APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 50
HCA/2021/50/XC
HCA/2021/52/XC

Lord Justice General
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

(1) NOTE OF APPEAL AGAINST CONVICTION AND SENTENCE and
(2) NOTE OF APPEAL AGAINST CONVICTION

by

(1) DYLAN WILLIAMSON; and (2) KIARA-LEE GALLAGHER

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: McConnachie QC, Hay; John Pryde & Co, SSC
Second Appellant: Mackintosh QC, MacQueen; Paterson Bell
Respondent: Prentice QC (sol adv) AD; the Crown Agent

8 December 2021

Introduction

[1] This appeal relies in part on arguments which were deployed in *Meighan* v *HM Advocate* 2021 SCCR 247. The appellants contend that there is additional evidence that undermines the testimony of Dr Kranti Hiremath given at their trial. She stated that the

occurrence of genital injury and pain is more likely to occur with non-consensual intercourse. At the outset of the appeal hearing, the appellants moved the court to hear oral testimony from three medical practitioners in Scotland, Denmark and Australia. The purpose of this was to demonstrate that Dr Hiremath's view did not accord with current forensic medical opinion which was, at least in the view of the Danish specialist, that genital injury was "irrelevant" to the issue of consent in a rape prosecution. The court refused that application. The primary question which arose thereafter is whether there was a reasonable explanation for the evidence of these doctors not being heard during the course of the trial (Criminal Procedure (Scotland) Act 1995, s 106(3)(a)) and, in any event, whether that evidence would have been significant in the context of the trial.

The trial

[2] On 14 January 2021, at the High Court in Edinburgh, the first appellant, Dylan Williamson, was convicted of two charges of rape. Both took place in late 2018. The first was of LF on 18 November at an address in Muirhouse and the second was of CM at an address in Restalrig on New Year's Eve. The second appellant, Kiara-Lee Gallagher, was convicted art and part (acting in concert) on the second charge. On 10 February 2021 the trial judge imposed an extended sentence of 9 years on Mr Williamson, 6 years being custodial, and 30 months on Ms Gallagher. Ms Gallagher does not appeal against her sentence, but otherwise the case proceeds as an appeal against both conviction and sentence.

Charge 1

[3] LF testified that she had met Mr Williamson for the first time at a party. There had been some consensual sexual activity on a sofa, involving digital penetration of her vagina.

However, she had resisted his attempts to penetrate her anus digitally or to penetrate her vagina with his penis. Nevertheless, the two went into a bedroom where Mr Williamson undressed the complainer and they performed oral sex on each other. She again resisted vaginal penetration with his penis. Despite that lack of consent, Mr Williamson proceeded to penetrate her vagina with his penis and thus raped her. On leaving the bedroom, he had told the complainer that she was "number 36".

[4] Corroboration of lack of consent came from evidence of distress, most notably from DT, who had seen the complainer "really upset" and crying about 20 minutes after Mr Williamson had left the party. Other friends had noticed the complainer in lesser degrees of distress, and also being concerned about what to tell her boyfriend. Later in the morning the complainer's mother had noticed her daughter in a state in which she had never seen her before.

[5] Mr Williamson admitted the sexual activity, other than attempting to insert his finger into the complainer's anus and vaginal penetration on the sofa. He accepted in his testimony that he had slept with 34 women.

Charge 2

[6] CM had returned to Ms Gallagher's house along with two friends after a night out. They were joined by Mr Williamson, who had been in their company earlier. The complainer, who was a professed lesbian, as was known to both appellants, had retired to bed with Ms Gallagher, although not for sexual purposes. Mr Williamson joined them. He started touching the complainer on the breasts, despite having been told repeatedly not to do so. The appellants then began discussing the complainer's sexuality. They suggested that she should have intercourse with a man in order to determine whether she was gay.

Mr Williamson removed the complainer's clothing and had intercourse with her for about 15 minutes. During this she suffered extreme pain (9 out of 10 on a scale) at one point. The appellants had intercourse with each other before Mr Williamson penetrated the complainer again several times. She was also penetrated digitally by Ms Gallagher, who had generally participated in all the sexual activity in one way or another.

[7] CM fell asleep. When she woke up she experienced extreme pain when urinating. There was blood on the toilet seat and on her underwear. She was cross-examined on the basis of various inconsistencies which were said to exist in her testimony, notably on how the sexual activity had happened chronologically. After the incident, the complainer had texted a friend to the effect that she had been "kinda pressurised" and that she had said no at first, but had felt forced to participate.

[8] There was evidence of distress occurring on the following evening when the complainer was seen to be upset and crying. A witness, FH, said that CM had told her that she had gone along with it at first, but then changed her mind. What had happened then had not been consensual, had been quite rough and she had been hurt.

[9] The complainer was examined by Dr Hiremath, a forensic medical examiner, on 3 January 2019; that is 4 days after the incident. She was recorded as complaining of vaginal pain and pain on passing urine. A colposcopic examination showed a healing abrasion on the posterior fourchette. In her report, Dr Hiremath described this as being "consistent with blunt force penetrative trauma". In her testimony, she regarded this as consistent with the allegation of rape. She said that the existence of an injury was not common in consensual intercourse, although it did occur in some 10 to 11% of consensual cases. In consensual situations the pain stopped. It did not continue. It was more likely that the intercourse had been non-consensual given the existence of the pain. Normally, natural lubricants lessen the

effect of trauma in consensual cases. It was most likely that there was no lubrication and hence more likely that the intercourse had not been consensual, although Dr Hiremath could not be "certain" about this. In cross-examination on behalf of Mr Williamson, Dr Hiremath accepted that it was possible that the injury, which was of a rubbing type, had been caused during consensual sexual intercourse. There was no cross-examination from Ms Gallagher's representative.

[10] Both appellants gave evidence that the intercourse had all been consensual. The complainer had said that she had been willing to carry out the proposed experiment to see whether she was gay or not.

Charge to the jury

[11] When it came to charging the jury, the trial judge said that, in relation to Mr Williamson, they could find corroboration either through the application of the principle of mutual corroboration between charges 1 and 2, or in respect of each charge, in the distress spoken to by the witnesses or the injuries found by Dr Hiremath. In relation to Ms Gallagher, he said that they could find corroboration in either the distress or the injuries found by Dr Hiremath.

Defective representation

[12] During the course of the appeal process, the appellants sought leave to amend the grounds of appeal by including a case based upon defective representation. Since all the grounds of appeal ought to be included in the Note of Appeal (Criminal Procedure (Scotland) Act 1995, s 110(3)(b)), the application is to introduce a new ground of appeal later. The request was centred on an allegation that the appellants' legal representatives had failed

to consider, investigate and prepare the defence case in relation to Dr Hiremath's report and her subsequent testimony. The defence ought to have precognosced her, obtained their own expert report, objected to her testimony, sought an adjournment at the conclusion of her evidence in chief and/or moved to desert the diet *pro loco et tempore*. The latter grounds were based on a contention that Dr Hiremath's testimony could not have been predicted by the defence simply from the terms of her report.

[13] Having considered the test for defective representation appeals, as set out in *Grant* v *HM Advocate* 2006 JC 205 (LJC (Gill) at para [21]) and for the late lodging of grounds of appeal in *Singh* v *HM Advocate* 2013 SCCR 337 (LJC (Carloway) at para [6]), the court refused to entertain the late ground. The court reasoned that Dr Hiremath's testimony, and the line of questioning from the advocate depute which adduced it, was eminently predictable from the terms of her report. The court continued (Statement of Reasons):

> "[13] …As was explained in *Meighan*, the purpose of a forensic medical examiner's investigations in a sexual offence case will usually be to detect signs of injury. That is with a view to demonstrating that, notwithstanding that consensual intercourse can produce injuries, a genital injury and/or pain is more likely to occur with non-consensual intercourse. That is what Dr Hiremath's evidence amounted to…
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> [14] Once that is accepted, the manner in which the defence chose to deal with Dr Hiremath's evidence was a matter for their tactical discretion. The recorded injury here was relatively small. Care would have to have been taken to avoid emphasising its existence and possible significance. The cross-examination was able to play down the potential significance of the injury and succeeded in drawing from Dr Hiremath certain concessions; essentially to the effect that the injury could have been caused during consensual sex….
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> [15] …An advocate depute is entitled to ask an FME for her view on whether her recorded findings are consistent or otherwise with consensual or non-consensual sex and her reasons for that. This is commonplace and unobjectionable. It certainly does not render a trial unfair. The defence have, and had, the opportunity of cross-examining on this and of leading evidence to contradict it. … Whether Dr Hiremath's opinions are correct or not, she has a wealth of experience of examining female genitalia both within and outwith the context of sexual assault. She is duly qualified as an expert…".

The additional evidence

[14] The appellants sought to rely on the content of reports from three medical practitioners. Dr Michael O'Keefe, who is a retired forensic medical examiner and now practises as an independent consultant, agreed that the injury to the genitalia was consistent with blunt force penetrative trauma. He considered, however, that Dr Hiremath should have added in her report that "the injury… does not clarify (*sic*) the question of consent". Dr O'Keefe was critical of the assessment of pain which was a subjective and unreliable observation. On Dr Hiremath's reference to genital injuries being found in 10-11 % of consensual intercourse, Dr O'Keefe referred in detail to literature which reported ranges from 6% to 89% in non-consensual cases and from 0% to 73% in consensual cases. Figures of 10% and 11% for consensual intercourse were mentioned in Sommers *at al*: *Women who are injured during rape…* (2002) and in Slaughter *et al*: *Patterns of genital injury in female sexual assault victims* (1997) in which the incidence of injury in non-consensual cases is given respectively as 32-87% and 89%. Anderson *et al*: *Genital findings of women…* (2006) reported that bruises and abrasions were 4 to 5 times "more likely to be in the non-consensual group".

[15] Dr O'Keefe agreed that lubrication, which was absent in non-consensual cases, lessened the chances of injury. The genital injury was consistent with non-consensual sex but a small healing abrasion was also consistent with consensual penetration. It was "not advised" to determine the presence or absence of consent from physical findings alone. The frequency of having one kind of genital injury was similar in consensual and non-consensual cases but more than one injury, more than one type of injury at more than one site "was significantly associated with non-consensual cases". Informed FMEs should be

aware that it is frequently not possible to state "with any degree of certainty" whether sexual acts had been consensual or non-consensual based solely on the anogenital findings.

[16] Dr Brigitte Astrup is a specialist in Forensic Pathology and Medicine. She is an associate at the University of Southern Denmark, Odense. She had produced a report for the appellants prior to the decision in *Meighan* v *HM Advocate* in which she stated that the nature of the "injuries, does not, however, corroborate the allegation of consent or non-consent". Dr Astrup referred to five studies, in none of which was there a statistical difference in the incidence of a single posterior fourchette lesion as between consensual and non-consensual cases. The same applied to abrasions. In her data, more women had an injury of this type following consensual intercourse. The level of pain was not relevant to an assessment of whether such an injury was caused by consensual or non-consensual sex.

[17] In a report following *Meighan*, Dr Astrup repeated her views. She stated that "blunt force trauma is NOT indicative of lack of consent". It was wrong to say that genital injury was consistent or supportive of the complainer's testimony of rape. The science was very clear. It rendered genital injury "irrelevant altogether". Although multiple injuries were more often than not found in non-consensual cases, the studies were few. Genital injury was "a neutral finding of no significance". The complainer's report of pain when she had been examined was also irrelevant as it was subjective. It could be simulated, exaggerated or understated. It was for the judge, and not an expert, to assess.

[18] Dr Astrup accepted that consensual intercourse released natural lubricants which were missing in non-consensual sex. No study had shown a correlation between lubricant and injury. Dr Astrup accepted that the greater the incidence of injury, the more likely it was that the complainer did not consent, but because the frequency of injury in consensual cases was so high, the finding of genital injury became irrelevant.

[19] Catherine Lincoln is a Forensic Physician at the Gold Coast University, Australia. Her report recorded that genital injury could occur in both consensual and non-consensual sex. Although it could indicate penetration, "it cannot provide any information in relation to consent"; nor could pain.

The Preliminary Motion to hear oral testimony

[20] The appellants moved the court to hear oral testimony from the three additional witnesses in advance of hearing submissions on the appeal in general. It was contended that in its earlier Statement of Reasons, which are quoted above, the court had already determined the principal issue in the appeal; *viz*. that it was possible to demonstrate that a genital injury and/or pain was more likely to occur with non-consensual intercourse, contrary to the terms of the uncontradicted reports from the appellants' three witnesses. Justice required the hearing of parole evidence. The fair-minded and informed observer would otherwise conclude that the court had pre-determined the issue and was unwilling to hear the witnesses. Refusing to hear the evidence amounted to a breach of the appellants' Article 6 rights. It was contrary to the practice of the court in previous cases which involved contentious scientific questions (eg *Gilmour* v *HM Advocate* 2007 SCCR 417; *Campbell* v *HM Advocate* 2004 SCCR 220). The Crown had been permitted to lead Dr Hiremath and a refusal to permit the appellants to adduce oral testimony from their experts was a breach of their right to equality of arms.

[21] The court declined to grant the motion in advance of hearing the merits of the appeal for two reasons. First, accused persons have the right to adduce such relevant testimony as they choose during the trial process. The right to lead additional evidence in the context of an appeal is circumscribed by the terms of sub-sections 106(3)(a) and (3A) of the Criminal

Procedure (Scotland) Act 1995. These provide that an appeal, which is based upon the existence and significance of evidence which was not heard in the original proceedings, can only found an appeal "where there is a reasonable explanation of why it was not so heard". It was not suggested that this provision, which is necessary in the interests of finality, breaches Article 6 of the European Convention. In short, the court first requires to determine whether such an explanation exists before considering any new evidence.

[22] Secondly, the evidence which the appellants wished the court to hear by way of oral testimony had been set out in some detail in the experts' reports. It is set out above in summary. The court is unable to see what advantage it would have, in the context of this appeal, in seeing and hearing the experts when it already has their detailed views on paper. If the reasonable explanation test were to be met, the court would then have to go on to see if the content of the reports was of such significance that, were it to have been heard by the jury at the original trial, it would have had a material part to play in the determination of a critical issue at trial (*Megrahi* v *HM Advocate* 2002 JC 99, LJG (Cullen) at para [219](6)). There is no obvious need to hear and see the experts in order to determine that question. The court can proceed on the assumption that any testimony which the experts might give would be in line with their reports.

[23] Neither in *Meighan* v *HM Advocate* nor in its Statement of Reasons in this case has the court found in fact that injury and/or pain is more likely to occur with non-consensual intercourse. It would be inappropriate for an appellate court to make such a factual finding. The determination of that matter was for the jury, if they considered it essential to reach a view on it. What the court has held is that, in both cases, Dr Hiremath, as an experienced Forensic Medical Examiner, was entitled to express her opinion on what might have caused the genital injury and/or pain and, if caused by force, the nature of that force (see *Meighan* at

para [68] and Statement of Reasons at para [15]). The Advocate depute had been entitled to explore whether the injuries were consistent or inconsistent with non-consensual or consensual intercourse. The defence then had the opportunity to cross-examine Dr Hiremath and to call such experts as they wished to contradict her view. It is not for the court, either at the trial or appellate level, to make findings in fact on the issue. In the event of a successful appeal, it would normally be for the jury to assess the matter again in any new prosecution which might be authorised by the court.

Submissions

[24] The submissions from both appellants were largely to the same effect. They challenged Dr Hiremath's opinion evidence that genital injury and/or pain was more likely to occur in non-consensual intercourse. It was Dr O'Keefe's view that Dr Hiremath had been speculating about the degree of pain suffered since the assessment of pain was unreliable. Consent could not be determined by reference to the level of pain associated with genital injuries. Although genital injury could be consistent with non-consensual intercourse, it was appropriate to add that a finding of a small healing abrasion would also be consistent with consensual penetration.

[25] Dr Astrup reported that it was scientifically wrong to say that genital injury was consistent or supportive of a complainer's testimony of rape. Genital injury was irrelevant. There was no statistically significant difference between consensual and non-consensual intercourse based upon a single lesion in the posterior fourchette. Although pain was a valuable finding, it was subjective such that the physician should not reach any conclusions about it. It could be simulated, exaggerated or understated. Dr Lincoln said that it was not

possible to say whether the genital injury was the result of penetration with finger or penis, or whether it was the result of consensual or non-consensual intercourse.

[26] On the issue of reasonable explanation, a broad and flexible approach had to be taken (*Campbell* v *HM Advocate* 1998 JC 130 at 146-147). *Meighan* v *HM Advocate* had stated that the purpose of an FME's investigation was to detect signs of injury with a view to demonstrating that, notwithstanding that consensual intercourse could produce injuries, a genital injury and/or pain was more likely to occur with non-consensual intercourse. The court's view of this opinion evidence was itself the reasonable explanation for the fresh evidence not having been heard at trial. In the view of the court, the defence should expect such evidence and be sanguine about it being led by the Crown. It was reasonable that the fresh evidence had not been heard at trial because the court was of the view that an FME could give evidence that a genital injury and/or pain was more likely to occur with non-consensual intercourse. There was "accordingly" a reasonable explanation for the fresh evidence not having been heard at trial.

[27] Once the reasonable explanation test had been met it was for the appellant to demonstrate that a miscarriage of justice had occurred; ie if the jury had heard the new evidence they would have been bound to acquit. Alternatively, the court may be satisfied that a miscarriage of justice had occurred. The court had to be satisfied that the additional evidence was capable of being regarded as credible and reliable and likely to have had a material bearing on, or play a material part in, the determination by the jury of a critical issue at the trial (*Megrahi* v *HM Advocate* 2002 JC 99 at para [219]). The appellants had met that test.

[28] The Advocate depute responded that there had been no explanation of why this new evidence had not been heard at the trial. The existence of a reasonable explanation was an

essential key to open the door for a successful appeal (*Campbell* v *HM Advocate* 1998 SCCR 214 at 261). Unless there was a reasonable explanation, the appeal could not succeed, no matter how significant the proposed new evidence might be (*Fraser* v *HM Advocate* 2008 SCCR 407 at para [131]).

[29] None of the reports from the defence experts contained any material that had not been available at the time of the trial. The fact that further reports were available now did not change the fact that this material was available pre-conviction (*Johnstone* v *HM Advocate* [2013] HCJAC 29 at para [57]). In their Cases and Argument, which had been lodged in May 2021, the appellants had sought to rely upon the same reports that had been produced in *Meighan*. They were dated between 2015 and 2019 and made reference to the research findings that post-dated the trial. Reference had also been made to earlier material. It was held in *Meighan* that this additional evidence had been available from other experts and was therefore not something for which a reasonable explanation was available (*Meighan* at paras [70] and [71]). Although the reports produced in this appeal post-dated this trial, they relied upon the same research and literature as in *Meighan*.

[30] Even if the reasonable explanation test had been met, the additional material would not have had a material bearing on the critical issue at trial; that is whether the complainer had consented or not. There was clear and unequivocal evidence from the complainer on charge 2. Dr Hiremath had testified that it was not common for the type of injury suffered by the complainer to have been sustained in consensual intercourse. She had nevertheless re-affirmed that it was possible that the injuries had been caused during consensual intercourse. The reports produced by the appellants went no further than to express the view that no conclusion regarding whether genital injuries could be indicative of consent or non-consent could be drawn. The complainer had given evidence that she had experienced

pain. Dr Hiremath's testimony had to be considered along with that evidence; the jury applying their collective common sense to the issue. *Meighan* had determined that the research cited did not amount to a significant development in medical science.

Decision

Reasonable explanation

[31] The appellants' contentions to a large extent mirrored those in *Meighan* v *HM Advocate* 2021 SCCR 247. As was said in *Meighan*:

> "[70] There requires to be a reasonable explanation for the new evidence not having been heard; the court taking a "broad and flexible" approach to that question (*Campbell* v *HM Advocate* 1998 JC 130, LJC (Gill) at 147). In so far as the new evidence contains references to papers which have been published since the trial, there is little difficulty in accepting that it would not have been possible to lead evidence about them. However, the purpose of the new evidence, put at its highest, is to demonstrate that the existence of genital injuries, at least *per se*, is of no assistance to a determination of whether sexual intercourse was consensual or not. Where substantially the same evidence was available from other experts at the time of the trial, the new material cannot qualify as evidence for which there is a reasonable explanation for it not being adduced at that time (*Johnstone* v *HM Advocate* 2013 SCCR 487, LJC (Carloway), delivering the opinion of the court, at para [57])."

[32] The evidence of Drs O'Keefe, Astrup and Lincoln was all available at the time of the trial in January 2021. Again, as was said in *Meighan* (at para [71]), the fundamental proposition that injuries cannot of themselves prove whether sexual intercourse has, or has not, been consensual, is neither surprising nor novel. Dr Hiremath agreed with that in her cross-examination. That amounted to an important concession which opened the way for the defence to downplay the possible significance of Dr Hiremath's findings. The defence were at liberty to call any or all of the three experts to demonstrate the same point and to expand upon it if necessary. They elected not to do so and that effectively means that the appeal must fail. In so concluding, the court does not criticise the decision of the appellants'

legal representatives at trial. It may have been imprudent to highlight the existence of the genital injury or to focus on the pain, from which the complainer was suffering upon examination some four days after the incident. A decision to deal with the matter by way of cross-examination was a reasonable one in the circumstances.

Significance

[33] The focus of the appeal was on the healing abrasion to the posterior fourchette. In considering the significance of the additional evidence, regard must be had to the evidence as a whole, within the context of the charge to the jury. First, in order to return verdicts of guilty, the jury were directed that they had first to accept the testimony of the complainers, in its essentials, as credible and reliable. In Mr Williamson's case, the jury must have accepted the evidence of both complainers, who spoke about events of a similar nature occurring within a few weeks of each other. Mutual corroboration would have supplied a sufficiency of evidence. Having accepted the complainers' testimony, a conviction was almost bound to follow irrespective of the jury's view of the injury to CM's genitalia.

[34] Although, the same cannot all be said in the case of Ms Gallagher, the jury must have believed CM and found her reliable. There were *de recenti* texts indicative of the use of force or pressure. Although the appellants' experts discount pain as a significant factor in their reasoning, they do seem to accept that it may be relevant to the fact finder's decision, looking at the evidence as a whole. Although a complainer's description, and perhaps experience, of pain may be subjective, it was not suggested that CM had been exaggerating when describing significant pain to Dr Hiremath which was still extant some four days after the incident. All of this would render the abrasion to the fourchette of relatively minor significance in circumstances in which, in agreement with the appellants' experts,

Dr Hiremath had acknowledged that injuries of this type could be caused during consensual intercourse.

[35] In all these circumstances, the court is not satisfied that the appellants have shown that the additional evidence is of such significance that, were it to have been heard by the jury, it would have had a material part to play in the determination of lack of consent. For this reason too, the appeals must fail.

Sentence

[36] At the time of the offences, Mr Williamson was aged 19 and 20. He had a supportive family. Until remanded for a breach of a bail condition, he had no previous convictions. He was an accomplished dancer. He was, however, assessed as presenting a high risk of reconviction and at moderate risk of re-offending, partly because of his continuing denial of responsibility for the offences. At the trial, his counsel had accepted the appropriateness of an extended sentence, under section 210A of the Criminal Procedure (Scotland) Act 1995, with a view to having a reduced period in custody.

[37] Although a period of 6 years in custody cannot be criticised, even for a person of Mr Williamson's comparative youth, as inappropriate for two rapes of the nature described, the court is not persuaded that the test for an extended sentence has been made out. That requires the court to be satisfied that the period for which Mr Williamson would be subject to a licence would not be adequate to protect the public from serious harm. The Criminal Justice Social Work Report did not suggest that the usual supervision and monitoring, which would occur on release from a long term sentence, was not adequate to protect the public from serious harm. Given Mr Williamson's youth and lack of previous offending, there is no substantial basis for the imposition of an extended sentence. The court will quash that

sentence and impose instead a determinate one of 6 years, backdated (as the trial judge had ordered) to 14 January 2021.