APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 18
HCA/XC000010/20

Lord Malcolm
Lord Turnbull
Lord Pentland

OPINION OF LORD MALCOLM

in

APPEAL UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

SJ

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: S McCall, QC; John Pryde & Co for Levy & Macrae, Glasgow
Respondent: A Edwards , QC, AD; Crown Agent

28 April 2020

[1] The preliminary hearing judge rejected paragraph 1(a) of the application made under section 275 of the Criminal Procedure (Scotland) Act 1995 on the view that evidence of earlier sexual behaviour between the complainer and the accused is of no relevance to the subject matter of the charge. Your Lordships would refuse the appeal essentially for this reason. There is support for the proposition in recent decisions: see *LL* v *HMA* 2018 JC 182;

RG v *HMA* [2019] HCJAC 18; *Lee Thomson* v *HMA* 13 December 2019 (unreported), referred to in Lord Turnbull's opinion in the present case; and *JW* v *HMA* [2020] HCJ 11.

[2] Before exploring this matter, while I am grateful to Lord Turnbull for setting out the circumstances of the present appeal, I wish to say a little more as to how the discussion in respect of paragraph 1(a) developed. Reliance was placed on police statements by the complainer, including that on the night in question she was unsure about having the appellant in her house, and that when he arrived she was nervous and shaky (statement of 14 January 2019). There had been no sexual behaviour between them at or after the Hogmanay party. There had been messaging between them in the intervening week. He "flirted" with her but she did not do likewise as she was not interested in him. It was anticipated by the defence that the Crown would build a case to the effect that the accused's sexual interest in the complainer having been rebuffed, he pestered her until she let him into her house when the offences occurred. There is evidence from witnesses on the Crown list, including police officers who had viewed CCTV evidence from the hotel, which, it is said, permits a different interpretation as to the complainer's attitude to the appellant; her previous involvement with him; whether they had spent time alone together, and as to his conduct in messaging her. The appellant wishes to lead evidence designed to correct what would otherwise be a misleading picture as to the true nature of the relationship between them. It would counter any suggestion that the complainer was uncomfortable in his presence and would suggest that she was sympathetically disposed towards him. He had gone through marital problems and she had recently experienced a break up.

[3] At the outset of the appeal hearing the advocate depute outlined how, as a result of discussions with defence counsel, the Crown would limit the evidence of the complainer, all with a view to restricting any need for evidence along the lines set out in the application. In

her submissions Ms McCall QC asserted that the messaging texts arose out of the time they spent getting to know each other better. This was the background to and reason for the appellant's visit. She did not wish to be "hamstrung" when exploring the messages with the complainer. (They had been deleted so their exact content is apparently not available.) Counsel wishes to lead evidence that the appellant and the complainer were more than just acquaintances. The jury should be allowed to assess her evidence that she was nervous and uncomfortable against that background. The appellant says that she was also being flirty in the messages, and she invited him to come round. It would be difficult to confine the evidence as to the background to the restricted parts the Crown says it will lead.

[4] In the course of Ms McCall's submissions the Crown intervened to say that the complainer will state that she did invite the complainer to her house on the day in question. Ms McCall submitted that this was bound to open up the question as to why she did that. The defence might disagree with her evidence on that matter. There were many such uncertainties rendering it difficult now to say with any confidence as to how the trial will develop. Counsel indicated that she was content not to ask about sexual intercourse the previous weekend, but the kissing and cuddling took place in public in front of witnesses, and was recorded on CCTV. The defence is anxious to avoid the jury having an inaccurate impression as to the nature of the relationship between the parties. The impact on the complainer's dignity and privacy was at the lower end of the scale.

[5] For the Crown, the advocate depute stated that the complainer has no memory of being alone with the appellant in the early hours of the new year. She had consumed a large amount of alcohol. She just remembers waking up alone, fully clothed in her mother's bed with her handbag and phone missing. There would have to be some evidence as to the lead up to the alleged events , if only to show that the appellant was not a stranger who broke

into the house, but any kissing and cuddling in a taxi or elsewhere was irrelevant, so any questioning or evidence on this subject was not admissible at common law. The courts have now said, very clearly, that evidence of earlier romantic behaviour between a complainer and an accused person has no bearing at all on the issues to be determined by the jury – see *LL* v *HMA* (cited earlier).

[6] In a short response, Ms McCall QC formally amended paragraph 1(a) of the application to delete the reference to consensual sexual intercourse.

[7] If the amended application is to be refused, I am not persuaded that this should be on the ground that the proposed questioning and evidence is irrelevant to the subject matter of the charge. I will now explain why I take this view. Legislative reform in England and Wales took place about 10 years earlier than north of the border. The concern was that discredited and discriminatory stereotypes about women and sex lingered on in the criminal courts ; in particular that unchaste women were more likely to consent to intercourse, and were less worthy of belief. This resulted in a low conviction rate in rape cases, and often humiliation for complainers. It deterred women from reporting such offences. The Heilbron Report of 1975 (cmnd 6352) advised that, while a previous sexual association between a complainant and an accused was potentially relevant, in general the reverse would be true in respect of a sexual history with other men. The Sexual Offences (Amendment) Act 1976 adopted this approach, introducing a leave requirement for evidence concerning men other than the accused. The failure of the reforms to achieve any real improvements led in due course to section 41 of the Youth Justice and Criminal Evidence Act 1999, which was discussed in detail in *R* v *A (No 2)* [2002] 1 AC 45. This decision addressed directly the question of the relevance of sexual history with the accused, and will be discussed below.

[8] In the meantime the Scottish Law Commission produced a report (1983 No 78) dealing with evidence in cases of rape and other sexual offences. In paragraph 3.9 the Commission noted that evidence of prior intercourse between a complainer and an accused was admissible in a trial for rape, quoting Lord Justice Clerk McDonald in *Dickie* v *HMA* (1897) 2 Adam 331 at 337:

> "… It has been held competent for the accused to prove that the witness voluntarily yielded to his embraces a short time before the alleged criminal attack. That such proof should be allowed is only consistent with the clearest grounds of justice for, in considering the question whether an attempt at intercourse be criminal and to what extent criminal, it is plainly a relevant matter of enquiry on what terms the parties were immediately before the time of the alleged crime."

The Commission was not aware of any practice in modern times of restricting such questions to the conduct of, and relationship between the parties "immediately before the time of the alleged crime". It was unclear to what extent there may be permissible exceptions to the general rule prohibiting evidence of sexual intercourse with men other than the accused, nor as to the limits, if any, on evidence as to previous or subsequent sexual relationships with the accused (paragraph 3.11). There was a need for a review of the law.

[9] In the report the Commission observed that some who had written on the subject asserted that previous sexual intercourse with the accused should never be mentioned in the course of the trial. "However, most of those whom we consulted were prepared to accept that such evidence would normally be relevant in cases where consent was in issue" (paragraph 4.5). While the Commission agreed that such evidence would generally be relevant, this would not always be the case, for example, in respect of a chance encounter many years before. It followed that the requirement for leave should extend to any sexual history of the complainer, including that involving the accused person. It was recognised, that, absent leave, there would be an exclusion even in respect of evidence that the parties

were married, but this would normally be introduced by the Crown, which was not to be subject to the restrictions. The Commission rejected a pre-trial application procedure in favour of decisions being taken by the trial judge who would have discovered the relevant issues in the trial, and "the Crown case will normally have become fairly clear before any decision on admissibility has to be made" (paragraph 5.21).

[10] Section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 excluded questioning or evidence as to the complainer's character, including whether she was a prostitute, and as to engaging with any person in sexual behaviour not forming part of the subject matter of the charge; all of this except with the permission of the court. Permission could be granted if the questioning or evidence was designed to explain or rebut evidence, other than evidence from or on behalf of the accused. It could also be granted if it concerned sexual behaviour taking place on the same occasion as that forming part of the subject matter of the charge, or was relevant to a defence of incrimination. Finally an interests of justice test could allow questioning or evidence which otherwise would be excluded.

[11] As with the experience in England and Wales, these reforms did not have the desired effect. There was too large an area for judicial discretion. It was often the case that irrelevant or probatively weak evidence was being allowed, having an overall prejudicial effect on complainers' evidence, who were still having to endure unacceptable intrusions into their privacy and dignity. It continued to be the case that trials were being diverted from the real issues onto the past behaviour of complainers.

[12] These concerns prompted the Sexual Offences (Procedure and Evidence) Bill introduced in June 2001, and its accompanying policy memorandum. In due course this led to the legislation now in force under and in terms of sections 274/5 of the 1995 Act. The

memorandum discussed the need for the judge to weigh the probative value of relevant evidence against its prejudicial effect on the complainer's interest in their privacy and dignity, and also the risk of diverting the jury from the subject matter of the charge. The proposal was to extend the restrictions to the Crown, and defences of consent and belief in consent were to be the subject of special notice. The memorandum envisaged applications being made before the jury was sworn, but in due course this was replaced by a pre-trial application procedure. In paragraph 49 it was explained that the overriding objective was "that the complainer's private life will not be explored to a greater extent than is strictly necessary". The aim was to "achieve a reasonable balance between the rights of the accused and the rights of witnesses" (paragraph 50).

[13] Meantime, south of the border the concerns expressed earlier led to section 41 of the Youth Justice and Criminal Evidence Act 1999. It excluded evidence or questioning in respect of any sexual behaviour of the complainant. That exclusion could be removed with the leave of the court. Leave could be granted if a relevant issue did not concern the question of consent. Where it was an issue of consent, leave could be granted if it concerned sexual behaviour taking place at or about the same time as the subject matter of the charge, or if it concerned behaviour so similar to that included in the charge that the similarity could not be a coincidence. In addition leave could be granted if the proposed evidence was necessary to rebut prosecution evidence or to allow it to be explored by the accused.

[14] For the first time in England and Wales, the restrictions applied to the complainant's sexual experience with the accused as well as that with other men. This gave rise to an issue which in due course came before the House of Lords – see *R* v *A (No 2)* cited earlier – in the form of a question:

> "May a sexual relationship between a defendant and a complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?"

The background was a defence of consent and the desire to ask questions about an alleged consensual relationship between the accused and the complainant over the three weeks before the alleged offence, the most recent act of sexual intercourse taking place one week earlier. The Court of Appeal allowed the questioning on the basis that it would be relevant to the issue of the accused's belief in the complainant's consent, but held that it was inadmissible on the question of whether she did consent.

[15] In the appeal all five of their Lordships gave detailed speeches. Lord Slynn of Hadley said (paragraph 4):

> "Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent. That is far from being necessarily true and the question must always be whether there was consent to sex with this accused on this occasion and in these circumstances."

His Lordship continued by observing that this required to be balanced against the accused's interest in a fair trial. In the event he agreed with Lord Steyn (paragraph 46) that the provisions in the 1999 Act required to be read down under section 3 of the Human Rights Act 1988 in such a manner as to allow questioning and evidence of prior sexual experience between an accused and a complainant where it is so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6, with due regard always being paid to the importance of protecting the complainant from indignity and humiliating questions.

[16] Lord Steyn considered that section 41 dealt fairly and sensibly with the issue of sexual experience with men other than the accused, this being almost always irrelevant to

whether there was consent on the occasion in question, or to the complainant's credibility. On the other hand, as for prior sexual behaviour between the complainant and the accused, the legislation posed "an acute problem of proportionality" (paragraph 30).

> "As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind. It cannot, of course, prove that she consented on the occasion in question. Relevance and sufficiency of proof are different things."

To always exclude such material ran the risk of "disembodying the case before the jury" and increased the risk of miscarriages of justice –see paragraph 32.

[17] The other judges were to similar effect. Lord Clyde spoke of a recognised distinction between a history with other men and that with the accused person. His Lordship noted that the statute did not strike at general considerations as to the existence of a relationship or to the objective facts of acquaintanceship or familiarity or the lack of such factors – paragraph 128.

[18] The Scottish legislation of 2002 was considered in *Moir* v *HMA* 2005 1 JC 102. The Lord Justice Clerk, Lord Gill, outlined the aims of the reforms and noted that they had to be reconciled with the protections built into our criminal justice system to prevent wrongful convictions. Any absolute prohibition on the questioning described in section 274 would violate article 6. However, the provisions recognised that the relevance of evidence on the matters mentioned in section 274(1) will vary according to the circumstances of the case. The judge can allow it when necessary for a fair trial – see paragraph 34.

> "The probative value of evidence that the complainer had sexual experience with another man may be much less than that of evidence that she had a sexual relationship with the accused …" (paragraph 35).

The Lord Justice Clerk considered that the trial judge should always have the final say as to the admission or exclusion of questioning or evidence under section 275, either by limiting

or extending a grant already made (section 275(9)) or by allowing a fresh application on cause shown. His Lordship observed that the preliminary hearing judge will not have as full and accurate an assessment of the evidential issues as the trial judge. Furthermore, experience had demonstrated that criminal trials seldom run exactly to plan – see paragraphs 43/44.

[19] If the above discussion demonstrates that evidence on questioning as to a prior history with the accused cannot be ruled out more or less automatically as being irrelevant to the subject matter of the charge, including the issue of consent, what other common law mechanism might be engaged? A potential candidate is to label it as "collateral" and thus inadmissible. Sometimes "collateral" is used as a synonym for "irrelevant"; however the two concepts are distinct. If evidence is irrelevant, there is no need to ask whether it is collateral.

[20] The collateral route was used to exclude evidence as to an alleged previous false allegation by a complainer in *CJM* v *HMA* 2013 SCCR 215. The concern was that investigation of that matter could add considerably to the length and complexity of the trial, and divert the jury from the key issue. (*R* v *O'Dowd* [2009] EWCA Crim 905 provides an extreme example, where a rape trial lasted for six months.) The twin justifications of convenience and expediency (*Swan* v *Bowie* 1948 SC 46, LP Cooper at page 51) are overcome if the collateral fact can be established more or less instantly and cannot be challenged, for example in the shape of a previous conviction (*CJM*, LJC Carloway at paragraph 32). Lord Clarke counselled against too readily using the collateral route "with the effect of excluding evidence, highly relevant to the accused's defence." Considerations of expedience and practicality had to be assessed against the overarching requirement of a fair trial – see paragraph 50. In any event, if sexual history of this kind is by its nature collateral, there

would be no need for the statutory tests, nor for the discussion of the issue in the case law and other material referred to earlier.

[21] If evidence of past sexual behaviour between the complainer and an accused is not irrelevant to the issue of consent, and cannot properly be excluded as collateral in nature, it by no means follows that it should be admitted. There remains the real concern that it might be misused by the jury to the prejudice of the complainer and adverse to a just resolution of the trial. The worry is that juries, while no doubt appreciating the obviously correct proposition that consent on one occasion does not mean that there was consent on another, will nonetheless take the view that if the complainer agreed then, she probably agreed on the day in question. The anxiety is that, in the absence of powerful independent evidence in support of the charge, which is often the case, this may result in an acquittal. In other words, juries might give such evidence greater weight than it reasonably bears.

[22] Similar thinking underpins our law's general prohibition on the introduction of an accused person's analogous previous convictions. Such can be relevant in showing that the accused has a propensity to commit the particular crime charged. However:

> "Our historic reluctance to trust the jury with this information arises from the fear that they may give it more weight than it deserves or regard it as proving that which it does not prove. The answer to that does not have to be to withhold it from them; they can be given clear and careful directions about how to use it." (Lady Hale of Richmond in *DS v HMA* 2007 SC (PC) 1 at paragraph 95)

[23] The recent case law mentioned earlier quite rightly stresses the aim of the legislation as being to dispel the malign influence of the previously mentioned "twin myths". As Lord Hope of Craighead said in *R* v *A (No 2)* at paragraph 76 , if the sole or main purpose of leading evidence of prior sexual history is simply to suggest that this made it more likely that the complainer consented on the day in question, or that her evidence to the contrary lacks credibility, it should not be admitted into evidence. Usually this will be the only

reason for a general attack on the complainer's character or a reference to sexual relationships with third parties. Barring particular circumstances, the only object is to plant the idea, and has no genuine probative value in respect of whether the Crown can prove a lack of consent, or indeed any other issue in the trial.

[24] The general thrust of some of the recent jurisprudence is that if the ultimate objective of evidence as to prior sexual behaviour with the accused concerns the issue of consent, then the same general exclusion applies, and for the same reason, namely that it cannot demonstrate consent in respect of the events which are the subject matter of the charge. As stated this is true – so one might ask, why have so many legislative schemes differentiated between a history with the accused and one with third parties, and how did the House of Lords manage to reach the decision it did in *R* v *A (No 2)*? The answer, I think, is that questioning or evidence as to a prior sexual relationship with the accused may, not always, but may bear on a fact, or allow an inference of fact, which is relevant to the issue of consent. In other words, the purpose is not simply to plant the myth in the mind of the jury, or to seek to prejudice the complainer in their eyes, but rather the legitimate one of seeking to establish something, or rebut something, which does have a logical connection with the real issues in the trial.

[25] Where does this leave us in respect of a case such as the present? To my mind the signposts are provided in section 275(1) of the Act, and in particular the requirement in subsection (c) that "the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited", keeping in mind that the proper administration of justice includes "appropriate protection of a complainer's dignity and privacy" (section 275(2)(b)(i)). I have concerns about an approach which would render this

test largely redundant, with all or at least most applications being refused on the basis of the second of the three cumulative tests in section 275(1), namely that of relevancy under subsection (1)(b). This would aid certainty, but the background to the reforms discussed earlier, and the structure of the provision suggests that the parliamentary intention was to provide guiding principles as to the court's task, not to remove the scope for judicial discretion. It is that evaluation based upon the particular circumstances of a case, described as a proportionality exercise in *R* v *A (No 2)*, which provides the safeguard against miscarriages of justice and breaches of article 6.

[26] It is likely that the test set down in subsection (1)(c) will result in the exclusion of most applications based on the character of the complainer or her sexual history with men other than the accused. In the main it was questioning on such topics which caused the concerns leading to statutory reform. The jurisprudence and other material discussed above suggests that more difficult issues can arise for determination in relation to cases involving an alleged prior relationship between the complainer and the accused person. Every such case will depend upon its own particular facts and circumstances, including the nature and extent of the behaviour, and its purpose in the context of the issues at the trial. For example, if it is intended to demonstrate a close and affectionate relationship, that may well be treated differently from a one-off and disputed alleged previous act of consensual sexual intercourse. The questioning might be aimed at rebutting evidence which it is anticipated the prosecution will adduce, something which is specifically permitted in the English legislation; which also allows material relevant to the accused's belief in consent at the time.

[27] The test set out in subsection 1(c) is a novel one for Scottish judges, whose traditional approach is to admit relevant evidence and leave its weight to be resolved by the decision-maker in the light of all the other relevant evidence in the case. The concern is that to

exclude relevant evidence may threaten the fairness of the procedure. This tradition may explain the criticism that judges have been too lax when applying the current legislative scheme and its predecessor. However, it is now well established that the fairness of a trial encompasses more than fairness to an accused, not least the public interest in crimes being reported and investigated, and the respectful treatment of those making reports of sexual offences both before and during a trial.

[28] If I am correct in thinking that applications under section 275 based on the prior sexual history of the complainer and the accused should not be more or less automatically refused as raising irrelevant or collateral matters, the task set for the court by subsection (1)(c) may well be far from straightforward; especially when being undertaken at a preliminary stage when the judge will have limited information in comparison to the evidence available to the parties, and often cannot be confident as to how matters will develop at the trial. No doubt there will be cases where the correct answer is clear, perhaps, for example, in respect of a casual episode in the remote past. But how are matters to be resolved in finely balanced cases? At least in relation to paragraph 1(a) of the application as amended, this does strike me as such a case. Otherwise, why was the Crown so concerned to limit the scope of the evidence to be taken from the complainer?

[29] The application demonstrates the potential difficulty of determining the admissibility of questioning or evidence in advance of the trial. During the hearing one of your Lordships asked the advocate depute whether, given her police statement to this effect, the complainer would be asked whether she was uncomfortable or nervous when the accused visited her house. At the time this struck me as a pertinent question, but I did not detect any clear answer. Even if there was an assurance from the advocate depute, it is difficult to be confident that such evidence will not emerge at the trial. If it does, how is one to measure

the probative value of the accused countering that by reference to the apparently well attested proposition that the previous weekend they had been on affectionate terms? Depending on the evidence, the jury may well dismiss it on the basis that the complainer was under the influence of alcohol and was taken advantage of by the appellant – but at present that can be no more than speculation.

[30] For myself I have reservations as to the Crown's proposal that the application be refused in the light of the suggested approach that the complainer's evidence be restricted so as to reduce any need for investigation of the events of the previous weekend. I have doubts as to how realistic that is. A trial is a dynamic process which, as Lord Gill commented, rarely goes to plan.

[31] Is it wise in any event? If there is an acquittal the complainer may well feel aggrieved that she was unable to tell the jury the full story and be left with the impression that the system has let her down. Furthermore, juries can be sensitive if they gain the impression that information which they might consider important is being withheld from them for unexplained reasons, and this could influence their verdict.

[32] The more general problems facing the judge were well explained, albeit in the slightly different context of evidence as to the criminal propensity of an accused, by McHugh J in the Australian case of *Pfennig* v *R* (1995) 182 CLR 461 at 528/9:

> "The use of the term 'outweigh' suggests an almost arithmetical computation. But prejudicial effect and probative value are incommensurables. They have no standard of comparison. The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial. …. the prejudicial effect of evidence is not concerned with the cogency of its proof but with the risk that the jury will use the evidence or be affected by it in a way that the law does not permit. In no sense does the probative value of evidence disclosing propensity, when admitted, outweigh its prejudicial effect. On the contrary, in many cases the probative value either creates or reinforces the prejudicial effect of the evidence. …. evidence that discloses the criminal or discreditable propensity of the accused is admitted not because its probative value outweighs its prejudicial effect but because the interests of justice …

> require its admission despite the risk, or in some cases the inevitability, that the fair trial of the charge will be prejudiced. If there is a real risk that the admission of such evidence may prejudice the fair trial …, the interests of justice require the trial judge to make a value judgement, not a mathematical calculation."

[33] The value judgement required in the present case can be viewed either in terms of whether the probative value of the proposed questioning and evidence outweighs the prejudicial effect, or whether its exclusion would render the trial unfair. It is the retention of that role for the judge and the opportunity for an appeal which renders the procedure article 6 compliant – for example, see *Jasper* v *UK* (2000) 30 EHRR 441 (a case concerning disclosure). In Canada judicial discretion renders the process constitutional and consistent with the principles of fundamental justice: *R* v *Darrach* 191 DLR (4th) 539, Gonthier J at paragraph 31.

[34] How is the value judgement to be exercised in the present case? Ms McCall's desire is to rebut an anticipated misleading impression as to the nature of the parties' relationship at the time of the alleged attack, and as to the complainer's state of mind when the appellant visited the house. I agree with Lord Turnbull that ultimately this is being done in order to bear on the issue of consent, but it can be distinguished from a simple reliance upon the discredited proposition that a woman who has consented to sexual behaviour before, will or is likely to do so again. As Lord Steyn said, to exclude all such evidence could disembody a trial. Logically, it would require the exclusion of evidence regarding any pre-existing relationship which involved consensual sexual behaviour.

[35] As I understand the submissions for the appellant, it is not being contended that any proof of consensual sexual behaviour in the past would lead to the inference that the events in question were similarly by agreement. (As your Lordships have pointed out, Ms McCall expressly disavowed such a proposition; understandably given that it is so thoroughly

discredited.) If that was suggested, it could be corrected by an appropriate direction from the trial judge: a direction which would no doubt be given even absent that suggestion by the defence. Rather the desire is to refer, in a now limited manner, to the events at and after the Hogmanay party which senior counsel considers will be necessary to correct what would otherwise be a misleading impression as to the parties' relationship; what was happening in the intervening week; and to rebut the anticipated evidence as to the complainer's state of mind when the appellant visited her house. It is submitted that none of that leads to any real risk that the jury will be led into either of the myths mentioned earlier. That is not the purpose of the application. In support of her submission counsel could have mentioned the phraseology of Lord Clyde in *R* v *A (No 2)* at paragraph 133:

> "The context and purpose of the evidence is not so much to show from past events that history has been repeated, as to indicate a state of mind on the part of the complainant towards the defendant which is potentially highly relevant to her state of mind on the occasion in question."

All or any of this may ultimately be aimed at the issue of consent, but, in my view that fact alone does not trigger a refusal on the grounds of irrelevancy at common law or under section 275(1)(b). It leads to the analysis set out in subsection (1)(c).

[36] For myself I would be inclined to allow paragraph 1(a) of the application as amended, but with an express instruction to the trial judge to keep the exercise under careful review during the trial as provided for in section 275(9). However, I appreciate that a different view could reasonably be taken on the basis that the probative value of a one-off episode the previous weekend is outweighed by the potential prejudicial effect of the proposed line of questioning and evidence. It seems plain that your Lordships would take this view, and rather than dissent in respect of the proposed outcome, I will rest on the above explanation as to why I consider that the case should be addressed and determined

under and in terms of section 275(1)(c). With regard to paragraph 1(c) of the application, I agree that it should be refused.

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28 April 2020

Introduction

[37] This appeal concerns a challenge to a decision of the preliminary hearing judge to refuse an application made on the appellant's behalf in terms of section 275 of the Criminal Procedure (Scotland) Act 1995.

[38] The appellant is due to appear for trial on an indictment which contains three charges. Charge 1 is a charge of sexual assault contrary to section 3 of the Sexual Offences

(Scotland) Act 2009, charge 2 is a charge of rape contrary to section 1 of the same Act and charge 3 is a charge of attempting to pervert the course of justice by disposing of his mobile phone in order to prevent police officers from gaining access to information contained therein, which he knew or suspected might be of relevance to their investigation.

[39] The two sexual offences concern the same complainer, JM. The offences are alleged to have taken place at her home on the evening of 11 January 2019 into the morning of 12 January. The third charge is alleged to have taken place on 12 January. The appellant has lodged a special defence of consent in respect of charges 1 and 2.

The application

[40] In light of the manner in which matters unfolded at the appeal hearing it will be of benefit to set out the terms of the application in some detail. When the case called at the preliminary hearing on 13 December 2019, the application made sought authority to elicit the following evidence:

a. On 1 January 2019, the complainer and the accused left the complainer's home address and went to a hotel with the intention of trying to get a room. While there, having been told no rooms were available, the complainer and accused were kissing and cuddling in the reception area. Thereafter they were driven by Crown witness DL to the complainer's mother's house. During the taxi journey, they were kissing and cuddling. After arriving, the complainer and accused had sexual intercourse in a bedroom in the house.

b. On 12 January 2018 (in error for 2019) at the time of the alleged incident in charge one, the complainer and the accused consensually kissed, and both touched each other's bodies over their clothing in the living room of the property.

c. On 12 January 2019 very shortly after the alleged offences, the complainer had sexual intercourse with (BB) at the locus.

[41] The application set out in paragraph 3 the issues at trial to which the evidence was considered to be relevant. These were stated to be:

a. The complainer's credibility and reliability. Further, it is relevant to contextualise evidence from the complainer's ex-partner (NM) about remarks he attributes to the accused on this occasion.

b. It is relevant to the accused's special defence.

c. The complainer's credibility and reliability in relation to the allegations and providing an alternative explanation for distress

[42] The reasons why the evidence was considered to be relevant were set out in paragraph 4 of the application as follows:

a. When she provides a statement on 12/1/19 following the alleged incidents, the complainer states that she has not previously had any sexual relationship with the accused. Nor did she tell the police at that time that she had previously spent the night in her mother's house with the accused. It is relevant to the jury's assessment of her credibility and reliability that she appears to have lied to or sought to mislead police about the nature of her previous involvement with the accused. Further, crown witness (NM) states that on 1/1/19 the accused told him that he "fancied" his ex, meaning the complainer. There was thereafter an argument outside the complainer's house between the accused and (NM) and another man. The import of the complainer's statements is that the accused was pursuing her and she was not interested in him, spurning his attentions, until he finally raped her. It is relevant to the jury's consideration of (NM's) evidence and

that of the complainer to know that the complainer has previously engaged in consensual sex with the accused and spent the night at her mother's house with him (her mother being on holiday). In addition, in her first police statement, the complainer told the police that on 1 January after the argument outside her house, she and the accused "went our separate ways", with her being picked up by a friend. It is relevant to the jury's assessment of her evidence that it appears she has not told the truth about that.

b. (…)

c. The complainer's position is that after the accused left her house, having committed the offence, at 2 AM she texted her friend (SR) on WhatsApp. They texted for a while about their relationship (they had recently split up) and at around 9 am the complainer sent him a photo of apparently self-inflicted injuries to her arm. After that, (SR) phoned her and she told him she had been raped. CP 12 contains screenshots of that conversation. There is a gap of just under 6 hours between the complainer messaging (SR) and him replying (0241 to 0811).

During the WhatsApp conversation from 0811 the complainer states (in reference to the accused) that she threw him out her house, after which she says she messaged (SR) without reply and she then says (B) came. This is understood to be a reference to (BB). She recounts a conversation with (B) in which he told her she was "getting made out to look like a slapper".

Thus it appears that (BB) has attended at the locus immediately after the alleged offences.

At precognition with the Procurator Fiscal (Letter from Crown dated 23 September 2019 following precognition of complainer in compliance with disclosure obligations), the complainer stated to the Procurator Fiscal that *prior* to the alleged rape, she had not had sexual intercourse since 30 December 2018 and that was with her former partner (NM).

At the medical examination 13/1/19 (CP31) the complainer told the FME that she had not had sexual intercourse other than the incident in the previous 10 days (ie between 3 and 13 January). But forensic analysis carried out on the intimate swabs of the complainer (see DP2) showed the presence of DNA from an unknown male in the sperm fraction of a high vaginal swab. The complainer was told this by the Procurator Fiscal when she attended for precognition and was asked to provide a statement to police. In a statement dated 23/9/19 (CP 33), she stated the unknown male DNA will be from (BB).

Firstly, the fact that she did not tell the FME the truth is relevant to the jury's assessment of her credibility and reliability.

Further the jury may consider that, if the complainer had been raped and sexually assaulted by the accused, it would be highly unlikely that she would consent to sexual intercourse immediately thereafter with another man, namely (BB). Such intercourse can only have occurred after the alleged rape given her

position at precognition to the PF that prior to the alleged rape, she had not had intercourse since December.

It is part of the accused's defence that the complainer has made a false allegation to (SR) initially in order to cover up her conduct on the night of 12/1/19 both consensually with the accused and with (BB).

[43] The application concluded in paragraph 5 by setting out that the inferences which the applicant proposed the court should draw from the evidence which was to be elicited were:

- That the complainer is not credible and reliable.
- That on the occasions libelled in charges 1 and 2 the complainer consented and the accused reasonably believed her to be consenting.
- That there is a reasonable doubt about the crown case.

[44] The preliminary hearing judge allowed the application insofar as paragraph 1b was concerned but refused the application as being irrelevant in respect of paragraphs 1a and 1c. The judge took the view that the evidence which was sought to be elicited in terms of paragraph 1a was evidence of an earlier sexual encounter. It was therefore a collateral matter of no relevance to the charges. The judge noted that senior counsel for the appellant had argued that the relevance of the evidence sought to be elicited consisted in the fact that the complainer had lied about there having been an earlier sexual encounter, and so was shown not to be a credible witness. The judge concluded that lying about a sexual encounter, even one with the appellant, was not relevant to the question of consent to the events in the libel.

[45] In relation to paragraph 1c the judge concluded that the proposed questions about the complainer having sex with (BB) were not in any way relevant to whether or not she had consented to sex with the appellant. She concluded that telling lies to the forensic medical examiner about having sex with another person was not relevant to the issue of whether she consented to sexual intercourse with the appellant.

The appeal hearing

[46] By the date of the appeal hearing further information had come to light about the circumstances in which the complainer had intercourse with (BB), demonstrating that this had occurred a day or two before the events of charges 1 and 2. In written submissions the Crown had explained that, contrary to the appellant's expectation, they did not propose to lead any evidence covering the events of 1 January 2019. Nor did they intend to lead evidence from the complainer that she had no interest in being involved sexually with the appellant and had spurned his attentions. Further discussions took place between senior counsel for the appellant and the advocate depute on the morning of the appeal hearing as a consequence of which, at the commencement of the hearing, the advocate depute identified to the court the evidence which the Crown proposed to lead from the complainer. That evidence was as follows:

- The complainer and the accused knew each other through residing in the same village;
- The complainer and the accused had known each other for a couple of years through her involvement in organising village Hogmanay parties;
- Each also knew each other through the fact that the complainer worked in the village shop;

- The complainer knew the accused's occupation;
- Both the complainer and the accused were present at a December 2018 Hogmanay party;
- The complainer and the accused were in each other's company and in the company of others at the 2018 Hogmanay party;
- In the days following this party there was telephone (and text) contact between the two;
- The complainer was aware that the accused had marital problems and had offered herself as a shoulder to cry on;
- On an unspecified occasion during the course of text communication the complainer offered the appellant the opportunity of staying at her home on 12 January 2019 when she was not to be there;
- On 11 January, again by text or other similar communication, the complainer invited the appellant round to her house to have a chat.

[47] In light of the further information and the position of the Crown senior counsel for the appellant moved to amend the terms of paragraph 1a of the application so that it would now read:

> "On 1 January 2019, the complainer and the accused left the complainer's home address and went to a hotel. While there, the complainer and accused were kissing and cuddling in the reception area. Thereafter they were driven by crown witness DL to the complainer's mother's house. During the taxi journey, they were kissing and cuddling."

[48] She moved to delete paragraph 1c in its entirety and substitute for it the following:

> "On 13 January 2019 the complainer was examined by a Forensic Medical Examiner following her complaint of rape by the accused. She was asked a series of questions relevant to the investigation and examination and in response to one of those she gave a false answer."

[49] No amendment to any other part of the application was moved. Thus, it can be seen that much of the explanation provided in paragraph 4a of the application setting out why the evidence was considered to be relevant no longer has any connection with the evidence which remains specified in paragraph 1a.

[50] There was no longer any suggestion that it would be relevant to lead the evidence specified in the application in order to demonstrate that the complainer had told a lie to the police about whether or not she had a previous sexual relationship with the appellant. In the absence of an anticipated account from the complainer that she was not interested in any form of sexual intimacy or relationship with the appellant, and that she had spurned his advances over a number of weeks, it could not be contended that the evidence which remains specified in the application would be relevant to undermine any such account. Accordingly, the submissions came to be presented as if the matter was a fresh first instance application.

Submissions for the appellant

[51] Senior counsel for the appellant accepted that evidence of sexual contact between the appellant and the complainer on 1 January would not be relevant in determining whether consent was present during the events of 11/12 January. Nevertheless, she submitted that it was important for the jury to have a proper understanding of the build-up to the events of 11 January and to appreciate that the complainer and the appellant were not just two people who knew each other along with others. She submitted that evidence of the circumstances of what transpired on 1 January, and of the developing text exchanges between the two, was relevant to explaining the extent to which they knew each other, since that went beyond

what the Crown wished to show. This fuller picture would, it was submitted, assist the jury in working out what to make of the complainer's evidence, including the expected evidence that she would say she felt uncomfortable with the appellant on 11 January.

[52] Senior counsel summarised her submission on the relevance of the evidence by explaining that the Crown would present a circumstantial case which would inform the jury's assessment of what happened on 11 January 2019 "and there is information available to the appellant which would permit a different interpretation of the circumstances".

[53] In relation to paragraph 1c it was submitted that it would be relevant to the jury's assessment of the complainer's credibility to know that she told a lie to the Forensic Medical Examiner on a matter which the examiner thought to be of relevance to the enquiry.

Submissions for the Crown

[54] The advocate depute explained that the complainer's account of the events of 1 January was that she was so intoxicated as to have no recollection at all of being in the appellant's company after leaving the Hogmanay party. Her next recollection after leaving was of waking up alone and fully clothed in bed in her mother's house. The advocate depute submitted that the evidence which remained specified in paragraphs 1a and 1c did not pass the common law test of relevancy. It was not habile to proof of the charge. In any event it was submitted that the proposed evidence would fail to pass the tests specified in section 275(1)(b) and (c).

Discussion

[55] The evidential picture which the Crown propose to present would establish that there was a limited form of friendship between the appellant and the complainer. The

appellant wishes to establish in evidence that this friendship extended to amorous and sexual behaviour on 1 January 2019. It was contended that it is relevant to do so as this will present a different picture as to the level (or nature) of the association which existed between the appellant and the complainer. It was argued that this is a different purpose than leading evidence of prior sexual contact in order to inform subsequent consent.

[56] In my opinion, there can be no freestanding purpose, or relevance, in establishing that the friendship between the complainer and the appellant had included prior amorous or consensual sexual behaviour of a limited kind. Such evidence can only pass the test of relevance if it bears in some meaningful way on the issue at trial.

[57] The issue at trial will be whether or not the complainer consented to the events of 11/12 January. To seek to demonstrate that the appellant and the complainer's "real" level of prior association was one which included recent amorous and sexual contact, can only have any relevance to this issue if it is contended that evidence of prior sexual contact will illuminate the question of whether or not consent was present on 11/12 January. Senior counsel for the appellant expressly rejected the suggestion that this was the purpose in leading this evidence. However, it is fair to comment that, when pressed, counsel herself had some difficulty in articulating a proposition which identified where the relevance of the evidence lay.

[58] Whilst it came to be expressed as "information which would permit a different interpretation of the circumstances", what that different interpretation would be was not set out. Presumably, it would be that they were a couple who had been amorously or sexually involved with each other. How this different interpretation would then be used to test the evidence of the complainer, or to assess the issue at trial, was not explained. It seemed to me that the underlying proposition could only be that evidence of amorous interaction on

1 January in some unspecified manner *would* inform the question of consent on 11/12 January.

[59] Looked at from a different angle, if it is contended that it is relevant to establish the "real" extent of their friendship in order to engage in a proper analysis of the complainer's credibility and reliability, one would need to understand how the facts established could achieve this purpose.

[60] The Crown do not plan to elicit evidence from the complainer that her friendship with the appellant did not involve sexual contact. In her evidence in chief she will be silent on this topic. Evidence will be elicited about the events of 11/12 January in the context of the complainer explaining that the appellant was someone whom she knew, had been in recent contact with and had invited to her home that evening. The only background conflict between the parties could be that, in addition to what the complainer says about their association, the appellant would claim that they previously engaged in consensual sexual activity.

[61] It is necessary to ask how this additional information could impact on the complainer's credibility and reliability, if not by the implicit suggestion that prior sexual contact illuminates the question of consent on 11 January. As observed earlier, there can be no other freestanding relevant purpose in establishing that the complainer and the appellant had engaged in a prior sexual encounter.

[62] In my opinion, in order to seek to admit the evidence identified in paragraph 1a, the appellant required to engage in an artificial attempt to construct a distinction between, leading evidence of a prior sexual encounter for the purpose of casting doubt on the complainer's evidence as to absence of consent, and, leading evidence of a prior sexual encounter for the purpose of a proper appreciation of how well the two knew each other. In

the absence of any articulated reason for establishing the latter in this fashion there is no valid distinction.

[63] In my opinion, the proposed evidence does not meet the test of relevancy. I consider that this view is consistent with the line of authority set out in the cases of *LL* v *HM Advocate* 2018 JC 182, *Lee Thomson* v *HM Advocate* 13 December 2019 HCA/2019/000517/XC and *HM Advocate* v *JW* [2020] HCJ 11. However, I am grateful to your Lordship in the chair for providing me with the opportunity of reading his own opinion in draft. I understand that your Lordship comes to a different view. In light of the detailed analysis which your Lordship has set out I should perhaps make a few further observations of my own.

[64] In the case of *R* v *A*, as I understand it, the House of Lords was considering the import of an English statutory provision which had a similar underlying purpose to that of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. As is clear from what was said by Lord Steyn at paragraph 39 and by Lord Hope of Craighead at paragraph 103, the English provision comprised a prohibition on leading evidence of a complainer's prior sexual behaviour and afforded less of an element of judicial discretion than is provided for by the Scottish legislation. The question with which the House of Lords was concerned was whether such a blanket prohibition was compatible with the accused's right to a fair trial. As your Lordship in the chair notes, their Lordships were concerned about the distinction which might be drawn between evidence of prior sexual behaviour between the complainant and the accused and evidence of prior sexual conduct between the complainant and other men. They were also concerned about the complicating effect of evidence of prior sexual conduct between the complainant and the accused having no relevance to the issue of consent, but still being admissible as relevant in relation to the accused's defence of honest (not reasonable) belief.

[65] Their Lordships acknowledged that a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. One example mentioned of a situation in which such evidence might be relevant was where two young people were living together in a sexual relationship. The English provision prohibited such evidence from being led. That is not of course the issue which arises in the present case and the Scottish legislation would not be engaged by the leading of such evidence (*Moir* v *HM Advocate* Lord Justice Clerk Gill at para 27).

[66] Of course the case of *R* v *A* was not referred to by either party in submissions before this court. I assume that was because the import of that decision, that evidence of a prior sexual relationship between a complainant and an accused may, depending on the circumstances, be relevant to the issue of consent, had no part to play in the argument advanced by senior counsel for the appellant. Senior counsel expressly disavowed the suggestion that her purpose in leading the proposed evidence was to cast light on the issue of consent. If that is in fact the ultimate purpose of leading the evidence then I would hold that the evidence proposed is not capable of bearing on that issue. I remain unable to detect any explanation of the manner in which the proposed evidence has any other evidential relevance.

[67] For my part I do not consider that the view which I have arrived at is based on a general exclusion of the type mentioned by your Lordship in the chair. Nor, respectfully, do I agree that this is the thrust of the recent Scottish jurisprudence. I do not detect any real difference in the approach decided upon by their Lordships in *R* v *A* as to the circumstances in which evidence of prior sexual conduct might be relevant to the issue of consent and the approach reflected in the recent Scottish jurisprudence. As I understood her, senior counsel for the appellant accepted that the law was correctly set out in *LL* v *HM Advocate* (see

paragraph [3] of the written submissions for the appellant). In that case the court made it plain that there is no absolute or fixed rule that sexual history falls to be excluded on the grounds of being inadmissible at common law. In giving the opinion of the court at paragraph [14] Lord Brodie stated:

> "That is not to say that there may never be cases where a previous act of intercourse might not be relevant to the issue as to whether the complainer consented on a subsequent occasion or to the issue of whether an accused reasonably believed that the complainer was consenting. However, in such a case particular circumstances would have to be averred to demonstrate what was said to be the connection between what we would see as, *prima facie*, unrelated events."

As I understood the submissions for the appellant, no such argument concerning particular circumstances was advanced in the present case.

[68] If guidance is to be taken from the case of *R* v *A* it seems to me that two particular passages from the opinions provide helpful pointers in the circumstances of the present case. At paragraph 45 Lord Steyn drew a distinction between what he considered would be logically relevant sexual experiences between a complainant and the accused and cases where previous sexual experience between the two would be irrelevant, giving as an example of the latter an isolated episode distant in time and circumstances. At paragraph 106 Lord Hope of Craighead drew attention to the fact that what the accused in that particular case wished to rely on was the mere fact that on various occasions during the previous three weeks the complainant had had sexual intercourse with him in his flat. His Lordship stated that, in his opinion, that fact alone was irrelevant to the accused's defence of consent. It seems to me that both of these identified examples of irrelevant evidence compare rather well with the proposed evidence in the present case.

[69] I am not persuaded that evidence of what took place between the accused and the complainer during a drunken New Year encounter, some 11 days prior to the date of the

alleged offence, is capable of passing the common law test of relevance. I do not see how such an event could provide evidence of the "true nature" of the relationship between the parties. Of course, the accused may wish to suggest that the complainer was not as intoxicated on that occasion as she claims. To my mind this would simply compound the problem. The trial would then be diverted from the true issues by an examination of the conduct of the complainer at the Hogmanay party, at the hotel and in the taxi. All of this would be in an attempt to determine how intoxicated or otherwise the complainer actually was on that occasion and whether any apparent familiarity was in fact on the basis of free agreement. That, it respectfully seems to me, would be an almost classic example of a collateral issue.

[70] The evidence now proposed in paragraph 1c is entirely irrelevant. It invites meaningless speculation and has no valid purpose.

Decision

[71] For these reasons, in my opinion, the evidence proposed does not pass the common law test of relevance and there is no need to consider the question of whether the tests in section 275 are met. In my opinion the appeal should be refused.

APPEAL COURT, HIGH COURT OF JUSTICIARY

2020 HCJAC 18
HCA/2020/000010/XC

Lord Malcolm
Lord Turnbull
Lord Pentland

OPINION OF LORD PENTLAND

in

APPEAL UNDER SECTION 74

by

SJ

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: S McCall, QC; John Pryde & Co for Levy & Macrae, Glasgow
Respondent: A Edwards, QC, AD; Crown Agent

28 April 2020

[72] I agree with Lord Turnbull, for the reasons he has set out, that the appeal should be refused. Since your Lordship in the chair takes a different view, I add some observations of my own.

[73] In *RG* v *HMA* [2019] HCJAC 18 at para [5] the Lord Justice Clerk (Dorrian) in giving the opinion of the court reiterated "for the sake of absolute clarity" that unless the evidence in question would be considered admissible at common law, no further question arose

under section 275 of the 1995 Act. The same point had been emphasised by the Lord Justice Clerk (Carloway) in *CJM* v *HMA* 2013 SCCR 215 at paras [28] to [32]. It is accordingly essential in a case such as the present to address as a primary consideration whether the evidence sought to be admitted would be relevant under the common law. In modern procedure that question falls to be dealt with at the stage of the preliminary hearing and not left over until the trial.

[74] Evidence is relevant if it has a reasonably direct bearing on the subject under investigation. In order to qualify as relevant it is necessary that the evidence should have some meaningful bearing on the issues in the case. The question is one of degree and is critically influenced by the particular context of the case. It is essential to explore the degree of connection between what is sought to be proved and the facts libelled, as a question of degree. Evidence is unlikely to have a sufficient degree of connection if it is remote in time from the events libelled, different in character, collateral, speculative or the like. These propositions are amply vouched by a long line of authority discussed by the Lord Justice Clerk (Carloway) in *CJM* v *HMA* 2013 SCCR 215 at paras [28] to [32]. The principles were recently affirmed by this court in *Lee Thomson* v *HMA* 13 December 2019 (unreported).

[75] Applying these principles to the circumstances of the present case, I am not persuaded that any of the evidence referred to in the amended version of paragraph 1a of the appellant's section 275 application is relevant to the real issues in the case. The real issues in the present case may be succinctly stated. They are whether the Crown can prove that the complainer and the appellant took part in non-consensual sexual activity on the occasions libelled in charges 1 and 2 on the indictment.

[76] It seems to me that whether the parties went to a hotel together 10 days earlier, kissed and cuddled in the reception area of the hotel, then travelled by taxi to the

complainer's mother's house and kissed and cuddled in the taxi are matters (whether viewed singly or cumulatively) which are not capable of shedding any light on the real issues. None of those alleged facts tells one anything about the real issues in the case. They are remote in time from the events libelled, having occurred 10 or 11 days previously. They allegedly took place in an entirely different context, namely the aftermath of a Hogmanay party. They are different in character; they extend to limited sexual behaviour which is far short of what is alleged in the charges on the indictment. Allowing evidence to be led about the points in paragraph 1a would be liable to open up a separate chapter about events that took place on a different occasion, in entirely different circumstances, involving different types of sexual conduct from those libelled. I agree with Lord Turnbull that such evidence is quintessentially collateral in nature,

[77] That is not to say, of course, that evidence of previous sexual conduct between the accused and the complainer cannot in some cases be relevant. On this point I can detect no difference of approach as between the law of England and Wales as set out in *R* v *A* and our law as set out, for example, in *LL* v *HMA*. It all depends on the degree of connection in the particular circumstances of the case.

[78] The submission advanced on the appellant's behalf that without the evidence of the matters now referred to in paragraph 1a the jury would somehow be left with an incomplete picture of the relationship between the parties in the lead up to the events libelled does not address the question of the relevance of the evidence sought to be led. To say that these alleged facts add colour or context or form the background to the circumstantial case against the appellant merely begs the question. Despite being given every opportunity to do so, senior counsel for the appellant was ultimately unable to specify in what way the "missing"

evidence was relevant to the real issues in the case. Her justification for introducing the evidence was in the final analysis vague and unsatisfactory.

[79] In past practice this sort of peripheral and hence irrelevant evidence was sometimes led on the basis that the events that were the subject of the libel had to be put into a wider context. Recent authorities in this court, such as those to which Lord Turnbull refers, have brought a much sharper focus to bear on the question of whether evidence of other sexual behaviour, which I note is now the subject of a strong statutory prohibition in section 274(1)(b), is truly capable of assisting in the resolution of the real issues. It was expressly accepted on behalf of the appellant in the present case that the question of consent could not be informed by evidence of earlier intercourse or (tellingly to my mind) by evidence of the sexual conduct referred to in paragraph 1a, as amended. What then could the relevance of the other sexual behaviour be? The answer, as it seems to me, is none. Suppose that all of the matters sought to be led were proved at the trial to be factually accurate, what could one logically draw from them for the purpose of deciding whether the appellant and the complainer engaged in non-consensual sexual activity as alleged in charges 1 and 2? In my opinion, the answer to that question is: nothing.

[80] Accordingly, I find myself unable to agree with your Lordship in the chair that the evidence sought to be led under the amended version of paragraph 1a is potentially relevant in the context of the real issues in the present case. In my opinion, the application therefore falls at the first hurdle.

[81] As to the evidence sought to be led under the amended version of paragraph 1c of the appellant's application, this is in my opinion clearly irrelevant. Whether the complainer gave a false answer, on an unspecified matter, in the course of an examination by a forensic medical examiner has no bearing on the real issues in the case.

[82] For these reasons, and for those which Lord Turnbull gives, I would move your Lordships to refuse the appeal.