2017 SCCR 84 at para [7]). The significant constraints on the questioning of complainers was illustrated by repeated decisions of the High Court (*CJM* v *HM Advocate* (*supra*); *HM Advocate* v *CJW* (*supra*); *Kerseboom* v *HM Advocate* 2017 JC 47; *LL* v *HM Advocate* (*supra*); *GW* v *HM Advocate* 2019 JC 109; *HM Advocate* v *JG* [2019] HCJ 71; *Oliver* v *HM Advocate* 2020 JC 119). The choice of means to secure compliance with Article 8 was a matter that fell within the domestic authorities' margin of appreciation (*X and Y* v *Netherlands* (1986) 8 EHRR 235 at para 24; cf *Bevacqua* v *Bulgaria*, Application No. 71127/01, 12 June 2008).

[31] A petition for commission and diligence to recover a complainer's medical records was not part of criminal proceedings but proceedings "in connection with" the criminal proceedings (*WF* v *Scottish Ministers* (*supra*) at para 43). *WF* was not, concerned with a step in the criminal proceedings. Recovery of medical records directly engaged a complainer's

right to confidentiality (*Z* v *Finland* (1997) 25 EHRR 371 at para 95). It was on this basis that it was decided that procedural fairness required the complainer to be given notice of such an application and the opportunity to make representations (*R(B)* v *Crown Court at Stafford* [2007] 1 WLR 1524 relied on in *WF* v *Scottish Ministers* (*supra*)). Not every decision which may affect a complainer's Article 8 rights required that the complainer be given a right to be heard. There would be material practical implications for the criminal process if applications under section 275 required to be intimated to the complainer with a view to giving her an opportunity to make representations.

[32] Article 10 of the Victims' Rights Directive did not give a complainer the right to make submissions on a section 275 application. Paragraph (20) of the Preamble recognised that the role of the victim varied across the Member States. The Directive was not intended to harmonise those variations The reference in Article 10(2) to being heard as well as providing evidence fell to be read in the context of a Directive which applied from the moment a complaint was made and did not only apply to the trial (Preamble, para (22)).

[33] Rules which provided that it was for the public prosecutor to make applications in relation to the way that a victim's evidence may be taken may be regarded as "part of the logic of a system in which the Public Prosecutor is a judicial body with responsibility for bringing prosecutions" (Case C-507/10, *X* v *Y*, unreported, CJEU, 21 December 2011, at para 37). Member states were afforded a large measure of discretion on the specific means by which they could implement that objective (Case 483/09 *Gueye and Sanchez* (*supra*) at para 57; Case C-507/10 *X* v *Y* (*supra*) at paras 28, 33). The minimum content of the obligations was to enable the victim to give testimony (Case C-404/07 *Katz* v *Sós*, unreported, CJEU, 9 October 2008, at para 47; Case 483/09 *Gueye and Sanchez* (*supra*) at para 58).

Second Respondent

[34] The accused opposed the petition as incompetent. The *nobile officium* was only available to address circumstances of injustice which were extraordinary or unforeseen and where no other remedy was provided for by law. It was not available where its exercise would conflict with the provisions of the statutory scheme (*Anderson* v *HM Advocate* (*supra*); *Lang, Petnr* (*supra*) at 933; *Beck Petnr*, 2010 SLT 519 at para 24). The circumstances here were neither exceptional nor unforeseen.

[35] Criminal proceedings were the subject of the detailed statutory regime set out in the 1995 Act. The complainer was not a party. Sections 274 and 275 of the 1995 Act were designed, within that statutory regime, to secure respect for the complainer's Article 8 rights by placing a duty on the court to decide the application in accordance with the terms of section 275(1), which included appropriate protection of a complainer's dignity and privacy. Such decisions were subject to appeal in terms of section 74(1) of the 1995 Act and were capable of review in terms of section 275(9) of the Act. Any change in the law in respect of the direct participation of the complainer was a matter for the legislature.

[36] Although the petitioner was a victim in terms of the Directive, it did not follow that there was a right to intervene and to have an opportunity to shape the cross-examination. *WF* v *Scottish Ministers* (*supra*) was not in point. In *WF* the Article 8 right of the complainer was asserted as haver of the documents, not as a person who had a right to be part of the trial process. A complainer was not asserting Article 8 rights when giving evidence. Complainers were obliged to answer any question which the Court considered relevant. They could not raise an Article 8 objection. The purpose of sections 274 and 275 was to find a balance between the Article 6 rights of accused persons and the dignity of the complainer.

[37] The Victims Directive did not state that a complainer became a party to the criminal

proceedings; simply that they are able to "to participate in criminal proceedings". It was clear from this they were not parties to criminal proceedings but that they were entitled to participate, which they do by giving evidence at trial.

Decision

Competency

[38] The *nobile officium* of the High Court is a general power of superintendence. It is available to deal with circumstances which are "extraordinary or unforeseen and where no other remedy is provided for by law" (*Meechan* v *Procurator Fiscal, Airdrie* 2019 SLT 441, LJG (Carloway), delivering the opinion of the court, at para [27] following *Anderson* v *HM Advocate* 1974 SLT 239, LJG (Emslie) at 240). It cannot be invoked where the remedy sought would conflict with the terms of a statute (*Beck, Petnr* 2010 SCCR 222, LJG (Hamilton), delivering the opinion of the court, at para [24] following *Anderson* v *HM Advocate* (*supra*), LJG (Emslie) at 240).

[39] The contention is that the petitioner had a right to be heard at the Preliminary Hearing in terms of the Victims and Witnesses (Scotland) Act 2014 and under the underlying Victims Directive. She was not afforded this right. She has no right of appeal under the Criminal Procedure (Scotland) Act 1995 nor at common law. That being so, the court is satisfied that the petitioner is entitled to petition the *nobile officium* in an attempt to vindicate the right which she claims has been denied to her. The circumstances are potentially, that is if established, extraordinary and unforeseen. The petitioner has no other remedy. At the stage of determining competency, there is no immediate concern that the right to be heard conflicts with the statutory regime in the 1995 Act. Whether it will do so or not must depend upon the nature and extent of the right and how it might be secured. The petition is

competent.

The Victims' Rights Directive

[40] The terms of the Victims' Rights Directive are clear. In so far as relevant for present purposes, it requires that member states put in place systems which ensure that the victims of crime receive appropriate information, are able to participate in criminal proceedings (Art 1) and are treated in a respectful manner (*ibid*). There are protections in relation to a victim's dignity when being questioned (Art 18) and concerning her privacy generally (Art 21). The procedural rules governing the practical application of the rights are to be determined by the member states (Art 10). The specific "Right to be heard" is, as it says, a right to be heard during criminal proceedings and to provide evidence (Art 10). The Directive recognises that some states allow a victim to be a party to the proceedings, while others do not (Recital (20)). The right is said to be fulfilled when victims are permitted to "make statements or explanations" in writing (Recital (41)).

[41] Thus far, if the Court were looking solely at the Directive, it would be considering a very general right to be heard during the proceedings; but not a right to be a party to them. The right in the Directive is not one to be heard on all aspects of those proceedings or at all times.

[42] The extent to which it is necessary to look at the Directive is tempered by the existence of primary legislation which seeks to transpose the Directive into Scots law by the Victims and Witnesses (Scotland) Act 2014. It was not argued that the 2014 Act failed to do so adequately. The Act was not challenged as disconform to the Directive. In that situation it is to the Act and not the Directive that the court should look. Where an underlying Directive has been properly implemented by national law, there is no scope for giving it

direct effect, especially where to do so would involve circumventing the plain terms of the legislation (*Royal Society for the Protection of Birds* v *Scottish Ministers* 2017 SC 552, LP (Carloway), delivering the opinion of the court, at para 187, and *Salt International* v *Scottish Ministers* 2016 SLT 82, Lord Justice Clerk (Carloway), delivering the opinion of the court at para 43, following *Felicitas Rickmers-Linie KG & Co* v *Finanzamt fur Verkehrsteurn, Hamburg* [1982] 3 CMLR 447, Advocate-General (Slynn) at para 455 and *Marks and Spencer* v *Customs and Excise Commrs* [2003] QB 866 at para 29).

The 2014 Act

[43] Section 1 of the Victims and Witnesses (Scotland) Act 2014 places an obligation on a number of persons and institutions to have regard to certain principles when carrying out their functions in relation to complainers. These persons include the first respondent, the Scottish Ministers and the Scottish Courts and Tribunals Service; the latter being a reference to the agency which provides administrative and other support for the courts and tribunals. Section 1 does not impose an obligation on the courts themselves. The principles are that a complainer should be able: (i) to obtain information about what is happening with the case in which she is involved; and (ii) "in so far as it would be appropriate to do so", to participate effectively in the proceedings. The issue which arises is whether there has been a failure on the part of any of the persons specified, notably the first respondent but possibly the SCTS too, to have regard to these principles and, if so, what the effect of that might be.

[44] So far as becoming a party to the criminal proceedings is concerned, the starting point is the domestic rules. The current system does not provide for victims to become direct participants (*Scottish Criminal Cases Review Commission* v *Swire* 2016 JC 38, LJC (Carloway), delivering the opinion of the court, at para [21], followed in *Porch v Dunn* 2016

JC 101, Lady Dorrian, delivering the opinion of the court, at paras [34]-[36]). Had it been the intention of Parliament to alter this fundamental aspect of criminal procedure, it had the opportunity to do so when amending sections 274 and 275 of the 1995 Act (Sexual Offences (Procedure and Evidence) (Scotland) Act 2002). Not only did it not do so, it laid down the procedure for intimating section 275 applications (1995 Act s 275(4)). This procedure does not include notification to the complainer. Where an application is made during the course of the trial, the procedure expressly excludes the complainer (s 275B(2)). Parliament had another opportunity to include the complainer in the procedure when it implemented the Directive in the 2014 Act. Once again, it did not do so.

[45] The fact that most civilian systems do permit a victim the status of party, or allow her to be represented at a hearing, is interesting. That might well be because it is more in keeping with an inquisitorial procedure and, in some countries, the power of the court to award damages in what are otherwise criminal proceedings. Equally, the introduction of similar procedural rights in Ireland and Canada, and the recommendations of the Gillen Report, may indicate a direction of travel (cf the position in England & Wales and currently in Northern Ireland: Youth Justice and Criminal Evidence Act 1999 s 43(1) and the Criminal Evidence (Northern Ireland) Order 1999/2789 Art 30). The comparative analysis serves only to highlight the fact that Parliament has not elected to introduce a similar system in this jurisdiction.

[46] The position remains that, in terms of the 2014 Act, the first respondent must have regard to the principles that a complainer should be able: (i) to obtain information about what is happening in the proceedings; and (ii) to participate effectively in them. The issue is how this should operate within the current system; that is by means other than the complainer becoming a party to the prosecution at least for the purposes of section 275

applications. It must be for the Crown (and it can only be the Crown in practical terms since the SCTS normally has no means of communicating directly with a complainer) to keep a complainer informed of the progress of the prosecution and to secure that she has the opportunity to participate in the proceedings.

[47] The first respondent candidly accepted that the petitioner had not been advised that a section 275 application was to be heard and therefore had not been able to participate at all in that part of the proceedings. That being so, the court at first instance has proceeded to a decision without proper knowledge of the facts. The court, when deciding upon the admissibility of evidence, including determining a section 275 application will often have to carry out a balancing exercise relative to probative value and prejudice to a complainer in the form of a potential interference with her Article 8 rights. In order to do that, it must have information on the complainer's position in relation to what is alleged. It will be important to know, for example, whether the alleged fact is accepted by the complainer or whether it is contentious. In the latter situation, if the evidence were admitted, the risk of the jury's focus being deflected from the events libelled onto a different and perhaps peripheral matter becomes very real. In assessing whether and to what extent a particular line of questioning will impinge upon a complainer's dignity and privacy, it will normally be essential to know what the complainer's attitude to the line is.

[48] In these circumstances, since the petitioner's position was not made known to the court at the preliminary hearing, the court will grant that part of the prayer of the petition which seeks a declarator that the decision of the High Court dated 2 October 2019, which granted the section 275 application in respect of parts of paras 1b) and 1c) (not d) was contrary to law and falls to be quashed. The application on these parts will require to be reconsidered in light of the petitioner's position. That position should be presented by the

Crown, after communication with the petitioner. The Crown will nevertheless be free to comment upon the petitioner's position as they see fit.

Article 8

[49] There is no doubt that a complainer's Article 8 rights are likely to be engaged when a section 275 application is allowed and relates to, for example, conduct remote from the events forming part of the libel. Whether what is allowed amounts to a breach of these rights will depend upon the circumstances. The right is to have a person's privacy respected. It is not one which prohibits questioning, or the leading of evidence, about private aspects of a complainer's life, where that is in accordance with the law and necessary in order to protect the rights and freedoms of others. An accused's right to a fair trial, including the Article 6(1)(d) right to examine witnesses, may be an important factor in determining an application. At this preliminary stage it is not possible to assert that the petitioner's Article 8 rights will be, or are even likely to be, breached.

[50] Given the protections which are built into criminal procedure, both at common law and by sections 274 and 275 of the 1995 Act, a court ought, if it correctly applies the law, to be able to ensure that a complainer's Article 8 rights are duly respected whilst securing a fair trial for the accused at the same time. Evidence of matters which are irrelevant or collateral to the offence libelled is inadmissible. Evidence of bad character is normally excluded as collateral. In terms of sections 274 and 275, questioning or evidence, which is designed to show that a complainer is not of good character, has engaged in sexual behaviour not forming part of the events libelled or has, at a point remote from these events, behaved in a manner from which an inference of consent or lack of credibility/reliability, is not generally admissible. [51] The upshot of this is that, quite apart from section 1(3)(d) of the 2014 Act, in

order to respect a complainer's Article 8 rights, the court must be given information on the complainer's position on the facts in, and her attitude to, any section 275 application. Neither the statutory provisions nor Article 8 carry with them a right for a complainer to be convened as a party. In the absence of statutory intervention, the system of criminal prosecution remains an adversarial one between the Crown and the accused. The complainer's status is still that of a witness to the facts libelled.

[52] For the reasons given, it is the duty of the Crown to ascertain a complainer's position in relation to a section 275 application and to present that position to the court, irrespective of the Crown's attitude to it and/or the application. This will almost always mean that the complainer must: be told of the content of the application; invited to comment on the accuracy of any allegations within it; and be asked to state any objections which she might have to the granting of the application. The court may require to adjust its preliminary hearing procedure, and the relative form (Forms 9.3A and 9A.4) accordingly. It is only by doing this that the principle that the complainer should be able to obtain information about the case and to participate effectively in the proceedings, along with her Article 8 right of respect for her privacy, can be upheld.