APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 15
HCA/2022/283/XC

Lord Justice General
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL

under section 74(1) of the Criminal Procedure (Scotland) Act 1995

by

EDWARD DORAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Renucci QC, C Hiller; Robert Kerr Partnership (Paisley)
Respondent: Edwards QC AD; the Crown Agent

25 August 2022

[1] Section 275B of the Criminal Procedure (Scotland) Act 1995, prohibits a judge from considering a late application to raise matters excluded by section 274 (the rape shield provisions) "unless on special cause shown". This appeal concerns what is meant by "special cause" in this context.

[2] The appellant was indicted to a preliminary hearing (PH) on 4 July 2022. He is charged, first, with administering a substance to the complainer for the purpose of stupefying or overpowering her to enable him to engage in sexual activity, contrary to section 11 of the Sexual Offences (Scotland) Act 2009. Secondly, he is charged with assault and rape, contrary to sections 1 and 2 of the Act. The libel is that these offences occurred whilst the complainer was asleep, intoxicated with drugs and incapable of giving or withholding consent.

[3] On 1 July, the appellant lodged an application under section 275 of the 1995 Act. This should have been lodged "seven clear days" prior to the PH (*ibid* s 275B). The application sought permission to lead evidence that:

> "during the incident … the applicant performed oral sex on [the complainer], at her request".

This evidence was said to have a bearing on the complainer's credibility and reliability; it being the appellant's position that she had voluntarily consumed the drugs, was awake throughout the incident and was capable of consenting to sexual activity. It was immediately after the sexual intercourse, which forms the basis of the rape charge, that the oral sex had taken place.

[4] At the PH, the judge refused to consider the section 275 application, coming as it did less than seven clear days in advance of that PH. It was accepted during the hearing on the appeal that, contrary to the practice before the implementation of the Bonomy Reforms (Criminal Procedure (Amendment) (Scotland) Act 2004), it was the responsibility of defence counsel, rather than agent, both to draft and to lodge any defence statement or section 275 application.

[5] The "special cause" said to justify consideration of the application was that counsel had made a mistake about dates. This was because of pressure of business; that is the number of trials for which she had accepted instructions in the wake of the Covid pandemic. Counsel had, on the advice of the appellant's agent, diarised the PH for 8 July instead of the diet four days earlier. As the PH judge comments, that would have still have made the application late. It was only when counsel received the papers on 4 July that the error was discovered.

[6] The PH judge did not hear the Advocate depute on the application. She did not consider that a mistake about the date constituted special cause. The difficulties experienced by counsel in dealing with the pandemic backlog was not special cause either. The refusal of the section 275 application would not prevent the appellant from putting forward a defence of consent, which the judge allowed to be lodged late. The judge accepted that the section 275 evidence, had it been led, might be relevant to show the complainer's state of consciousness and sobriety.

[7] A trial diet was fixed for 13 March 2023.

[8] The appellant submitted that the PH judge erred in holding that an administrative error made by counsel, who, like others practising at the criminal bar, was under pressure to deal with the volume of the backlog of cases, did not amount to special cause. The PH judge ought to have had regard to the purpose of the time limit in section 275B, notably the avoidance of ambushes, the prevention of disruption to the proceedings and the desirability of avoiding complainers being advised of likely lines of evidence at a late stage (*HM Advocate* v *G(J)* [2019] HCJ 71 at paras [26]-[28]). Following upon intimation of the application, the Crown had been unable to contact the complainer. However, there was ample time to do so in advance of the trial. The PH judge had failed to take into account the

Crown's lack of opposition and the prejudice which would ensue to the appellant were the application to be refused (*Darbazi* v *HM Advocate* 2021 JC 158 at para [27]).

[9] The Crown did not oppose either the appeal or the application. The advocate depute submitted that the correct approach was to determine where the interests of justice lay (*Murphy* v *HM Advocate* 2013 JC 60 at para [33]; *Darbazi* v *HM Advocate* at paras [20] and [21]). The use of "special cause" rather than "cause" reflected the need not to disrupt proceedings and to avoid the late raising of issues (*HM Advocate* v *G(J)*). The Crown had now obtained the complainer's views. Her position was that she did not consent, was not awake at the time, and had no memory of the incident.

[10] The 1995 Act envisages that, in solemn cases before the High Court, the indictment will cite the accused to a PH. In non-custodial cases, the PH must occur within 11 months of the accused's first appearance on petition (1995 Act, s 65(1)). At the PH, a trial diet ought to be fixed within 30 days or thereby (*ibid*). Although the latter time limit has, for good reasons, rarely been complied with in recent years, it still sets the context in which there is a requirement upon an accused person to lodge documents, including any section 275 application, at differing periods in advance of the PH. The reason for the seven clear day period in respect of section 275 applications is to enable the Crown to make enquiries about the complainer's position in relation to what is alleged (*RR, Petnr* 2021 JC 167, (LJG (Carloway), delivering the opinion of the Full Bench, at para [47])). It enables the Crown:
(a) to carry out any investigations which might be required to counter any allegation; and
(b) to give the complainer up to date information about what she likely to be asked at trial.

[11] It is important, as a generality, that applications comply with the time limits in section 275B . The PH, and occasionally the trial, judges are responsible for ensuring that compliance. The use of the words "special cause" is a familiar one. It does not mean that

there has to be an enhanced level of "cause". It means that the cause must be particular to the case, not one which applies in all, or most cases (see eg under other legislation: *Towers* v *Flaws* 2020 SC 209, LJC (Carloway), delivering the opinion of the court, at para [26] and citing *King* v *Patterson* 1971 SLT (notes) 40; *Heasman* v *JM Taylor & Partners* 2002 SC 326, Lord Coulsfield at para [4], Lord Johnston at para [6]). The existence of pressure of business, whether related to the backlog of cases as a result of the lockdown during the Covid pandemic or otherwise, is not a speciality of this case.

[12] Provided that a speciality exists, the search is simply for a "cause". The test is not whether there is a reasonable excuse, or similar consideration, which explains why the application is late, although that will often be a factor in the equation. Cause will be shown if it is demonstrated that admitting the evidence is in the interests of justice (*Darbazi* v *HM Advocate* 2021 JC 158, LJG (Carloway), delivering the opinion of the court, at para [20]). In order to assess that, regard must be had to the merits of the application. The stronger the merits, the more likely it is that the interests on justice will dictate that it should be granted. In this context, the purpose of the time limit should be considered; that is the prevention of disruption to the criminal process, the need to ascertain the complainer's attitude to the evidence and the requirement to provide the complainer with advance notice of what she might be asked at trial. The attitude of the Crown is a factor to which regard must be had, although it is not determinative (*RN* v *HM Advocate* 2021 JC 132 (LJC (Lady Dorrian), at para [20])). The date of the trial is an important consideration.

[13] The speciality in this case was the error in identifying the correct date for the PH and hence the due date for lodging the application. Cause is shown because it is in the interests of justice to allow the appellant to introduce the evidence, which the PH judge correctly regarded as relevant. There is no prejudice to either the Crown or the complainer. There

would have been no enquiries necessary beyond that involving the complainer. The evidence relates only to a specific occurrence of sexual behaviour and that occurrence is relevant to whether the appellant is guilty of the offence charged. The probative value of this evidence is significant. It will outweigh any risk of prejudice to the proper administration of justice, including the protection of the complainer's dignity and privacy. The evidence concerns activity at the time of the alleged rape. Disabling the appellant from giving evidence about what happened during the course of the crime alleged would place him in a difficult position so far as presenting his defence is concerned. The court does not consider that allowing this evidence would deflect the jury's attention from the main issues to be resolved at trial.

[14] For these reasons the court will allow the appeal. It will allow the section 275 application to be received late; special cause having been shown. It will grant the application for the reasons given above.