APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 9
HCA/2018/214/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION AND SENTENCE

by

JM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Capital Defence (for the Lambie Law Partnership, Glasgow)
Respondent: Gillespie AD; the Crown Agent

24 January 2019

General

[1] On 23 March 2018, at the High Court in Glasgow, the appellant was convicted of five charges involving lewd and libidinous practices towards his three daughters, in the family home, during the years 1976 to 1990. Charges 1 and 2 were lewd and libidinous practices and behaviour towards F, aged between 4 and 11, at common law from 1976 to 1984 and

under section 5 of the Sexual Offences (Scotland) Act 1976, whilst she was over the age of 12 and under 16, from 1984 to 1986. Charges 3 and 4 adopted the same structure in respect of such conduct towards L, between the ages of 8 and 11, from 1982 to 1986 and, when she was over 12 and under 16, from 1986 to 1988. Charge 5 was a charge at common law involving conduct towards E, whilst she was aged between 5 and 11, during the years 1983 to 1990. The behaviour consisted of touching and rubbing the vaginas of the complainers, pressing and rubbing his penis against their buttocks, ejaculating, masturbating, inducing the complainers to masturbate him and on one occasion digitally penetrating L. There was also a libel of inducing L and E to watch pornographic material.

[2] On 18 April 2018, the appellant was sentenced to 4 years on each of the common law charges and 2 years in respect of the statutory offences. The sentences on respectively charges 1 and 2, and those on 3 and 4, were consecutive to each other, but concurrent as a whole. The sentence on charge 5 was consecutive to that. The totality was therefore 10 years imprisonment.

The trial

[3] Each of the complainers gave evidence broadly in terms of the libels. Each was cross-examined on a number of different matters, including statements which they had made to various persons, including the police, long after the offences had allegedly been committed. The appellant too gave evidence. He denied committing the offences. The trial judge describes the defence speech as "somewhat diffuse". Although there had been references by the appellant's counsel to the statements given by the complainers, the judge did not think that these were central to the defence speech. The main arguments raised different points.

[4] A transcription of the defence speech (88 + 35pp) was obtained in order to identify the points made and to gauge their materiality. Isolated from the context of the testimony, it is not easy to follow many of the references in the speech. This is not a criticism, but an aspect of the speech being looked at in the context of the trial as a whole. After certain preliminary comments, counsel turned (at p 21) to what was going to be "broadly" her approach under several headings: timings and why they were important, relative to the dates in the libel; prior inconsistent statements; evidence which had not been adduced by the Crown; the evidence of an expert psychologist led by the Crown; and, finally, the defence case.

[5] In turning to the question of inconsistencies (at p 67), counsel explained that this was a way of testing the credibility and reliability of the complainers. If someone had been consistent "throughout", the jury could say "that's always been their position"; giving the appellant as an example of this. In relation to the women, it had been L who, in 1994 when she was 20, had made an allegation in the context of a social work enquiry about allowing the appellant access to her children. She had told a social worker that her older sister, F, had been abused by her father, but that she did not think that the appellant would abuse her children, as he had not abused her younger sister, E. Counsel maintained that, contrary to what she had said in 1994, L had testified to witnessing "stuff happening to" E.

[6] There was evidence that F had said to her aunt that "[L] is lying. My dad hasn't done anything to me". In a statement to the police, she had explained that she had denied that anything had happened to her because the care home, in which E was living, was bad. However, according to defence counsel, she had not visited E in the care home at that point. F also said that she had been about to become 16 and would be able to "get" and protect E. F had testified that her grandfather had "procured" the pornographic videos for his son, the

appellant, and had known what they had contained. In her statement to the police in June 2016, she had said that her grandfather had not known that "it (*sic*) was a porn video". Her grandfather had asked her to give the videos to her father.

[7] There had been a rule that F was not allowed to return home from school before 4.06pm. On one occasion, she had breached this rule because she needed to go to the toilet. She had opened the livingroom door and found the appellant sexually abusing E. She had gone to the toilet, after which the appellant had asked her "how was school", as if nothing had happened. In the June 2016 statement however, F had said that, after she had come upon the incident of abuse, the appellant had started shouting at her for being 2 minutes early. "A completely different account you might think" according to defence counsel.

[8] F had said that the first episode of abuse had been when she had been naked in bed; "my nightie was completely off". In her statement to the police, she had said that her clothing was "up". At a McDonalds in 2013, F had been asked by a witness "what's all this carry on with L?", in the context of further police investigations. F had said "It's a lot of s...e" and "nothing happened to me".

[9] After an adjournment overnight, the defence speech resumed, with counsel concentrating once more on timings and about matters spoken to by L, which had not been libelled. There was a reference to an incident involving a number of men, not including the appellant, which F had mentioned in her statement of 2016. She had said that she did not remember these men touching her anywhere specifically. She did not mention anything happening to E. When it came to her testimony, she said that she had been on a man's knee and he had his penis out and this had happened to E as well. "If ever there was an inconsistent statement that was it". In relation to the episode of vaginal penetration, L had

said that this had stuck in her mind, but she had not mentioned it until the statement in 2016.

[10] Moving on to E, she had said that she had not discussed the incidents with her sisters. She was then taken to the police statement she had given in 2016 in which she had said that she had spoken to L regularly and mentioned things that she now remembered. The speech continued by referring to various incidents which E had spoken to, which had not been reported earlier to the police.

Charge to the jury

[11] The trial judge gave the jury standard directions on the need to assess the credibility and reliability of the complainer. At an early part of his charge, he said:

> "Consistency is often times an important way of approaching a witness's evidence. So you ask yourself the question: 'Has the witness's evidence been consistent?' That's to say internally consistent. Has ... the same account been given from beginning to end or are there contradictions?"

He told the jury that they could also assess whether or not a witness was "externally consistent"; that is to say whether their testimony was consistent with what other witnesses had said. A contradiction of a minor nature may not matter, but the jury had to weigh up what significance any contradiction might have. The judge dealt with the demeanour of the witnesses and related matters. He asked the jury to test the evidence in light of their collective common sense and their own experience of life. In connection with the delays in reporting, the judge said that it was accepted that there can be good reasons for a person, against whom a sexual offence has been committed, delaying telling others, or not reporting it to the police at the time (Criminal Procedure (Scotland) Act 1995, s 288DA). These could include the inability of a child to understand, love for the parent and shame at what had

happened. Having completed his section on evidence, the judge gave the jury the standard directions on the presumption of innocence, the burden and standard of proof and corroboration:

> "... When you apply my directions to the circumstances of this case, you should consider all the evidence that the Crown relies on and the submissions made to you by the Advocate Depute, and you should give equal consideration to the evidence relied upon by the defence and the speech made to you by Ms Livingstone."

[12] In relation to prior statements, the judge directed the jury that police statements could be used in circumstances where the witness had accepted what they had said to the police and that it was true. After the jury had retired to consider their verdicts, the appellant's counsel very properly directed the judge's attention to what she considered to be the absence of a direction that prior statements had been used, not for the purposes of the witnesses adopting them, but to discredit their evidence by reason of inconsistency. This was not just in relation to statements to the police but those to others too, including the content of the social work records. Prior statements which were inconsistent could be used to test the credibility and reliability of the witnesses and the jury ought to have been directed on this. The trial judge said that he did not think that the jury would be in any doubt that the prior statements had been used for the purposes of discrediting the witnesses

[13] The trial judge recalled the jury and said:

> "Perhaps more importantly, one thing I omitted to do was I didn't point out to you another qualification to a rule against hearsay, which is a rule which allows [the defence] to put police statements to a witness where they are what are called 'prior inconsistent statements', that is to say they're not the same as, they don't say the same as what the witness is saying in evidence, and [the defence] can use that to challenge their testimony and to point out to them that that's not what they said before.
>
> So I need to make it clear that laws of evidence or rules of evidence permit [the defence] to use, not only police statements for that, but I think social work records as well saying, 'That's not what you said in your evidence to the court' and

> thus to challenge and, if possible, undermine. So ... if it was a matter of doubt to you, I should make it clear that [the defence] was entitled to do that, and our law on evidence permits her to do that."

Submissions

Appellant

[14] It was accepted that the charge required to be looked at in the context of the whole trial and not scrutinised as if the jury had not heard the evidence or the speeches. It was primarily for the parties to address the jury on the parts of the evidence which were, or were not, significant. The judge did not require to extract and repeat all the points in favour of one party or the other (*Sim* v *HM Advocate* 2016 JC 174 at para [32]). There were, however, standard directions on prior inconsistent statements (Jury Manual: Part 2 chapter 27) and a judge ought to take care before omitting a normal direction (*White* v *HM Advocate* 2012 SCCR 807 at para [13], cf *Moore* v *HM Advocate* [2010] HCJAC 26 at para [19]). The challenge to the credibility and reliability of the complainers was an important part of the defence case. The jury were not adequately directed on the use to be made of prior inconsistent statements, in terms of section 263(4) of the Criminal Procedure (Scotland) Act 1995.

[15] The directions, which had been given after the jury had retired and been brought back into court, did not go far enough. They did not follow the Jury Manual guidance, which was a relevant factor in assessing whether there had been a misdirection. The directions on "internal consistency" were a reference to what was said in court, rather than a comparison between evidence and statements. The directions on giving consideration to the evidence relied on in the defence speech was not sufficient. There ought to have been a direction on how to approach particular categories of evidence, including the content of prior statements, albeit not an unnecessarily intricate or condescending one (*Rehman* v *HM*

Advocate 2014 SCCR 166 at para [51]; see also *Khan* v *HM Advocate* 2010 SCCR 514 at para [23]; *Haggerty* v *HM Advocate* [2009] HCJAC 31 at para [6]; *Niblock* v *HM Advocate* 2010 SCCR 337; and *Lumsden* v *HM Advocate* 2012 JC 133 at paras [4] and [5]; cf *Moynihan* v *HM Advocate* 2017 JC 71 at paras [19] – [21]).

Decision

[16] As has been often said in recent years (*Moynihan* v *HM Advocate* 2017 JC 71, LJG (Carloway) at para [17] citing *Younas* v *HM Advocate* 2015 JC 180 and *Sim* v *HM Advocate* 2016 SCCR 303) it is:

> "primarily for the parties to address the jury on what parts of the evidence were, or were not, significant and to make such submissions on credibility and reliability as they thought appropriate. The distance over which the judge should traverse the arena of fact was very much a matter for his judgment, based upon his unique understanding of the true issues of fact in contention during the trial".

[17] In relation to the use of adopted prior statements, it may be that a direction is necessary to clarify for the jury that such a statement may be used as proof of fact where it is essential or material for proof of the charge (eg *Niblock* v *HM Advocate* 2010 SCCR 337, LJC (Gill) at para 14). Where the statements are used solely for the purpose of undermining credibility or reliability in terms of section 263(4) of the Criminal Procedure (Scotland) Act 1995, the primary purpose of giving a direction is to explain that the jury cannot use such statements as proof of fact unless adopted (*Haggerty* v *HM Advocate* [2009] HCJAC 31, Lord Hardie at para 6). It is not to state the obvious; that a prior inconsistent statement can be used to undermine testimony at trial.

[18] In this case the judge did give an appropriate direction, during the initial stages of his charge, when he spoke about the internal consistency of a witness's evidence. Although

it is argued that this meant only inconsistencies in the witness box, that is not the obvious meaning of the words which the judge used; rather they would apply to prior inconsistent statements, which the complainers accepted in evidence as having been made by them. The judge also invited the jury to take what defence counsel had said in her speech to the jury. He then said:

> "When you apply my directions to the circumstances of this case, you should consider all the evidence that the Crown relies on and the submissions made to you by the Advocate Depute, and you should give equal consideration to the evidence relied upon by the defence and the speech made to you by [defence counsel]."

In addition, if there were any doubt on the matter, the judge's supplementary remarks, having recalled the jury from seclusion, were perfectly adequate to explain the potential effect of prior inconsistent statements. That would, however, have been obvious from counsel's speech. There has been no material misdirection leading to a miscarriage of justice.

[19] The appeal against conviction must be refused.

Sentence

[20] The contention was that, notwithstanding the seriousness of the conduct involving the appellant's daughters over a 14 year period, the 10 year custodial sentence was excessive, having regard to a number of mitigatory factors, especially the appellant's exemplary conduct since the last of the offences, which was 30 years ago. Since then, the appellant had gone on to have another family, which was supportive. The appellant was 66. He had had some serious health problems over the years and presently had poor physical health and some mental health difficulties. He had had no prior experience of custody. The offences involved only one penetrative act. The CJSWR had assessed the appellant as at

medium risk of re-offending, but that had taken alcohol, which was no longer a feature in the appellant's life, into account. It had ignored the absence of offending over a 30 year period. The individual sentences could all have been made to run concurrently as the conduct was all part of a single course of conduct, with offences overlapping in terms of time and place.

[21] There is no doubt that the offences were serious, involving sexual offences against the appellant's own daughters over a prolonged period. However, these were, with one exception, non-penetrative offences committed over 30 years ago by a person who is now 66 and has, and has had over recent years, a new and supportive family. In these circumstances, the court is persuaded that the cumulative effect of the sentences is excessive. It will order the sentence on charge 5 to run concurrently with the other sentences, thus reducing the totality to 6 years.