**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2021] HCJAC 48**
**HCA/2020/000301/XC**

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal under Section 74

by

MP

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: Duff; Paterson Bell**
**Respondent: A Prentice, QC, AD; Crown Agent**

9 February 2021

[1] The appellant has been charged with three offences against the complainer, of which charge 3 is a charge of rape on 23 December 2006. A special defence of consent has been lodged. A child was born as a result of this encounter.

[2] The appeal relates to the decision at a preliminary hearing to refuse as irrelevant paragraph 1(7) of the appellant's section 275 application, and to refuse paragraphs 1(44) to

1(48) as irrelevant and collateral. Paragraphs 1(1) to 1(6), and 1(9) to 1(11) of the application were allowed, as was paragraph 1(8) to the extent only that as a result of sexual intercourse between the complainer and appellant on the date of the event libelled, a child was born. Paragraphs 1(12) to (43) were also refused, as irrelevant and collateral, but are not the subject of appeal.

[3] Paragraphs 1(1) to (6) related to the circumstances in which the appellant went to the complainer's home, a discussion there between them about contraception prior to their having sexual intercourse and about their undressing each other before the sexual encounter proceeded. The evidence sought to be elicited in terms of paragraph 1(7) was in the following terms:

> "after sexual intercourse, he searched for his clothes in the dark and she was laughing when he could not find his socks."

It was asserted that paragraphs 1(1) to (7), if heard by the jury, would allow the jury to consider whether they can be satisfied beyond a reasonable doubt that the complainer did not consent to the sexual activity that night.

[4] The preliminary hearing judge considered that paragraphs 1(1) to (6) could properly be allowed, as being relevant to the defence of consent, but refused paragraph 1(7), on the basis that what happened after intercourse was irrelevant to the question of consent at the time of intercourse.

[5] As the preliminary hearing judge explains in her report, paragraphs 1(12) to (48) of the application dealt with evidence about events after the birth of the child, in a high degree of detail, including issues of maintenance; contact; agreement about, and cessation of, the latter, and litigation thereanent; the appellant's marriage and birth of a child thereof; the further cessation of contact and resultant litigation. The preliminary hearing judge

considered that these paragraphs raised material which was irrelevant and collateral and refused them. Paragraphs 1(44) to (48) were as follows:

> "(44) on 9 January 2019, a motion was enrolled to recall the sist and intimated to the complainer's solicitor.
>
> (45) on 12 January 2019, the complainer tried to contact the applicant by telephone repeatedly using different phone numbers to call him.
>
> (46) on 13 January 2019, the complainer contacted the police.
>
> (47) on 14 January 2019, the complainer provided a statement to the police in which she accused the applicant of rape.
>
> (48) the complainer did not make that allegation at any point during the court action relating to contact or during the involvement of solicitors in relation to contact."

[6] All of the paragraphs in the application were said to be relevant to the same issue at trial, namely "the credibility and reliability of the complainer in relation to her allegation of rape against the applicant". The sole inference to be drawn from all paragraphs was said to be that the complainer was not truthful in her allegation of rape.

[7] The complainer did not make her allegation of rape to the police until 13 January 2019, shortly after intimation of a motion to recall a sist in the contact action. The application asserted that allowing the jury to hear evidence about the history of contact between the complainer and appellant over the years in relation to the child would allow them to consider whether they found the complainer "credible and reliable in her allegation of rape when it came to be made in these circumstances."

[8] Counsel advised the preliminary hearing judge that she did not have any evidential basis for the assertion that the complainer made a false allegation of rape because she was angry about the motion to recall the sist in the civil action, but wished to lead the evidence showing the dates involved and ask the complainer why she did not make the allegation

until the week when the motion was enrolled. The preliminary hearing judge considered that the detail asserted in paragraphs 1(12) to (48) indicated that the defence intended to lead evidence about the course of the relationship between the appellant and his child and the complainer's attitude thereto, which were irrelevant and collateral matters which would be apt to distract from the question before the court of consent at the date of the libel. In her report, recognising that the defence would be entitled to ask the complainer when she made the complaint of rape, the preliminary hearing judge now considers that she should have refused paragraph 1(47) as unnecessary rather than as irrelevant.

**Submissions for the appellant**

[9] In support of the appeal it was maintained that none of the evidence referred to in paragraphs 1(44) to (48) engaged section 274, and regarding these the application ought to have been refused as unnecessary. The evidence to be elicited related to the circumstances in which the complainer reported the allegation. Such evidence was admissible at common law and would require a direction under section 288DA(2) in due course. The evidence would enable the jury to hear not only that there was a delay in making the allegation but also the circumstances leading up to and in which the allegation came to be made to the police. A section 275 application was not required and the application should have been refused as unnecessary.

[10] Paragraph 1(7) was relevant at common law and bore on the central issue of consent. It was relevant to show that immediately after the sexual intercourse which was the subject of the charge, the complainer was in a jocular good mood. A jury could be invited reasonably to infer that this was indicative of her state of mind during the immediately

preceding sexual intercourse. This fell within the exception in section 274(1)(c). The preliminary hearing judge ought to have refused the paragraph as unnecessary.

**Submissions for the Crown**

[11] The Crown challenged the competency of the appeal, on the basis that the appellant did not seek to overturn the decisions made but to adjust the reasons given in the court minute. It was not argued that the preliminary hearing judge had been wrong to refuse the application. This was not an appeal against a "decision… at a preliminary hearing" (section 74) and should be refused on that basis. In any event, the preliminary hearing judge was entitled to take the view that the evidence sought to be led was inadmissible at common law and to refuse the paragraphs.

[12] The principal issue for the jury in this case, is whether the complainer consented. Whether she laughed (which she denies), and if so, why she did and what that may have meant, are not immediately verifiable issues, and investigation of them would risk distracting a jury from the main issue. It is well documented that individuals may react to trauma in various and different ways. If this paragraph were allowed the Crown may seek to lead expert evidence to rebut the inference the appellant will invite a jury to draw and explain the wide spectrum of responses to trauma.

[13] The appellant would be perfectly entitled to lead evidence of the fact that there was a 12 year delay in the making of the allegation, and to ask the complainer why that was, but would not be allowed to speculate about the reasons for that. Apart from paragraph 1(47), however, the history between the parties was complex, detailed and likely to distract a jury from the issue under their consideration.

**Analysis and decision**

[14] The arguments advanced in this appeal do not criticise the decision to refuse the application, but question the reasons given. It was submitted that the preliminary hearing judged erred in refusing paragraphs 1(7) and (44) to (48) as she did, and that she should have refused them as "being unnecessary". This somewhat bizarre basis for appeal reflects the equally extraordinary terms of the section 274 application itself which had averred that paragraphs 21, 24, 29, 36, 40 and 41 were considered to be unnecessary but were included "for context"; and that paragraphs 28 and 44 were considered unnecessary, and capable of agreement but were also included "for context". It is now contended that paragraphs 45-48 were also unnecessary, although that was not the basis of the original application.

[15] The preliminary hearing judge in her report advises the court that the extraordinary approach taken in this application, and appeal, of setting out a whole series of paragraphs and then asserting that an application in respect of them is not necessary, is increasingly being taken in section 275 applications. It seems that a practice has developed to include proposed questions or evidence for which counsel maintains an application is unnecessary but upon which the court is nevertheless asked to make a ruling. In effect, in seeking to have the court refuse the paragraphs in an application as "unnecessary", applicants are seeking to convert a ruling under section 275 into a general ruling on admissibility for which the procedure was not designed.

[16] Where counsel consider that an application to the court is not necessary, then the making of an application stating this is absurd. If counsel consider that such an application is not necessary then they should not be making an application, taking up valuable court time on issues which are redundant. To the extent that an application under section 275

asserts on its face that it is unnecessary, or where counsel so submits, it is *per se* an incompetent application and should be refused on that ground.

[17] The heart of the problem here is that the applicant is seeking to introduce evidence which has no relevance at all to the proceedings, for example paragraphs 1(44) to (46), and (47), and to create relevance by means of impermissible speculation. That this is what the present application seeks to do can be seen in the submission that this evidence "would enable the jury to hear not only that there was a delay in making the allegation but also the circumstances leading up to and in which the allegation came to be made to the police". There is no link between the two separate facts referred to in this submission – the making of the allegation and the family history - save in the imagination of counsel. There is no evidential basis for suggesting that the history in relation to the child has anything to do with the making of the allegation. There is no evidence to demonstrate a link, and the whole purpose of including this material is to enable counsel to go on a fishing expedition at trial.

[18] The preliminary hearing judge was entirely correct to refuse these applications, since the underlying basis upon which the evidence was said to be relevant was wholly without foundation.

[19] So far as paragraph 1(7) is concerned, it is clear from the paragraph that the underlying purpose of seeking to introduce this evidence is to suggest that if the complainer appeared "jocular" at the time, she must have consented to sex immediately before that, or at least that the jury should consider that this creates a reasonable doubt as to the matter. The issue of consent requires to be examined at the time of the act in question, not subsequent to it. Moreover, as the Advocate Depute submitted it is well understood that individuals may react to trauma in various and different ways. Again the preliminary judge

was correct to refuse this paragraph as an example of detail of something said to have happened which would not assist the jury in their task, and thus irrelevant.

[20] The decision of a court that an application or a paragraph within an application made in good faith is, after due and appropriate consideration of submissions concerning the nature of the evidence and issues expected to arise at trial, not required has often been expressed, as a sort of convenient shorthand, in terms suggesting that the application is unnecessary. In the majority of cases what is meant is that the evidence in question does not fall foul of any of the prohibitions in section 274. In the interests of clarity of decision-making, this wording, or similar according to the circumstances might be preferable to the vague term "unnecessary". A section 275 application therefore has a distinct and precise statutory purpose, and the decision should reflect that.