APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 71
HCA/2018/000164/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

DAVID PENMAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg, Solicitor Advocate; Messrs Paterson Bell
Respondent: McSporran QC, AD; Crown Agent

20 November 2018

Introduction

[1] In March 2018 the appellant was unanimously convicted of 11 historic charges of a sexual nature, carried out between 1987 and 1991. The complainers, six girls and two boys, were fellow pupils of the appellant at the Royal School for the Blind in Edinburgh. At the time of the incidents they were all aged between 12 and 15 years, the appellant was aged between 12 and 16. The appeal relates to the decision of the trial judge to grant a Crown

motion under section 266(4) & (5) of the Criminal Procedure (Scotland) Act 1995 allowing evidence that the appellant had previous convictions to be placed before the jury.

Section 266 provides:

> "(4) An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless—
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> …
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> (b) … the accused has given evidence of his own good character,
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> …
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> (5) In a case to which paragraph (b) of subsection (4) above applies, the prosecutor shall be entitled to ask the accused a question of a kind specified in that subsection only if the court, on the application of the prosecutor, permits him to do so."

[2] At the trial each charge was spoken to by the relevant complainer and there was direct corroborative evidence in relation to four of the charges (2, 3, 14 and 15). The Crown relied upon the doctrine of mutual corroboration for a sufficiency of the evidence on the other charges of which the appellant was convicted. The appellant gave evidence denying his guilt and asserting that the complainers were lying. A special defence of alibi was relied upon in respect of some of the charges.

Background

[3] During cross examination the advocate depute put the following proposition to the appellant: "That's a lot of witnesses to come to court and give evidence that's not true?" In response the appellant stated: "I've never been in court so I don't know in terms of size whether that would be a normal number of witnesses. Nine is quite high in number, yeah."

[4] Outwith the presence of the jury, the advocate depute submitted that the statement

"I've never been in court " could only be taken to be a statement of the appellant's good character. There had been no need for him to volunteer this information. The statement was in fact false, since the appellant had previously been convicted of offences of a sexual nature, to which he had pled guilty in 1993, 2000, and 2009. The advocate depute wished to correct the false impression of the appellant's character implied by the statement, and to lead evidence that he had been convicted on these dates. Recognising that the fundamental consideration was one of fairness, the trial judge allowed him to do so, repelling an objection on behalf of the appellant. The trial judge said:

> "The position in the present case is that the accused, quite unnecessarily and without prompting by the Crown, stated that he had never been in court. ... If his evidence were allowed to stand unchallenged by the Crown it would leave the jury with a seriously false impression ....

[5] The advocate depute subsequently put the general terms of the previous convictions to the appellant in cross examination. The specific details were not disclosed. The appellant admitted that he had previously been in court and had pled guilty to offences in 1993, 2000 and 2009. He accepted that he had told lies when he said he had never been in court. In re-examination he repeated the fact that he had lied about never having been in court. He said that he had never gone through a trial before as in other cases he had pled guilty. He had meant to say that he had never been in a trial.

Submissions

[6] It was submitted that the trial judge erred in concluding that the statement constituted evidence of the appellant's own good character. The appellant's explanation for making the statement, given later in his evidence was that he had never been to trial before, which is what he meant to say. It was submitted that in context it was obvious that this is

what he meant. The advocate depute had been able to confirm that the previous convictions arose from pleas of guilty.

[7] The circumstances were similar to those in *Khan* v *HM Advocate* 2010 SCCR 514, where the court held that there had been no contravention of section 266. Even where the evidence given can be brought within the terms of the statutory provisions, the admission of evidence of convictions remains a matter of discretion (*Leggate* v *HM Advocate* 1988 JC 127), the fundamental considerations being fairness and balance. If the potential prejudice to the accused was out of proportion to any potential effect of the remark, then the reference to previous convictions should not be allowed and the appeal should succeed, as occurred in *McLeish* v *HM Advocate* 2016 SCCR 422. Reference was also made to *Barr* v *HM Advocate* 2006 JC 111. As in that case, no specification was given by the advocate depute as to the nature of the convictions and the jury was accordingly left in a vacuum as to what they were. Had the defence sought to do so it would have further increased the prejudice.

[8] The credibility and reliability of the appellant was very much a material issue at trial and the repeated reference to the appellant's evidence regarding his convictions could only prejudice the jury's views on this matter, and has resulted in a miscarriage of justice.

Submissions for the respondent

[9] The statement by the appellant was clear in its terms and could only be construed as putting himself in a good light and suggesting that he had no convictions. The comparison with *Khan*, where the circumstances were very different, was not a sound one. The case was somewhat unusual, relating not to an attack on general character but to exposing the fact that in giving such evidence of his own good character the appellant had lied about this specific matter. It was the fact of having lied about the matter which was significant, and it

would have been more prejudicial for the advocate depute to have disclosed the detailed nature of the convictions which were analogous, and included a conviction in the High Court for rape and assault with intent to rape which attracted an extended sentence, of which the custodial part had been 10 years. The appellant admitted that he had lied about not being in court, and it was this admission, rather than the convictions to which it related, which formed the basis of the use to which the evidence was put. It was proportionate in the circumstances for the judge to have allowed the fact of conviction to be put. In any event, standing the weight of the evidence, the clear directions, the limited use to which the evidence had been put, and the discriminating verdict of the jury, it could not be said that allowing the matter to be explored as it had been resulted in a miscarriage of justice.

Analysis and decision

[10] The first question which arises is whether evidence given by the appellant constituted "evidence of his own good character". As a preliminary, we would observe that it is somewhat surprising that the advocate depute's remark "That's a lot of witnesses to come to court and give evidence that's not true?" was not objected to, since it is a comment more appropriate to form part of a jury speech, rather than a proper question to put to the appellant. It was not, however, objected to, and the appellant's response was neither a necessary, nor even obvious, riposte. It was for the appellant to decide how he chose to respond, and it seems difficult to construe what he said, in volunteering that statement, as anything other than an attempt to put himself in a good light, and create the impression that he was a person without any prior involvement with the law, far less someone who had prior convictions; after all, even without going to trial, he'd have known how many witnesses were ranged against him in the earlier cases. It is apparent from the partial

transcript of evidence with which we have been provided that in his answers to cross-examination, the appellant gave his evidence in a very measured fashion, and was extremely careful in his choice of words in answering the advocate depute. On occasion he corrected the advocate depute if a mistake was made in referring to evidence or even the name of a witness. The comment which prompted the motion was not simply a passing or casual remark. The position can be contrasted with the case of *Khan*, where the court held that the appellant's remark should have been understood in its context as a denial of involvement in the specific incident in question or any other incident of assault, which was a true statement. In the present case the statement was entirely unqualified, specific in its terms and untrue: I have never been in court before. In our view the trial judge was correct to interpret it as evidence of the appellant's own good character.

[11] Proceeding on the basis that the evidence was such as to constitute evidence of the appellant's own good character, the second question to address is whether the trial judge should have exercised his discretion to allow the fact that he had prior convictions to be placed before the court.

[12] In *O'Hara* v *HM Advocate* 1948 JC 90 the Lord Justice Clerk (Thomson) pointed out that in the exercise of the court's discretion whether to allow an accused to be questioned regarding previous convictions:

> "The fundamental consideration is a fair trial and there may be cases where the price which the accused may be called upon to pay if cross-examined will be out of all proportion to the extent and nature of the imputations cast on the witnesses who testify against him."

This statement was approved by the court in the full bench case of *Leggate* v *HMA* 1988 JC 127 (although *O'Hara* was overturned on other matters) which added:

> "We would, however, stress that a trial judge has a wide discretion as to whether to allow cross-examination of this kind. The fundamental consideration is fairness, and in applying the test of fairness one must have regard both to the position of an

> accused and the public interest in the detection of crime and the bringing of wrongdoers to justice."

[13] These are therefore the considerations which should be brought to any application to allow previous convictions to be referred to in the presence of the jury. What is required is a balancing exercise. In *Barr*, for example, the statement that the appellant was "totally against drugs of any kind" was considered to constitute evidence of his own good character, but to use that as a basis for disclosing a prior drugs conviction was disproportionate. In *McLeish* it had been disproportionate to admit evidence of prior convictions on the basis of a "passing remark" which incidentally reflected adversely on the character of one of the witnesses. As we have noted, the statement in this case was not a passing or casual remark but one deliberately volunteered by the appellant for no good reason. In determining whether the discretion had been properly exercised, it is necessary to take note of the limited extent to which the convictions were referred to. They were referred to for the purpose only of showing that the statement, on oath, "I have never been in court" was a lie. The advocate depute was restrained in the way in which he proceeded, limiting himself to establishing that a lie had been told. The exercise showed that the appellant had lied on this matter, and the use made of the evidence by the advocate depute, and the directions as to the use to which the jury could put it, were restricted entirely to issues of credibility and reliability. The judge's directions, which had also contained the injunction not to speculate about the evidence generally, were not criticised. The directions on the legitimate use of the evidence in question were as follows:

> "The fact that the accused has previous convictions does not in any way assist the Crown in proving any of the charges on this indictment. So far as these charges are concerned, his previous convictions are irrelevant and must be ignored by you. The only reason why his previous convictions were mentioned in the course of the trial is because the advocate depute required to refer to them to challenge the truthfulness

> of his evidence that he had never been in court. Reference was made to them only to test his credibility and when that was done he admitted that he had lied when he'd said he'd never been in court. The point which you must bear in mind is that the evidence of his previous convictions is not evidence against him on any of the charges on the indictment."

[14] The details of the convictions were not referred to. Miss Ogg submitted that it would have been highly prejudicial to the appellant had the advocate depute referred to the analogous nature of the offences, making it difficult to understand her objection to the fact that the detail was not presented. That submission appears to have been based on a remark in *Barr* that the jury should not have been left in ignorance of the nature of the conviction, thus allowing them to speculate. However, that remark must be seen in context: the appellant's assertion that he was totally against drugs had been diluted to an assertion that he was against hard drugs, specifically heroin. Not to bring out that his one conviction related to cannabis could create the wrong impression for the jury. Whether it is necessary or appropriate for the details of convictions to be established will always be a matter of circumstances. We are in no doubt that it would have been highly prejudicial to the appellant in the present case to have the jury informed of the detail of his convictions, and the restraint displayed by the advocate depute was entirely appropriate.

[15] In any event, even had we been critical of the judge's decision to grant the Crown motion, we would have found it impossible to say that the result had been a miscarriage of justice. We have already referred to the limited use to which the conviction was put, and the clear directions that the issue went only to credibility. The appellant was able to offer in re-examination his explanation for making the statement, relating to not having been to trial before. The jury were directed that in considering credibility one issue they could consider was whether a witness was able to give an explanation for any contradictions in his or her evidence. There was evidence against the appellant from 8 different complainers, and in

four of the charges there was direct corroboration. The jury returned a discriminating verdict, acquitting him of charge 15 (one of the charges with direct corroboration) and significantly amending the terms of the libel in another, suggesting that the issue in question had not taken on an undue significance in the jury's deliberations. For all these reasons, the appeal will be refused.

Postscript

[16] At a procedural hearing on 5 September the court appointed the solicitor advocate for the appellant, NO LATER THAN 24 OCTOBER to lodge a written, agreed position in respect of the evidence of the appellant, the submissions made to the judge in respect of section 266, and the terms of the speech of the advocate depute. Clearly, the reason for this was to ascertain whether it might nevertheless be necessary to obtain transcripts of the relevant section of the evidence and the speech, or at least a supplementary report from the trial judge. That order was not complied with, and it was only on Monday 12 November, two days prior to the appeal and 18 days after the due date, that the appellant's solicitor advocate submitted not an agreed position as directed but her own transcript of sections of the evidence of the appellant, the subsequent debate and of parts of the Crown speech. As it happens there was no dispute about this matter and fortunately it was not necessary for the appeal to be discharged for further inquiry to be made. The explanation offered for failing to obtemper the order of the court related to the undertaking of other commitments. We consider this to be a highly inadequate explanation. It is not for counsel to decide whether, or when, to obtemper an order of the court which has been stated in such clear terms. If there is difficulty in complying for some good practical reason the matter may be brought before the court to ascertain whether the date for compliance may be extended, but

otherwise it is the duty of those appearing to comply with any orders made by the court, in a timeous and proper manner.