APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 69
HCA/2018/000013/XC

Lord Justice Clerk
Lady Paton
Lord Turnbull

OPINION OF THE COURT

Delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

RYAN GRAHAM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlay, QC, Young; Paterson & Bell, Edinburgh for Messrs Jim Irvine, Solicitors
Respondent: Goddard, QC, AD; the Crown Agent

15 November 2018

Introduction

[1] On 10 October 2017 after trial the appellant was unanimously convicted of the following charges:

> "(01) On 8 March 2017 at …you RYAN WILLIAM GRAHAM did assault (the complainer), then your partner and now deceased … threaten her with violence, struggle with her, displace her clothing, restrict her free movement, seize hold of her neck and penetrate sexually her vagina with your fingers, and an aerosel (*sic*) can to her injury: CONTRARY to Section 2 of the Sexual Offences (Scotland) Act 2009;

> (02) On 8 March 2017 at … you RYAN WILLIAM GRAHAM did abduct and assault (the complainer), then your partner and now deceased, … and did lock her within said [address], refuse to allow her to leave and did seize hold of her body, repeatedly kick her on the body, punch her on the head, strike her on the head with a torch, propel an item of furniture towards her and cause it to break against her body, repeatedly seize hold of her neck, all to her injury;
>
> (05) on 10 March 2017 at …, you RYAN WILLIAM GRAHAM did assault (the complainer) then your former partner and now deceased, … and did attempt to kiss her, utter sexual remarks and threats to her, repeatedly push her on the body, pull down her lower clothing, penetrate sexually her vagina with your fingers, attempt to rape her by attempting to penetrate her mouth with your penis, and rape her by penetrating her vagina with your penis and pull her hair, all to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009; you RYAN WILLIAM GRAHAM did commit this offence while on bail,…".

He was sentenced to a total of 10 years imprisonment (3 years for charge 1, 18 months for charge 2 and 7 years for the final charge, to be served consecutively) backdated to 13 March 2017.

[2] The issues which arise in the appeal are (a) whether statements made by the complainer, who had taken her own life for unconnected reasons prior to the trial, admitted in terms of section 259 of the Criminal Procedure (Scotland) Act 1995, ought to be viewed as decisive evidence against the appellant in terms of *Al-Khawaja* v *UK* (2012) 54 EHRR 23, in relation to charge 1 and 5; and (b) in the event that the statements were decisive, whether there were sufficient procedural safeguards to ensure that there had nevertheless been a fair trial. In a compatibility minute, it was accepted that there was a good reason for the use of the hearsay evidence but it was maintained that in respect of each of charges 1 and 5 that the hearsay evidence was decisive, and that there were insufficient counterbalancing factors to enable a proper assessment of that hearsay evidence to take place. The trial judge repelled the compatibility minute.

[3] The statements of the complainer which were admitted under s 295 included:

- A recording and transcript of a 999 call made on 8 March 2017 (prod 20)
- A statement made to PC O'Hanlon at about 0550 on 8 March 2017, contained in an affidavit from that officer, and spoken to in evidence by him.
- A statement made to police officers at 0720 on 8 March 2017 (prod 7)
- A statement made to police officers on 8 March 2017 at 0935 hrs (prod 22)
- A statement made to police officers on 9 March 2017 (prod 23)
- A recording and transcript of a 999 call made on 10 March 2017 (prod 21)
- A statement made to police officers dated 10 March 2017 (prod 8).

[4] There was in addition forensic evidence, medical evidence, evidence of distress, and evidence of other witnesses all as summarised below. It was accepted that there was a sufficiency of evidence relating to charge 2, but given the relation between these two charges the evidence as a whole relating to the incidents of 8 March 2017 is narrated.

Evidence at the trial

8 March 2017

[5] At around 0540 on the morning of 8 March 2017 a Mr and Mrs Lusk met the complainer in Livingstone Street, a few minutes' walking distance from the locus at Old Caley Road. She was crying, barefoot, wearing only a vest top and shorts and appeared to be frightened. At her request, Mrs Lusk called the police, handing the phone to the complainer to speak to them. Mrs Lusk heard the complainer say she had been attacked and had been hit with something. In the recording of the 999 call the complainer said that her boyfriend had hit her with something so that her face was "aw burst open". She made no mention of any sexual assault. Neither witness spoke to seeing any injury on her.

[6] At 0550 two constables (O'Hanlon and Scott) arrived at the complainer's house, where the complainer and the appellant were both present. The complainer was tearful, upset and irate. She had a small cut above her left eye, blood on her face, which was swollen, and scratches on her right leg (photographs produced as production 32). There were kitchen utensils in the living room, broken pieces of furniture in a bedroom, a piece of wood on the stairs, blood in the bathroom and blood staining on the duvet cover in the bedroom.

[7] The complainer told PC O'Hanlon that she had been in bed at around 0430 when the appellant had let himself in to the house. He had tried to have sex with her, and when she refused had penetrated her vagina with his fingers and attempted to insert an aerosol can into her vagina against her will. He had wrecked the house. An ambulance attended and treated a cut on the complainer's head, but she had refused to attend hospital.

[8] At 0730 the complainer gave a statement at Saltcoats police station which was noted in PC Throw's notebook. The complainer signed the entry as noted. In that statement she made no mention of anything sexual in nature. She gave an account of falling and hitting her eye, adding that the appellant had gone out leaving her locked in, but she got out through a window and asked a woman in the street to call the police. The appellant had subsequently caught up with her on the street, hauled her by the hair back in to the house, kicked and punched her and smashed a chest of drawers.

[9] Later that day and on the following day the complainer gave two separate formal witness statements to the police. Each was signed at the end and on each page by her. In the first she described the appellant as "my now ex-boyfriend". She said that the appellant had gone out to buy drugs, which turned out to be fake heroin. She and the appellant had fallen out. He left but returned at around 0400 telling her "I'm gonnae punish you, I own

you." He assaulted her as she lay in her nightclothes on the bed. He had pulled off her pants and shorts in a struggle. She told him "What you are doing is rape". He inserted his fingers into her vagina and then inserted a green deodorant can, pushing it back and forth. He pulled the can out and inserted his hand. During this he held her down with his hand near her throat and told her to "fuck up". When she tried to get away he punched and kicked her in the kitchen, threw a torch at her and struck her with part of a damaged chest of drawers which broke on contact. The torch hit her on the face causing a cut near her left eye.

[10] At the time of giving this statement the complainer declined to give the pants she had been wearing for forensic analysis, saying she was still wearing them. She let a policewoman see them, and no damage was noted. The next day she handed in a different pair of pants, ripped, saying these were the ones she had actually been wearing and that she had washed them.

[11] In the second statement she added that the appellant had put his fingers in her anus. He had followed her downstairs and as she tried to leave grabbed her by the throat and pushed her against a radiator. She asked him "What have I done so bad for you to do this?" and he replied "because you think I'm a bam". She said she had gone to see her doctor because her vagina had been very sore. She gave DNA samples. Photographs were taken of her injuries. She agreed to a medical examination but failed to attend.

[12] The appellant was taken into custody on 8 March 2017 and gave a statement to the police in which he admitted that he and the complainer had argued about the purchase of powder which had not contained heroin, and had both gone to look for the person who sold it. On their return, he had made a sexual advance to the complainer, speaking to her as she had described to the police, as she liked him doing that. When she rebuffed his advances he accepted that. She had been hitting him, so he picked her up and threw her across the room.

He confirmed that the complainer had climbed out of the living room window in her pyjamas and that he had gone after her to bring her back. He was arrested and charged, appearing on petition on 9 March when he was granted bail on special conditions not to approach or contact the complainer.

[13] The complainer's GP gave evidence that the complainer had called to see her shortly after 0800 on 9 March 2017 looking upset. She said she had been raped by her boyfriend a few days previously.

[14] There was cctv footage which seemed to show the complainer at a junction near the locus between 0443 and 0447, then a male figure, at about 0502. A female figure was seen again at about 0545 joined by another figure and both walked off together.

Forensic evidence

[15] A grey mousse can taken from the complainer's bedroom was examined. Light blood staining was noted on its upper rim, producing a DNA profile which matched the complainer. In a mixed DNA profile taken from visible white staining on the can, the major element matched the appellant and the minor the complainer. The underside metal rim towards the spray nozzle end produced another mixed DNA profile matching that of the appellant and complainer. A low level partial match to the DNA profile of the appellant was also obtained from another area of the can.

[16] The forensic scientists considered that the pants were most likely to have been damaged by pulling. There was no evidence that they had been washed after the damage.

[17] All but one of the swabs taken from the appellant's hands and fingers nails gave a positive presumptive test for the presence of blood. DNA profiles matching the appellant were found in these samples along with trace elements of another profile consistent with that of the complainer. Such findings could be explained by digital penetration of the

complainer's vagina but might also have resulted from the fact that they lived together. It could not be established how or when the blood presence on top of the can had been deposited.

10 March 2017

[18] At 20.26 on 10 March the complainer made a further 999 call saying she had bumped into a man with bail conditions not to be near her address. He had come back into her house with her. The transcribed note named the person as "Brian Graham". She said he had tried to touch her and to "put his thing inside ma mouth". He then left. The police attended her home between 20.30 and 20.45. She was seen to be very distressed, pacing up and down and shaking. She initially told the police officers that the appellant had breached his bail conditions not to approach her and that he had raped her. He had held a cheese knife to her throat when in the house. The knife was not found.

[19] The complainer was initially uncooperative once CID officers attended. Eventually she stated that she had by chance bumped in to the appellant who was carrying a small knife described as a "wee dagger" this time. He came back to her house and raped her on the couch by putting his penis and fingers into her vagina. He forced her legs apart, put his penis in her vagina and then his fingers in to her bottom. It had been sore, given the previous incident, and she had been crying. She didn't think he had ejaculated. He pulled her hair and said that as she had been telling everyone that he had raped her he would "show her what rape was". He also tried to put his penis in her mouth. Afterwards he had asked her to retract her statement and if they could get back together. She had asked him to get her bike from outside and when he left she had called the police. She allowed swabs for DNA purposes to be taken and handed over her pants to the police. She agreed to attend a medical examination, but again did not attend. Swabs were also taken from the appellant

who was arrested on suspicion of breaching his bail conditions at 2035 at the junction of Old Calley Road and Quarry Street. On being interviewed subsequently he replied "no comment" to most of the questions asked.

Forensic evidence

[20] Swabs taken from the appellant's penis contained traces of the complainer's DNA at a level which indicated that the likely source was bodily fluid such as vaginal cells. The forensic scientists concluded this could be explained by the appellant having intercourse with the complainer.

[21] A trace of semen on the crotch of the complainer's pants contained a DNA profile which matched the appellant. No semen was detected on the swabs taken from the complainer's vagina.

[22] DNA matching the complainer had been detected on the appellant's hands, but the source could not be determined so it could have resulted from anal penetration or from other contact with the complainer.

[23] Although a special defence of consent had been lodged, the appellant did not give evidence.

The trial judge's reports

[24] The trial judge repelled motions of no case to answer in respect of charges 1 and 5, being satisfied that there was a sufficiency of evidence in respect of each charge. He also repelled the compatibility minute. In the opinion he issued at the time, and in his initial appeal report, it seemed that the trial judge must have rejected the argument that the evidence was decisive. Having recorded the submission that the statements fell to be

considered determinative because the jury could not convict unless the complainer's evidence was accepted, he added:

> "In my view that is too narrow a statement in the light of the authorities because the issue of fairness, according to the passages quoted in *Alongi* [*HMA* v *Alongi* 2017 SCCR 287], falls to be determined with regard to whether there is other evidence which would allow the jury to decide whether they could rely on the complainer's account. The stronger that is, the less likely that the statements will be decisive."

[25] It seemed, from his reference to the corroborating evidence that, at least in relation to the fifth charge, the trial judge considered that the evidence was not decisive, but that otherwise in respect of both charges there were in any event sufficient safeguards to enable the jury to take account of the evidence of the statements. However, the basis of his decision was sufficiently unclear to lead to a request for a supplementary report. In that report he indicates that in fact he considered the evidence to be decisive, on the basis that whilst the corroborating evidence might support the hearsay evidence of the deceased, it did not itself offer primary evidence of the commission of the offences in question. The question had thus resolved itself into whether there were sufficient counterbalancing factors to allow the jury properly to test the complainer's evidence. He considered that there were such factors in the form of the corroborating evidence, the opportunity to highlight and address inconsistencies between the statements, and inconsistencies between the statements and other evidence, as well as the giving of appropriate directions about the risks inherent in the use of hearsay evidence. Such directions were given. He also noted that counsel for the appellant had highlighted that the 2 figures seen at the end of the cctv footage appeared to walk off together with no sign of any disturbance between them. We allowed the concession to be withdrawn, for several reasons. First, and most importantly, the court is not bound by any concession in law, whether made by the Crown or otherwise (see for example *HMA* v *Santini* 2000 SCCR 726). Secondly, allowing the concession to be withdrawn at the outset

would enable both parties to address the issue, and enable the court's decision to proceed on full arguments. Thirdly, we did not consider that there was any risk of prejudice to the appellant (and none was argued) since (a) the Grounds of Appeals; and (b) the initial case and argument had both proceeded on the basis that the point was in issue in respect of both charges.

Preliminary Issue

[26] Prior to the appeal a case and argument had been lodged on behalf of the Crown in which it was conceded that the evidence in question was to be regarded as decisive, and that thus the only issue related to the adequacy of any counterbalancing safeguards. At the outset of the appeal the court asked to be addressed on the correctness of this concession, as a matter of law. Following further submissions and a short adjournment, the Advocate Depute sought to withdraw the concession in respect of the evidence relating to charge 5.

Submissions for the appellant

[26] It was submitted that it was essential to draw a clear line between the evidence which derived its source from the deceased complainer and the evidence which came from other sources. The overall issue was that the evidence of the deceased complainer could not be directly tested by the appellant at trial, and refusal of the compatibility minute had resulted in an unfair trial and a miscarriage of justice.

[27] In respect of both charges 1 and 5 the hearsay evidence of the complainer was decisive and the Crown's original concessions had been correctly made. The issue was addressed in *Al Khawaja* at para 131: the question was whether the evidence was of such importance as to be determinative of the outcome of the case. In a case where the corroborating evidence did not of itself provide proof of commission of an offence, the

hearsay evidence could not but be decisive. The matter was to be addressed by asking whether, taking the hearsay evidence out of the equation, there would otherwise be a sufficiency of evidence upon which a jury could proceed to convict. If, as in the present case, the answer was no, then the evidence had to be viewed as decisive. It was only by adding the evidence of the complainer back in that there was a sufficiency for conviction, showing that the evidence must be regarded as decisive.

[28] In these circumstances the court had to address the question whether there were in place adequate procedural safeguards to allow the complainer's evidence to be tested by the jury. Many of the adminicles of corroborative evidence, relied upon by the trial judge as counterbalancing, were no such thing. Much of the supporting evidence was at best neutral.

Charge 1

[29] There were significant discrepancies in the evidence of the complainer which could only have been explained by her. The defence were placed at a disadvantage compared to the Crown as a result of the inability to exercise effective cross-examination. There would accordingly have been significant cross examination of the complainer, had that been possible. Key examples included the following:

- Production 7 – in this first account given at the police station there was no reference to a sexual assault. [We observe that this is not in fact the first account, and that in the earlier statement to PC O'Hanlon the complainer had made such an allegation].
- Production 20 - while the complainer complained of an assault in the 8 March 2018 999 call, she made no reference to a sexual assault.
- Production 22 - in this statement the complainer made a complaint of sexual assault, but gave no explanation why this was not referred to in production 7.

- In her statement dated 9 March 2017 the complainer made further allegations including anal penetration. Anal penetration did not feature in the ultimate libel of charge 1.

[30] While reliance on the evidence of *de recenti* distress and scant attire was noted, these had to be considered in the context of a situation in which the complainer had at no point made reference to any sexual assault. While the police officers attending the complainer had noted she was "upset and irate", that there were signs of violence having taken place at the house, and the complainer was injured, the complainer's initial comments to them had been "Look what he has done to my face". There had been no reference to the sexual assault at that point. [Again, we observe that this is incorrect: see the reference above to the evidence of PC O'Hanlon].

[31] While it was accepted that the appellant had told the police that he had made a sexual advance to the complainer which she rebuffed, and that he had tried to remove her shorts, it was of importance to note that the complainer's statement (production 22) said she was wearing shorts and pants.

[32] The forensic evidence was at best neutral, and could be explained by the relationship between the appellant and the complainer.

[33] A further example was that the complainer initially refused to hand over the pants said to be worn during the incident, claiming that she was still wearing them, yet later she produced ripped pants which she claimed to be the ones she had worn, saying "I have washed these and I had forgotten when speaking to police yesterday that I had changed them already." There was no evidence that the damage was recent, and her account (production 8) was that the pants were pulled by the right leg – "pulled" not "ripped".

[34] The appellant was deprived of the opportunity to ask her for an explanation of her reluctance to engage with the police or be medically examined.

Charge 5

[35] It was accepted that the evidence would entitle a jury to conclude that sexual intercourse took place. It was submitted that the appellant had relied upon the special defence of consent, in respect of which the fact that the complainer, whose credibility was central, was not available for cross examination was accordingly crucial. The forensic evidence did not assist with the question of consent. The jury had been deprived of the opportunity to make a full assessment of the credibility and reliability of the complainer.

[36] In production 22 the complainer asserted "we have been violent with each other before", but she had immediately sought to change that to "No in fact he has always been violent with me". The Crown relied on the bail conditions, but this had to be seen against the background of a chaotic relationship. The fact that both the complainer and the appellant had been involved in taking drugs was also relevant.

Submissions for the respondent

[37] Three questions arose when hearsay evidence was admitted from an absent witness:

1. Was there a good reason for the non-attendance of the witness?

2. If so, was the hearsay evidence "sole or decisive"?

3. If so, were there adequate counterbalancing measures, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence to take place?

No issue arose as to the first matter, the witness being deceased.

[38] Turning to the question whether the evidence was decisive, the Advocate Depute submitted that in relation to charge 1 the hearsay evidence did have that character. The charge in question was a sexual assault by penetration in terms of section 2 of the Sexual

Offences (Scotland) Act 2009. Whilst the supporting evidence in respect of charge 5 was itself eloquent of penetration, that was not the case in respect of charge 1. In charge 1, absent the hearsay evidence there was no evidence of penetration. The position was further complicated by the fact that charge 2 related to a non-sexual assault essentially at the same time, in respect of which much of the evidence, including that of distress, was equally relevant. Having regard to *McGlynn* v *United Kingdom* (App No. 40612/11) the hearsay evidence in respect of charge 1 fell to be regarded as decisive. In that case, the court had determined that the evidence in question was decisive on the basis that it could not be distinguished from the circumstances of *Al - Khawaja*, where:

> "it was the very fact that the trial judge had observed 'no statement, no count one', which compelled the Court to conclude that the absent witness's statement in that case was decisive".

However, the situation was different in relation to charge 5. As already noted, there was corroborative evidence in the form of the DNA swab of the appellant's penis, which was itself eloquent of penetration. There was very recent distress observed in the context of an assertion of sexual assault, and further supportive DNA evidence from the pants and the swabs of the appellant's hands. On this charge the hearsay evidence could not properly be considered decisive.

[39] In considering the question of safeguards, the court should bear in mind that the interests of justice were obviously in favour of admitting the statements, most of which were recorded by the police in proper form (see *Al-Khawaja* para 156; *McGlynn* para 24). The matter required to be addressed in light of what were the real issues for the jury, what the value of cross examination of the complainer would have been, and the judge's careful directions to the jury as to the limitations of the complainer's evidence and the ways in which the jury could test its reliability. Having regard to these factors, the jury would have

been able to conduct a fair and proper assessment of the reliability of the complainer's evidence such that admission of the evidence did not constitute a breach of Article 6.

[40] The trial judge noted two important procedural safeguards in Scots law: (1) the requirement for corroboration of the essential facts of each charge and (2) the giving of appropriate directions to the jury about the dangers of uncritically accepting hearsay evidence of the complainer's account. It was submitted that the trial judge had considered the sufficiency of the evidence and then whether there was material available both in support of and in contradiction to it, which would allow the jury to assess the reliability of the complainer's report. The defence were able to highlight for the jury the discrepancies and inconsistencies both within the complainer's accounts and between aspects of that and aspects of other evidence, as well as her initial nondisclosure, her apparent reluctance to co-operate and her refusal to be medically examined. This provided the jury with a considerable and comprehensive body of material allowing them to fairly and properly assess the reliability of the complainer's evidence.

[41] When the proceedings were looked at as a whole and when the "overall fairness" of the trial was being assessed, the court was entitled to have regarded to a number of factors. These included: the public interest in the prosecution of serious crime, particularly those with a domestic or sexual element; the requirement for corroboration of the essential elements of the charge and the associated obligation upon the trial judge to uphold submissions of no case to answer; the weight of the plethora of supporting evidence placed before the jury to consider; the general duty of the trial judge to assess the fairness of the trial as it progressed; the specific assessment of fairness which the trial judge had carried out as a result of the compatibility minute; and the directions given by the trial judge about the dangers of uncritically accepting hearsay evidence of the complainer's account.

Analysis and decision

[42] At para 118 of its decision in *Al- Khawaja* the Grand Chamber stated that in considering whether there has been a fair trial:

> "… the Court's primary concern under art.6(1) is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses."

It confirmed, at para 146, that the same approach should apply where the issue under consideration stemmed from an argument based on the "sole or decisive" rule:

> "The Court is of the view that the sole or decisive rule should also be applied in a similar manner. It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise. To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice."

[43] The question of when hearsay evidence may be viewed as decisive was addressed at para 131 as follows:

> "'Decisive' in this context means more than 'probative'. It further means more than that, without evidence, the chances of a conviction would recede and the chances of an acquittal advance, a test which, as the Court of Appeal in *Horncastl*e pointed out, would mean that virtually all evidence would qualify. Instead, the word 'decisive' should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive".

[44] As was noted in *HMA* v *Alongi* 2017 SCCR 287, para 8:

> "It is important to note in this connection that the European Court is not using the word "corroboration" in the pure sense in which it is understood in Scots law."

The search is not for testimony which provides a sufficiency of evidence, even in a system which has a requirement for corroboration. The issue is not one of sufficiency but of whether there is supporting evidence which adds sufficiently to the weight of the hearsay account such that the hearsay account cannot be regarded as "decisive" as that term is understood. The supporting evidence is part of the context in which the overall significance, and potentially determinative nature, of the hearsay evidence must be assessed. When the court in *Al Khawaja* stated that the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive, it must be seen as addressing the issue of weight, not of sufficiency.

[45] Generally speaking, an account from the complainer, either in the form of oral testimony or, in appropriate circumstances, by way of statement introduced by section 259 of the 1995 Act, will provide the evidential foundation for a charge of sexual misconduct. The absence of any such evidence will mean that in most, but not all, cases there is an insufficiency of evidence to support the charge brought. In some cases it will mean that there is simply no evidence in support of the charge at all. We would understand this to be the context in which the trial judge in *Al-Khawaja* made the observation "no statement, no count one". He was making a statement concerning sufficiency, albeit the Grand Chamber came to view the evidence admitted by way of hearsay as decisive.

[46] The fact that hearsay evidence of this sort may provide the underlying foundation for the charge does not however mean that it must necessarily be the decisive evidence. This is clear from what the Grand Chamber itself said in *Al-Khawaja* at paragraph 131. A further example of the recognition of this distinction can be found in the subsequent decision of the Grand Chamber in the case of *Horncastle* v *United Kingdom* (2015) 60 EHRR 31. At

paragraph 141 the court observed that it was "more than arguable" that the strength of the other (circumstantial) incriminating evidence in the case meant that the statement of the deceased victim of assault and robbery was not "decisive" in the sense of being determinative of the outcome of the case.

[47] For these reasons we do not see the decision of the Fourth Section of the ECHR in *McGlynn* v *UK* as setting down any principle to the effect that the statement of a deceased witness will be viewed as decisive if that statement is necessary to initiate the prosecution or to establish the essential elements of the crime charged. It will be necessary to examine the circumstances. These may be such, as in *Al-Khawaja*, to lead to the conclusion that the hearsay evidence is decisive, but on the other hand, there may be supporting evidence of such significance as to lead to a different conclusion, it is a question of degree. Where the complainer's evidence is tendered in hearsay form it is necessary to ascertain whether there is any supporting evidence, and then to assess that evidence, not in terms of sufficiency, but as to the extent to which it adds to the persuasiveness and reliability of the hearsay evidence in question.

[48] In the submissions for both the appellant and the Crown, the matter was approached on the basis that one had to remove the hearsay evidence from the picture, and then ask whether there was direct evidence against the appellant on the charge in question. For the reasons given, we do not consider this to be the correct approach.

Was the evidence decisive?

Charge 1

[49] Although we doubt the approach taken by the Crown in this case, as already noted, we are with hesitation prepared to proceed on the basis of the Crown concession that the

hearsay evidence in respect of this charge should be regarded as decisive. The clear association between charge 1, a sexual assault, and charge 2, a non-sexual assault, and the fact that a great deal of the evidence which might be viewed as supportive of the hearsay evidence can relate as much to charge 2 as to charge 1, as well as the fact that the supporting evidence does not point towards penetration in such a clear way as the evidence available on charge 5, have led us to conclude, with some hesitation, that we should not disturb the Crown concession, and to proceed on the assumption that it has been correctly made.

Charge 5

[50] The position here is very different. We are quite satisfied that the Advocate Depute was right to withdraw the concession previously made, and that the hearsay evidence in respect of this charge cannot be considered decisive. In respect of this charge there was considerable supporting evidence of real significance. The most weighty factors were the DNA evidence, the clear distress observed by police officers within a short time of the original 999 call, the fact that the appellant was subject to bail conditions from only two days previously not to contact the complainer, and the fact that he was arrested less than 10 minutes after the 999 call, near to the locus.

Procedural Safeguards

[51] Where, as in respect of charge 1, hearsay evidence is considered to be of a decisive nature, the court must address the question whether there were sufficient factors in place to counterbalance the effect of the absence of the witness, and to permit a proper and fair assessment of the hearsay evidence to take place. In this regard it is relevant to note that the majority of the statements in question had been signed by the deceased complainer. Amongst factors which may be taken into account are: that the court approaches the use of

such evidence, and the weight to be attached to it, with caution; the directions given thereanent by the trial judge; the availability of (in this case the requirement for) corroboration; the opportunity for the appellant to place his own version of events before the court; and the opportunity to cast doubt on the credibility and reliability of the hearsay evidence.

[52] Having regard to these factors we consider that there were in place such safeguards as to make it permissible for the jury to rely on the hearsay evidence in reaching its decision. There was corroborative evidence in the form of the observed condition and distress of the complainer when seen by the Lusks, and during the 999 call; and again when seen by the police; the presence of the aerosol can in the bedroom and the DNA evidence relating thereto; the DNA evidence from swabbing the appellant's hands; and his admission that he had made a sexual advance to the complainer, notwithstanding that he had added that he did not pursue the matter when rebuffed. The trial judge gave clear directions about the need to exercise great care when examining the hearsay evidence, pointing out that the jury had not had the opportunity to see or hear the witness, that her evidence was not given in court, or on oath, and had not been tested by cross examination as would usually be the case. They were thus in a poorer position from which to make an assessment of credibility and reliability. Numerous discrepancies in her evidence were alluded to, and the jury were reminded about the point made by senior counsel for the appellant in relation to the cctv. The appellant had made a statement to the police which was played before the jury, and he had the opportunity to give evidence had he so chosen. Furthermore, the defence had the opportunity to highlight, during the evidence and in the defence speech, various discrepancies which arose within the statements of the complainer or between her statements and other evidence. In all the circumstances we are satisfied that there were

indeed sufficient procedural safeguards such that no unfairness arose from the reliance on the hearsay evidence. We note that the safeguards in place appear to be considerably greater than those which were deemed sufficient in the case of *Al-Khawaja* (see para 156) where there were also concerns that there had been deficiencies in the directions given, a point not suggested in the present case.

[53] In respect of charge 5, this issue does not arise. Had it done so, however, we would have reached exactly the same conclusion, and for much the same reasons, save that the corroboration was stronger. In conclusion, the appeal against conviction will be refused.

Sentence

[54] The appeal is also against sentence, the ground of appeal being that, given the appellant had no analogous previous convictions, that the appellant and complainer's relationship had been volatile at the best of times and the fact that the complainer had previously attempted suicide and her death was not attributable to the matter libelled in the indictment, the sentence imposed was excessive.

[55] The trial judge noted that the record of the appellant was not serious, and that he had no analogous convictions. He presented a moderate risk of sexual reoffending. Despite a submission made to him, he did not consider the volatility of the relationship between the appellant and the complainer. The charges which the appellant was convicted of required deliberate actions on the part of the appellant. Since it was clear that the complainer's suicide was not associated with the events in question the trial judge did not take that matter into account in sentencing.

[56] The first charge consisted of a particularly unpleasant sexual assault for which he imposed a 3 year sentence. As the common law assault charge occurred as part of the same

incident as charge 1 a concurrent sentence of 18 months was imposed. In relation to the final charge the trial judge was of the view that the seriousness of the rape charge was aggravated by the fact that at the time of its commission the appellant had been on bail for the earlier offences which had included conditions not to approach the complainer and the fact that the rape had occurred so soon after the first incident. In the trial judge's view a substantial consecutive sentence was accordingly merited, causing him to impose a consecutive sentence of 7 years. We do not consider that the cumulo sentences imposed can be considered excessive in the circumstances of the case. The events of charge 5 were significantly aggravated by the proximity in time to the events which were the subject of charges 1 and 2, by the appellant's motivation (to punish the complainer) and by the fact that it was in blatant breach of the order designed to protect her. Accordingly, the appeal against sentence will also be refused.