APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 3
HCA/2019/692/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

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

by

RN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty, L Glancy; PDSO, Ayr
Respondent: A Edwards, QC, AD; Crown Agent

16 January 2020

[1] The appellant faces two charges, first, that on various occasions he sexually penetrated the anus of his son, A, and repeatedly placed his fingers in the child's anus during a period when the child was between the ages of 2 and 8, from 2012 to 1 June 2018; and second, that over a similar, but not exactly corresponding period, on various occasions he sexually penetrated the vagina of his partner, B (the child's mother) and forcibly inserted his fingers and objects into her vagina without consent.

[2] An application under section 275, containing 6 paragraphs, was presented to the sheriff, in respect of evidence which was sought to be elicited in respect of B. It was not proposed to put any of the material in question to A, and there was no application made in respect of him. At the hearing, argument was heard on three paragraphs only.

[3] The three paragraphs which were considered by the sheriff were as follows.

> 1. That between September and December 2018 B repeatedly induced and attempted to induce her sons, A and C (not a complainer), to make false allegations of sexual abuse against teaching staff at their school.
>
> 2. That the interlocutor of 26 March 2019 of the sheriff at Ayr, following a proof at which referral grounds were established, confirmed the foregoing averred facts.
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> 6. That A has repeatedly made false allegations against specified teaching staff, and in particular did so on 11.9.18, 12.9.18, 5.11.18, and 2.5.19, to social workers and/or police, whilst being interviewed about the allegations made against the appellant.

[4] Two further paragraphs, 4 and 5 were granted "of consent". In advance of the hearing of the appeal, the court indicated that it wished to be addressed also on these paragraphs, since a decision "of consent" did not constitute the judicial determination required by the legislation. Paragraphs 4 and 5 were in these terms:

> 4. That between June 2018 (effectively the conclusion of the libel) "and the present day" B had induced A to make false allegations against the applicant, "forming the subject matter of charge 1".
>
> 5. That between June and August 2018 B attempted to induce her other son, C, to make false allegations of abuse against the applicant.

The sheriff refused paragraphs 1, 2 and 6 as raising collateral matters. He did not consider that the interlocutor was capable of bearing the inference attributed to it.

[5] There was placed before the court a Joint Minute which seems to have been designed to explain some background to the case, and set out the basis upon which the court might approach the application. We would not wish to discourage parties from putting before the court in summary form the background or nature of the material which underpinned an application, but it would probably have been better if this document had appeared in some different form, since a Joint Minute, at least worded as this one was, does not seem to be a very appropriate way of conveying the information contained therein.

[6] Sections c and d of the application seek to state (i) the issue at trial to which the evidence is relevant; and (ii) the reasons it can be said to be relevant. These were not categorised in an individual way, but were rather stated in a general format. It was thus not always clear what was said to relate to the evidence concerning paragraphs 1, 2, and 6 and that concerning paragraphs 4 and 5. The issues at trial to which the evidence is relevant were: that credibility and reliability are central to the case; that the appellant denies the charges and "maintains" that the child has been influenced by his mother to make false allegations against him; that the false allegations against the teachers are closely related in time and character to those against the appellant and thus relevant in the trial of the allegations against the appellant; the former "have been judicially determined to be false", and this falsity is thus easy to establish by virtue of the relevant interlocutor; and that A could not be expected to know about digital penetration of the anus unless he had either been told about it or been the victim of it. The making of false allegations against teachers increased the likelihood that he has been told about it rather than experienced it.

[7] The reasons the evidence was said to be relevant were that the appellant denies the charges; that the proposition that the allegations are falsely made is not far-fetched but one made in the context of a series of false allegations investigated by the authorities and discounted as false; and that the evidence relating to allegations against the teachers is related in time and character to those against the appellant.

[8] Finally, section e of the application set out, as required by section 275(3)(e), the inferences which it was proposed to submit to the jury should be drawn from the proposed line. These were (i) that the issues of credibility and reliability raised by the defence were well-founded; (ii) that the defence was not far-fetched and ought to be accepted; (iii) that B was a serial manipulator of her children and had "caused or attempted to cause" A to make false allegations of sexual abuse against those who have met with her disfavour; (iv) that she had induced A to make a false allegations against the appellant; and (v) that the appellant is not guilty.

[9] Although from the joint minute and the terms of the interlocutor in the referral proceedings, together with the way in which these matters were addressed in the application, one could at least see what was to be asserted as being an evidential basis for the claims in paragraphs 1, 2, and 6, this could not be said in relation to paragraphs 4 and 5, which appeared to rest merely on the assertion that the appellant "maintains" this to be the case. The court sought to explore further what the evidential basis was for these assertions. For example, whether it was grounded in experiences of the appellant whilst living with the complainer, her former attitude to him, or to the children, and the like; or whether it was in reality based on the proposal that if inducing or attempting to induce the children to make false allegations against others could be established, it followed that it was a reasonable inference, given the similarity of the claims, that the allegations against the appellant had

equally been falsely induced. It was clear that the latter was indeed the basis upon which the matter was put, and that the proposal was essentially that inference (iii) allowed inference (iv) which together in turn allowed inference (v). So far as the reference in paragraph 1 to inducing or attempting to induce C to make allegations against the appellant, the situation was even more remote, not to say bizarre. The way it was anticipated that this would be dealt with was by leading the police officer to whom the child had made a statement to establish that in it he made no disclosure of any sexual abuse.

Submissions for the appellant

[10] In support of the application the Dean of Faculty submitted (i) that the sheriff had erred in concluding that the material was not admissible at common law; (ii) that it constituted behaviour in terms of section 274(1)(c), and thus was struck at by the legislation; but (iii) that it met the test for admissibility in terms of section 275(1).

[11] As to the first of these submissions the Dean submitted that the evidence was generally relevant in the sense that it demonstrated that the mother was engaged in a course of conduct or a pattern of behaviour which involved getting the children to tell lies about adults for her own purposes. This bears directly on the allegations made against the appellant. Even if the evidence was relevant only as going to weight, as discussed in para 29 of *CJM* v *HMA* 2013 SCCR 215, it could be admitted as being readily ascertainable at trial.

[12] The facts underlying paragraphs 1, 2 and 6, and by association the remaining paragraphs, were established as a matter of fact by the interlocutor pronounced by the sheriff at Ayr in referral proceedings finding grounds of referral established in respect of both sons, in which the sheriff had amended the grounds to include the statement that B "has reported accusations made that A and C have been sexually abused by their father [the

appellant] and has influenced A and C to make allegations of a sexual nature against teaching staff at the school they attend". The sheriff had erred in stating that the interlocutor had been ambiguous. It was not submitted that either A or B would accept that this was the case.

[13] Whether the matters in question also reflected on character in terms of section 274(1)(a) they certainly came within the definition of "behaviour" for the purposes of section 274(1)(c)(ii) and were thus struck at by the legislation, hence requiring the application under section 275. However, it was submitted that the material met the tests set out in section 275(1)(a) to (c) and should thus all be admitted.

Submissions for the Crown

[14] The Crown maintained its opposition to paragraphs 1, 2 and 6. No opposition was made in respect of paragraph 4, but it was submitted that a difficulty of a collateral nature also arose in respect of paragraph 5. So far as 1,2 and 6 were concerned the short submission was that the evidence was not admissible at common law as irrelevant; even if relevant, it was not readily verifiable, and was thus inadmissible as collateral. The interlocutor in the referral proceedings did not establish that any false allegations had been made and was in any event in proceedings for a very different purpose. To allow the material referred to in paragraphs 1, 2 and 6 to be raised would lead to the jury being distracted on matters not habile to proof of the charges libelled. A similar objection arises in relation to paragraph 5, since the child referred to there was not a complainer.

[15] As to paragraph 4, it became obvious in the course of submissions that the Crown's response had been conditioned by the understanding that it would have been possible for counsel for the appellant to put to A that the appellant had not abused him and that the

allegations were fabricated. It became clear that the Crown had not considered the difference which existed between such a situation and one where it was being asserted to another individual that they had induced the child to fabricate a story.

Analysis and decision

[16] In our view it is apparent even from the brief terms of paras 1,2, and 6 as noted above that they raise collateral issues. This is evidence of the kind discussed in *CJM* (see paras 27 and 29 thereof). As with the evidence in that case it has no connection, direct or indirect, with the facts at issue but may at best affect the weight to be attached to evidence in the trial. For the reasons explained in detail in *CJM,* evidence of this kind is generally inadmissible as collateral. In the present case to allow the evidence would move the focus from the evidence relating to the charges against the appellant onto alleged behaviour on the part of B which is not clearly specified, is disputed, and would involve derailing the trial on a side issue. It is precisely the kind of evidence which is excluded for reasons of convenience and expediency. It is not a matter of the kind which "can be demonstrated more or less instantly and cannot be challenged" (*CJM*, para 32). The further one explored the nature of the allegations, and the way in which the matter was to be presented, the more apparent it became that the material in question was collateral. The "joint minute" for example, illustrating some of the material which the appellant would wish to rely on, contained many examples of material which is very clearly collateral. The agreement was essentially that various agencies in discussion assessed those allegations and either considered them unfounded or expressed concerns thereanent: this is virtually a classic description of collateral evidence, namely that other people considered matters, looked at the facts and made their own separate assessments.

[17] The interlocutor, even leaving aside the general question of its admissibility, to which we will revert, provides no assistance. In the first place, the interlocutor is ambiguous as to what it actually is. Separate grounds were lodged in respect of each child. The interlocutor purports to be a finding in relation to the grounds relating to C, not A, yet makes a supervision order in respect of A. From this material, it is impossible to determine what the findings relating to A actually were. Moreover, it was not clear whether the statement of grounds lodged with it was the actual statement considered by the sheriff: the copy of the grounds in relation to A, lodged by the defence, differed in terms from the copy lodged by the Crown, which appeared to be a principal copy. The defence copy contained a statement that B made accusations that A and C had been sexually abused by their father "as reported to her by A and C" and thus makes a clear distinction between the position relating to the appellant and that of the teachers. The contention of the appellant is not something which could be demonstrated instantly and without challenge. It is abundantly clear that this too is a very clear, classic, case of collateral material.

[18] Indeed, it is because material such as this is collateral that it is not admissible. Although we were not referred to any authorities on the matter, it is well understood that, prior convictions aside, a determination in one case, is generally not admissible as evidence in another, even between two civil cases. As Dickson points out (Dickson, Evidence paragraphs 386-389) they are excluded as *res inter alia.* (See also Walker's Evidence, 4th edition, paragraph 9.4.2). Thus, even had the interlocutor been capable of bearing any inference of the kind referred to for the appellant, there is a much more fundamental objection to its admissibility.

[19] The sheriff was thus in our view entirely correct to refuse to allow the evidence to be admitted.

[20] Of the other 3 paragraphs which the application contained, para 3 was not insisted in. The procurator fiscal depute indicated that she did not oppose paragraphs 4 and 5. The sheriff appears to have considered this to be an end of the matter and allowed those paragraphs without considering the matter further. That is not appropriate. Whether the Crown does or does not oppose the application cannot be determinative of whether the evidence should be allowed. The legislation is quite clear that evidence of the kind referred to in section 274 is not admissible. If it is to be admitted it can only be because the court has properly and carefully considered the matter and has been satisfied that all three aspects of the test in section 275(1), which are cumulative, have been met. In addressing that issue the court will be conscious of the fact that the third leg of the test, which relates to the administration of justice, necessarily involves consideration of appropriate protection for the complainer's dignity and privacy, and a weighing up of the proportionality of admitting the evidence in the circumstances of the case (section 275(2)(b)). Section 275(7) requires the court not only to state what evidence or questioning it is permitting, but also to state the reasons for "its conclusion" that the evidence is admissible. It is not open to the court to abrogate responsibility for addressing these issues in detail simply because the Crown does not oppose an application. There has thus not been a judicial determination in respect of paragraphs 4 and 5, which we now proceed to consider.

[21] The complete lack of specification in these paragraphs has already been noted. It is not surprising that there is such a lack of specification since there appears to be no evidential basis for the propositions, save the supposition of the appellant. It is important to understand the context in which the propositions in these paragraphs are asserted. In cases where the defence is simply that the allegations are complete lies, or, where an adult is involved the defence is one of consent, these matters can readily be put to a complainer

because the accused is in a position to know what happened and to give evidence about it. In the present case the appellant may be in a position to give evidence that these things did not happen, but he is not in a position to go further and give evidence that the child was put up to it by B. Nor is he in a position to lead any evidence from which such an inference may legitimately be drawn. It was quite clear that he seeks to do so only by reference to evidence which is, in itself, wholly inadmissible. That is not to say that an accused may never be in a position to make such an allegation, but in order to do so he must be in a position to place before the court material or evidence from which that inference may legitimately be drawn by the jury. Otherwise what is involved is a mere exercise in supposition, speculation and character assassination.

[22] In *CJM* the Lord Justice Clerk (Carloway) noted at paragraph 44:

> "It is not unreasonable to comment that some courts, and prosecutors, appear to have found it difficult to balance the clear intent to restrict evidence in the wider interests of justice for all, and in particular complainers, with what they consider to be fair, looking primarily to the interests of the accused."

It appears that this difficulty continues. It is therefore perhaps worth restating some basic principles. Before consideration of the statutory provisions arises, the court must be satisfied that the proposed evidence is relevant and admissible. The test of relevance was clearly stated in *CJM,* the fundamental question being whether the evidence sought to be led has "a reasonably direct bearing on the subject under investigation" (*CJM*, paragraph 28). Even evidence which may have a degree of relevance, *prima facie,* may nevertheless be inadmissible as collateral.

[23] If the evidence would be admissible at common law, then attention must turn to the statutory provisions. It is worth noting the peremptory terms of section 274(1): the court "shall not admit" questioning or evidence of the kind referred to therein. As was noted in

DS v *HMA* 2007 SC (PC) 1 at paragraph 71 (Lord Rodger of Earlsferry) the section "forbids" the court to admit evidence or allow questioning designed to elicit evidence, of the kind referred to. The starting point therefore is that such evidence is *prima facie* inadmissible.

[24] The court is only permitted to admit such evidence where it has been satisfied that the tests in section 275(1) have been met and that an exception to the rule against admissibility should be made. As Lord Hope observed in *DS* (paragraph 28)

> "The important point to notice is that such questioning or the admission of such evidence will only be permitted if the court has been persuaded that it passes the three tests.

In other words, unless these tests are satisfied the questioning or evidence remains inadmissible. The tests are cumulative, meaning, as again noted in *DS,* paragraph 38, that

> "A court which is satisfied that all three tests are met will have concluded that the questioning or evidence relates only to specific matters which are relevant to establishing whether the accused is guilty and are of significant probative value."

[25] That third limb of the test, referring to probative value, requires not just that the evidence is of significant probative value, but that the probative value is sufficiently significant that it is likely to outweigh any risk of prejudice to the administration of justice from its being admitted (Section 275(2)(c)). This is important to note because it is consideration of the interests of the administration of justice which requires the court to address two further matters, namely the appropriate protection of a complainer's dignity and privacy and the proportionality of admitting the evidence (section 275(2)).

[26] When representatives are preparing an application under section 275 they should keep all these matters in mind. They should understand that since the evidence is *prima facie* inadmissible the focus should be on providing a full explanation for the proposition that the court should nevertheless admit the evidence, concentrating strongly on the statutory tests.

Proper consideration of section 275(3) is important in this regard. This was noted by Lord Brodie in *HMA* v *MA* 2008 SCCR 84 where he stated that an application must, at a minimum, comply with the requirements of this subsection, and set out the requisite detail in a comprehensible manner. This is material which the court requires in order to understand why it is being invited to admit otherwise inadmissible evidence. All the matters referred to therein should be included in the application and should be addressed separately in respect of each piece of evidence or proposed questioning. Paragraph (a) is self-explanatory. Paragraph (b) is designed to enable the court to understand not only what is to be put but the evidential basis for doing so. Paragraphs (c) to (e) are particularly important. Paragraph (c) requires the application to explain what the issues at trial are to which the evidence is relevant, and paragraph (d) requires an explanation of why it may be considered relevant to those issues. The paragraphs hinge together, and it is singularly unhelpful simply to say "credibility and reliability" under (c) and make a mere assertion under (d) that the evidence is relevant. Bald assertions will not be sufficient to meet the requirements of the subsection (see *JG* v *HMA* 2019 HCJ 71, para 35). Explanation is required. The explanation should lead naturally to being able properly to set out for the court in a clear and understandable way the inferences to which it is said the evidence reasonably gives rise. In *LL* v *HMA* 2018 JC 182 it seems remarkable that neither at the PH nor in the appeal could counsel identify any proper inference which might be drawn, nor say how the evidence could bear on the question of free agreement. These are issues which should be addressed at the time of drafting the application, since the court, before granting an application, must understand what these inferences are, and be satisfied that they are legitimate ones which could reasonably be considered by a jury on the basis of the evidence

in question. Deficiencies in an application may result in the court refusing to hear the application (see *JG*, paragraph 36).

Conclusion

[27] For the reasons given above, we consider the sheriff was correct in refusing to allow paragraphs 1, 2 and 6. However, the sheriff's failure to provide a judicial determination in respect of paragraphs 4 and 5 is a matter of which the court can take notice *ex proprie motu*. Doing so, and making our own determination, we consider, for the reasons already given, that the evidence is not admissible and that these paragraphs also should not have been admitted. We will therefore refuse the appeal, and in doing so refuse the section 275 application in its entirety.