APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 2
HCA/2022/000333/XC

Lord Woolman
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Appeal against Conviction and Sentence

by

JOHN WATT

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: D R Findlay KC, V Young; Paterson Bell (for Beltrami & Co, (Glasgow)
Respondent: Charteris KC, AD (Solicitor General), Fyffe KC, (sol adv); Crown Agent

18 January 2023

Introduction

[1] The appellant stood trial at the High Court in Glasgow on five charges of historical sexual abuse against four complainers. The jury convicted him on all charges. He committed the offences between 1973 and 1987, when the complainers were aged from 7 to 13 years. The trial judge imposed a sentence of 10 years' imprisonment, reduced from 11 years to reflect time spent in custody following his arrest.

[2] Only one ground of appeal against conviction passed the sift. It related to two charges which concerned the complainer, M. Charge 1 libelled the use of lewd, libidinous and indecent practices towards her. Charge 2 was one of rape. Leave to appeal against sentence was also granted, but only in the event that the appeal against conviction was successful.

Outline of the Crown case

[3] M's account of the incident giving rise to the first two charges was as follows. Her late father was a senior counsel at the Scots Bar, who died in 2012. Shortly before she started secondary school in August 1978, he had taken her to a lane in the West End of Edinburgh. He left her there in a mews-like property with a man to whom he referred as "Watty" and "Johnny Boy". This man then subjected her to the abuse libelled. She identified the appellant as being the perpetrator at a VIPER and from a 1980s photograph.

Section 275 application

[4] Prior to the trial, the defence lodged an application under section 275 of the Criminal Procedure (Scotland) Act 1995 seeking permission to lead evidence relative to charges 1 and 2, which would otherwise have been inadmissible under section 274.

[5] The defence sought to admit or elicit three chapters of evidence. First, that M's late father (a) sexually abused her during her childhood, (b) headed a paedophile ring involving prominent members of the legal profession, and (c) instigated and organised her abuse by members of the ring. Second, that M had made allegations against individuals as early as 2000 (whom the appellant wished to name to the jury), yet did not make any allegations against the appellant until 2014. Third, that the appellant did not move to Edinburgh until

the late summer of 1978 when he commenced "devilling" (pupillage) at the Faculty of Advocates and did not meet M's father until after his admission in 1979.

[6] The application provided limited specification as to the relevance of the evidence to the issues at trial:

> "The [appellant] denies any form of sexual contact with [M] and denies being part of any paedophile ring.
>
> He firmly asserts that it was quite simply impossible for him to have encountered [M] in the circumstances she alleges as he had little or no contact with Edinburgh during the period libelled let alone [M's] father.
>
> At the very least of it, the reliability of [M] is at the very heart of charges one and two.
>
> …
>
> It must be relevant for the jury to know that [M] repeatedly named prominent persons as having abused her but did not name the panel until a much later date. The [appellant] must be entitled to seek a full explanation for what is clearly a significant delay."

The decision of the preliminary hearing judge

[7] The preliminary hearing judge allowed the appellant to elicit the evidence in the second chapter relating to the timing of M's allegations as being relevant to her credibility. He also held that the details of the appellant's professional background as set out in the third chapter were admissible without the need for the court's permission.

[8] The preliminary hearing judge determined, however, that the evidence in the first chapter was either irrelevant at common law or prohibited by section 274. The names of the other alleged abusers, their status and how they came into contact with M were collateral matters.

[9] Further, the evidence did not meet the section 275 tests for admission: it was not confined to specific occurrences; it was not relevant to establishing the appellant's guilt; it

would run the risk of distracting and confusing the jury, as well as inappropriately intruding into M's dignity and privacy. The probative value of the disclosures made by M, while potentially relevant, did not outweigh the risk of prejudice to the proper administration of justice. The appellant did not seek leave to appeal that decision.

The trial

Incrimination

[10] In advance of the trial the appellant lodged a special defence of incrimination, alleging that M was in fact identifying a solicitor with the surname "Watt" who lived in Edinburgh at the material time.

[11] The Crown led evidence in respect of all the charges on the indictment. It relied on the doctrine of mutual corroboration to establish the appellant's guilt. He gave evidence denying that he had committed the offences.

Joint minute

[12] The parties entered into a joint minute agreeing (among other things) the following facts.

(1) At the material time the incriminee resided at a property in the West End of Edinburgh that fitted the description of the locus, and was photographed along with M's father at the wedding of another advocate in April 1979.

(2) Prior to 3rd September 2014 [M] did not inform anyone that she had been sexually abused by anyone named Watt, QC Watt, James Watt or John Watt. Prior to this date, and specifically in 2000, she made allegations of sexual abuse against a

number of men who she named and of whom she provided details. In 2014 she repeated previous allegations against those men and introduced allegations against a man named Watt, QC Watt, James Watt or John Watt.

(3) The appellant practised as a solicitor in Dunoon before he commenced devilling in Edinburgh in the late summer of 1978 and was admitted as an advocate on 13 July 1979.

Renewed section 275 application

[13] On day five of the trial, during the course of M's examination in chief, senior counsel for the defence moved to vary the section 275 order. He sought permission to lead evidence about the names of the other alleged abusers and their association with M's father. The trial judge refused the motion for similar reasons to the preliminary hearing judge. He held that the evidence was irrelevant and collateral. It would distract the jury from the crucial issue: whether the appellant raped and abused M on the occasion libelled.

Cross-examination of M

[14] In cross-examination senior counsel challenged M's reliability. He made the following suggestions to her. (1) She had been inconsistent about when the incident occurred, her age at the time, and how she came to know the appellant's name. (2) She had delayed in making allegations against the appellant. (3) In her book *I Remember Daddy* (2011), she did not mention a mews property.

[15] In her testimony M resisted these suggestions. She admitted that she became upset when police showed her a photograph of the incriminee, but denied that he was her abuser.

She explained that she had delayed naming the appellant, because after making the disclosures in 2000, she stopped engaging with the police. That occurred before she had the chance to "go through everybody".

Closing Speeches

[16] The advocate depute submitted that M had correctly identified the appellant as the perpetrator of the crimes against her. It would be a bizarre coincidence if the abuse libelled in charges 3, 4 and 5 only came to light when M had erroneously identified the appellant as her abuser. The evidence about the incriminee was a red herring.

[17] Senior counsel for the defence said that the Crown had failed to produce any evidence that the appellant knew M's late father before 1979. The appellant's employment history demonstrated that he did not. If M's evidence were accepted, it followed that there would have had to be mutual trust and confidence between the two men. It was not credible that her father would refer to the appellant by his real name in her presence before the abuse took place. While there may be reasons why she did not report the appellant initially, it was significant that she waited 14 years, during which time she had named others.

The Appeal

Submissions for the defence

[18] The appellant contends that he was deprived of a fair trial by not being allowed to elicit six (overlapping) items of evidence. First, M had previously made disclosures of abuse and named the abusers. Second, they were members of the legal profession. Third, she could have known them. Fourth, the appellant was among the last persons to be named,

despite the allegations against him involving very different circumstances to all the other allegations. Fifth, the other alleged perpetrators attended "parties" where M said that abuse was committed. Sixth, despite the discrepancy, she did not remember the appellant until the latest stages of her disclosure.

[19] In oral submissions, senior counsel confirmed that his challenge was confined to the preliminary hearing judge's decision. His overall theme was that he had only been able to put part of the appellant's defence to the jury. It became abundantly clear as the trial progressed that the defence had to explore the prohibited evidence. He accepted that little criticism could be made of the preliminary hearing judge's decision at the time it was made; however, its consequences on the trial should be considered. The court must assess whether, in the whole circumstances, there had been a miscarriage of justice.

[20] If the jury accepted M as credible and reliable, the starting point was that there existed a paedophile ring in Edinburgh in the 1970s. Her father orchestrated it. He facilitated her abuse by prominent members of the legal profession. The eminence of the other alleged abusers was such that it was inconceivable that M's father and the members of the paedophile ring would include in their activities a junior solicitor from Dunoon, who was a comparative stranger with no identifiable connection to them. By contrast, there was independent evidence connecting the incriminee with the locus and her father. Had the appellant been allowed to lead the evidence in question, this could have affected the jury's assessment of her reliability, particularly in relation to identification.

Submissions for the Crown

[21] The Solicitor General advanced four points. First, the existence of a paedophile ring was no part of the Crown case. It would have been no defence for the appellant to establish

he was not a member of the ring. The issue at trial was whether the Crown could prove beyond reasonable doubt that he committed the offences libelled.

[22] Second, a section 275 application had to concentrate on the statutory tests (*CH* v *HMA* 2021 JC 45, Lord Justice Clerk at paragraph [44]). Here, the content of the application was deficient. It did not contain several of the points about which the appellant now complains

[23] Third, the preliminary hearing judge applied the correct tests and reached the right decision on the basis of the application as presented to him. The evidence in question was collateral and inadmissible at common law. Its introduction would have amounted to an unwarranted intrusion into M's privacy and dignity. It would have deflected the jury's attention away from the real issue at trial.

[24] Fourth, there had not been a miscarriage of justice. The defence had been able to make every point which might reasonably have been made in the appellant's favour.

Decision

[25] The section 275 case-law is now well developed. Each application should explain how the statutory requirements are met. It must set out the specific occurrence(s) of sexual behaviour about which the applicant proposes to lead evidence at trial; how it is relevant to guilt or innocence; and why its probative value outweighs the likely risk to the proper administration of justice.

[26] The defence application did not meet these tests in two important respects. First, it did not explain how the evidence in question was relevant to the appellant's guilt on charges 1 and 2. The Crown did not suggest that the appellant was a member of any

paedophile ring. Second, the application failed to address the requisite balance between the complainer's dignity and privacy and the rights of the accused.

[27] In any event, the preliminary hearing judge's decision cannot be impeached by reference to subsequent events. It must be assessed in the light of the information before him at the time. He addressed the statutory code in a sequential and logical manner. He correctly disallowed any evidence about a supposed paedophile ring. That was plainly collateral, irrelevant and inadmissible. It would have deflected the jury from its task.

[28] We conclude that the preliminary hearing judge reached a discerning decision. He did not impose a blanket prohibition. Instead, he allowed evidence that there had been a significant delay in M's disclosures about the appellant. That important fact was set out in the joint minute.

[29] We are not persuaded that any unfairness arose from the section 275 decision. The appellant was able to advance his defence at trial. The jury were made aware (i) of the date that he commenced devilling, (ii) the particulars of the incriminee, and (iii) that he denied any sexual contact with M. That enabled senior counsel to explore the alleged inconsistencies and improbabilities in M's evidence and to submit that she was an unreliable witness. There was therefore no miscarriage of justice.

[30] As we refuse the appeal against conviction, no question of sentence arises.