HIGH COURT OF JUSTICIARY

[2020] HCJ 11
IND/2019-004063

OPINION OF LORD TURNBULL

in causa

HER MAJESTY'S ADVOCATE

against

JW

Accused

_____

Crown: Davie QC, AD; Crown Agent
Accused: Green; Tony Currie Solicitors, Ayr

14 January 2020

Introduction

[1] The accused JW appeared before me at a preliminary hearing in the High Court at Glasgow on 14 January 2020. He tendered a plea of not guilty to a charge in the following terms:

> "on 16 and 17 September 2019 at Sessionfield Industrial Estate, Ayr, the A713 road, the B742 road, Craigs Road, the B730 road, 1 Ravenscroft Place, Rankinston, LittleMill Place, Rankinston, Ladies Walk and Mill of Shield Road, both Drongan, all in East Ayrshire and elsewhere you [JW] did abduct [the complainer], c/o Police Service of Scotland, St Marnock Street, Kilmarnock, and whilst travelling in motor car registered number [given], you did detain her against her will and assault her, repeatedly shout and swear at her, push her head against a car window, seize her arm and push it behind her back, repeatedly seize her car keys and mobile telephone and refuse to return them to her, spit on her, push her on the body, demand that she drive you home, pull on the handbrake whilst she was driving, slap her on the head,

> kick the car, smash a bottle and brandish it at her, utter threats of violence towards her, throw her mobile telephone into a field, throw her car keys into a field, kick her on the leg causing her to fall to the ground, seize her by the hair and arms, repeatedly call her derogatory names, pull her by the hair from the car, demand she sit on the ground and be silent, punch and kick the windscreen of the car, seize her hand and pull her, force her to go with you to the house at [an address] and there demand she remove her clothing, forcibly remove her underwear, utter threats of violence, spit on her and penetrate her vagina with your fingers and penetrate her vagina and anus with your penis, and you did thus rape her and thereafter you did drive her to her car, refuse to give her the car keys, utter derogatory comments to her, demand she buy you breakfast and threaten her, and all this you did to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009 and the common law."

[2] Each of the advocate depute and counsel for the accused moved an application under section 275 of the Criminal Procedure (Scotland) Act 1995. The Crown's application was not opposed, the application made on behalf of the accused was opposed.

The circumstances of the alleged offence

[3] The summary of the circumstances of the alleged offence which I was given was that the accused and the complainer had met each other through an online dating site and had been exchanging messages over a period of a few days prior to the 16 September 2019. On that date they met up by agreement and had sexual intercourse in the motor vehicle belonging to the complainer, the registration number of which is given at line 14 of the indictment. None of these circumstances were in dispute between the parties.

[4] The complainer's account was that immediately, or very shortly after that episode of sexual intercourse, and whilst the couple were still within the car, the accused saw what he understood to be a text message on her mobile telephone from a partner or former partner. This caused him to be angry and in the course of the journey described in the indictment the accused behaved in the manner specified at lines 14 to 21. Thereafter, she was taken by him to his house at the address specified in line 26 where the events then described in the

following three lines took place. At a later point they left his house and the events specified in the last few lines of the indictment occurred.

[5] The accused's position was reflected in the notice of special defence lodged on his behalf. The sexual encounter which took place at his home took place with the consent of the complainer. I understood him to deny that the preceding events specified in the charge took place.

The application made on behalf of the Crown

[6] The Crown's application sought authority to elicit evidence that shortly before the behaviour alleged in the charge, whilst in the complainer's motor car, the accused and the complainer engaged in consensual sexual activity. This included vaginal and oral penetration.

The application made on behalf of the accused

Submissions for the accused

[7] Paragraphs 1c), e) and f) of the application referred to the events specified in the indictment which were said to have occurred after the alleged sexual assault at the complainer's home. It was recognised that these parts of the application related to matters which were part of the subject matter of the charge. Paragraph 1b) referred to things which the accused was said to have asked the complainer about in the course of the text exchange mentioned. Counsel accepted that this was irrelevant and withdrew this part of the application. There is no paragraph 1d) in the application.

[8] Paragraph 1a) sought authority to lead evidence about the content of the communications which passed between the accused and the complainer by text in the days

prior to meeting up. This included messages in which the complainer had said to the accused that she had a high sex drive, she had a preference for "DP", which was understood to mean double penetration, and that she enjoyed anal sex. The account of what the complainer had said in her text messages was lifted from the content of a police statement taken from the complainer which had been disclosed to the defence.

[9] The sexual acts specified in the charge included anal penetration. The submission advanced on the accused's behalf was that if the jury were only to hear the complainer's testimony, which was that she asked the accused not to engage in this conduct, they would conclude that she was someone who would not consent to such activity. The evidence of the content of the text messages was therefore relevant since it would demonstrate that she had indicated a preference for this activity prior to meeting the accused and that it informed his reasonable belief during the course of the sexual encounter that she did consent to anal penetration.

[10] Having passed the test of relevance, it was submitted that the evidence satisfied the tests set out in section 275. It related to specific occurrences of behaviour which were relevant to establishing whether the accused was guilty and the evidence proposed was of a probative value which was significant and likely to outweigh any risk of prejudice to the proper administration of justice.

[11] Paragraph 1g) sought authority to lead evidence concerning penetrative sexual activity which the accused contended the complainer had engaged in with him consensually at some point between 9.30am and 10.30am. The contention was that this activity occurred in the accused's car after they had left his home, had visited the shop specified in paragraph 1e) and had been for breakfast, as specified in paragraph 1f).

[12] It was explained that the accused had given this account to the police when interviewed. It was contended that this evidence was so closely connected in time to the events specified in the charge as to constitute a course of events and pattern of behaviour, such as made it relevant to the jury's assessment of consent in relation to the events specified in the prior episode.

[13] Having passed the test of relevance it was submitted that this evidence also satisfied the cumulative tests set out in section 275.

Submissions for the Crown

[14] In relation to paragraphs 1c), e) and f), the advocate depute submitted that the evidence sought to be led did not engage section 274 of the Act.

[15] She submitted that the evidence specified in both paragraph 1a) and paragraph 1g) was irrelevant and inadmissible. As a matter of law, consent could not be given in advance and the content of the text messages could not inform the question of consent on a later date. Nor could the evidence permit the accused to hold a reasonable belief in consent at a point in time separate from when the communications were passed. Reference was made to *GW* v *HM Advocate* 2019 SCCR 175.

[16] The sexual assault charged against the accused was said to have taken place in the early hours of the morning, although it was unclear when it came to an end. The application sought authority to lead evidence of events which were said to have taken place at least a matter of hours later. The complainer denied that anything of the sort specified in paragraph 1g) took place and what was specified was simply the accused's position. The evidence sought to be led was of no relevance to the question of whether consent had been present on the earlier occasion. It was a collateral matter.

[17] Having made this submission, the advocate depute conceded that what had been said by the court in the case of *Oliver* v *HM Advocate* [2019] HCJAC 93 at paragraph [9] might be thought to run counter to her principal submission. If therefore I was not prepared to hold that the evidence was irrelevant, it was submitted that it nevertheless failed to pass the test specified in section 275(1)(c). The probative value was not significant in the context of what was alleged to have happened in the early hours of the morning and issues concerning the proper administration of justice would arise.

Discussion

[18] The evidence specified in paragraphs 1 c), e) and f) relates to the subject matter of the charge and, in my opinion, is not engaged by section 274 of the Act.

Paragraph 1a)

[19] In the case of *GW* v *HM Advocate* the court made it plain that the definition of the offence of rape, as set out in section 1 of the Sexual Offences (Scotland) Act 2009, requires that consent is to be given, in whatever form, at the time of the sexual act and not at a point remote from it. Thus, the court made it clear that, as a matter of law, consent to a sexual act could not be given in advance. This makes it plain, in my opinion, that the evidence sought to be led on the accused's behalf as specified in paragraph 1a) is irrelevant. If consent cannot lawfully be issued in advance, the question of consent in relation to the sexual act between the accused and the complainer specified in the charge cannot be illuminated, or determined to any extent, by prior expressions of interest in sexual conduct with the accused, or by expressions of interest in any particular type of sexual activity.

[20] The Sexual Offences (Scotland) Act 2009 made an important change to the mental element of the crime of rape. By introducing a requirement for any belief as to consent to be reasonable, rather than honest, the Act moved from a subjective test for belief in consent to a test which was objective but which also directed attention to the steps which the actual accused took, or failed to take, to ascertain whether there was consent (section 16).

[21] The effect of this, in my opinion, is that the evidence specified in paragraph 1a) cannot be relevant to the accused's contention that he believed the complainer was consenting. It is not any such belief that is of relevance but only one which passes the test of "reasonable". If, as a matter of law, a prior expression of willingness to engage in sexual activity simply cannot constitute consent to a subsequent act of that kind, then it cannot provide the basis for a "reasonable" belief in consent either. Nor does section 16 of the Act provide any assistance to the accused. That section directs attention to what the accused did or did not do in order to determine whether or not "there was consent". The section does not contemplate an examination of steps to determine whether there would be consent, or whether there had been consent. It directs attention to what steps were taken by the accused at the time at which the sexual activity took place. For these reasons, I concluded that the application in relation to this paragraph required to be refused. It did not pass the test of relevance to any extent.

[22] In considering this aspect of the application on the accused's behalf I took account of what was said in the opinion of the court in the case of *Oliver* v *HM Advocate* at paragraphs [28] to [32]. As I would understand it, in this passage of the opinion the court was giving its decision in relation to part of the application made under section 275 of the 1995 Act by the appellant in that case. That part of the application sought permission to lead evidence of things said by the complainer to the appellant in the course of a train journey on

the day before the events which came to be specified in charge 5 on the indictment (a charge of rape which included anal penetration). It appears that part of this conversation included the complainer indicating to the appellant that she wanted to engage in anal intercourse with him outside later that evening. At the time of the debate before the preliminary hearing judge reference was made to text messages which the appellant's agent was in the process of recovering and which it was thought would lend support to this aspect of the appellant's position.

[23] As I understand it, the preliminary hearing judge granted authority on a restricted basis to lead evidence to the effect that "… the complainer told the applicant that… she wanted to engage in sexual activity with him at his house on that date." The Crown do not appear to have challenged that aspect of the preliminary hearing judge's decision.

[24] In giving its decision at paragraph [32] the court expressed agreement with the reasoning of the preliminary hearing judge. Furthermore, the court appears to have expressed the view that a reconsideration based upon the context of the text messages might lead to allowing the original formulation of the application, if support for the appellant's position materialised.

[25] It may be thought that the circumstances of the application in the case of *Oliver* were quite similar to those specified in paragraph 1a) in the present application. It may also be thought that the observations of the court lend some support to the accused in submitting that evidence of this sort might be both relevant and pass the test provided for by section 275. To the extent that I have arrived at the view explained above, and to the extent that this view might be thought to be to any extent in conflict with the opinion of the court in the case of *Oliver*, I relied upon the decision of the court in the case of *Lee Thomson* v *HM Advocate* 13 December 2019 HCA/2019/000517/XC. In that case the application presented on

the accused person's behalf sought authority to lead evidence of a discussion which he claimed to have had with the complainer during the course of a journey within 24 hours of the offence of rape which was said to have occurred and which included anal penetration. It was contended that during that discussion the complainer indicated her willingness to have anal intercourse with the accused. The application was refused. In upholding the decision of the preliminary hearing judge the reasons for the court's decision were given by the Lord Justice-Clerk who said:

> "Section 275 does not provide an exception to the common law rules on relevancy or on the expedient exclusion of collateral material. As the PH judge identified, the fact that a person may have consented to sexual activity on one occasion has no bearing at all on whether they consented on another occasion, either before or after the incident in question, save possibly, in particular circumstances, in the immediate aftermath. Far less does the fact that on an earlier occasion a complainer discussed the possibility of one type of sexual conduct have a bearing on the question whether that individual later in fact consented to such activity."

Paragraph 1g)

[26] In my opinion, the contention that the appellant engaged in consensual sexual intercourse with the complainer at a point between 9.30am and 10.30am has no bearing at all on whether she consented to sexual activity with him in the early hours of the morning at his house at some time between 4.30am and 7.00am. In the course of the debate, Ms Green's initial submission was that evidence of a consensual act of this sort would have a direct bearing on the question of whether consent was present on the earlier occasion. This seemed to be in conflict with the concept of autonomy which underpins the Sexual Offences (Scotland) Act. I thought it would be of value to bear in mind the remarks made by Lady Hale in *R* v *Cooper* [2009] UKHL 42, (as quoted with approval by the Lord Justice-General (Carloway) at paragraph [31] of *GW* v *HM Advocate*):

> "[I]t is difficult to think of an activity which is more person – and situation – specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by art. 8 of the European Convention …"

[27] When challenged on her submission Ms Green modified it to the proposition that the evidence sought to be elicited would bear on the credibility of the complainer, rather than directly on the events themselves. This, it appeared to me, would mean that it was evidence of the kind discussed in *CJM* v *HM Advocate* 2013 SCCR 215 at paragraph [29]. On this basis the application seeks authority to admit evidence which has no direct or indirect connection with the facts in issue, but may conceivably affect the weight to be attached to testimony which does have direct relevance to the facts, in this case the testimony of the complainer as to the absence of consent on the occasion specified in the charge.

[28] The weakness in the argument advanced is however obvious from the terms of part 4 of the application. That part is headed "The reasons why the evidence is considered to be relevant are as follows:" The explanation of the relevance of the evidence sought to be elicited in paragraph 1g), as given, is this:

> "That the complainer's willingness to have sexual intercourse with the accused in his vehicle some hours after the alleged rape in his home, tends to support the position that the complainer consented to the intercourse in his home. This is particularly so given that the complainer was in possession of her car keys and was in a position to leave the accused and drive herself home."

[29] This explanation, in my opinion, demonstrates that the evidence sought to be led falls squarely within the definition of collateral. The complainer denies that this event ever took place, far less that it proceeded on the basis of the "willingness" relied upon by the accused. To allow the evidence sought would move the focus from the evidence relating to the charge against the accused on to alleged behaviour on the part of the complainer 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)." For these reasons I concluded that the application in relation to this paragraph required to be refused. It did not pass the test of relevance to any extent.

[30] I did not consider that I was prevented from reaching this conclusion on account of the decision in the case of *Oliver*. I took account of the passages of the decision in that case to which the advocate depute drew my attention, and of which I was aware in any event. All of these decisions will be fact specific. In *Oliver* the court was dealing with a situation in which it seemed to be admitted that the complainer continued to stay with the appellant, her partner, for a period of time after the events specified in the indictment and to have sexual intercourse with him during that period. There was an explanation for doing so. Accordingly, the evidence which the court admitted in that case was not in dispute and was not collateral in the sense that I have attributed that description to the evidence sought to be led in the present case. I also took account of what had been said in the case of *Lee Thomson* in relation to evidence of post event sexual activity as specified in the quote set out above.

[31] Even if, contrary to the view I reached, I had been persuaded that the evidence had any relevance I would still have refused the application. The evidence sought to be led does not have significant probative value, particularly having regard to the appropriate protection of the complainer's dignity and privacy and the proportionality of admitting the evidence.

The Crown application

[32] It may be helpful to say a word or two about the Crown application and my reasons for granting it. This application proceeded upon the premise that on the date specified in the charge, shortly before the alleged behaviour specified, the accused and the complainer engaged in consensual sexual intercourse in her motor vehicle. Section 274 of course prohibits the court from admitting evidence that the complainer has "at any time" engaged in sexual behaviour not forming part of the subject matter of the charge. The "shortly before" exception arises in section 274(1)(c) and relates to behaviour which is not sexual behaviour.

[33] In part 4 of the application it is explained that the evidence is intrinsically linked to the matter libelled in the indictment. It suggests that it would be unfair to the complainer to restrict her evidence and it would serve to provide the jury with a false or at least incomplete impression of how the material libelled in the charge is said to have occurred.

[34] Some of what was said in part 4 (and in part 3) caused me some discomfort. The suggestion that an application under section 275 should be granted in order that a complete understanding of an event, or of its context, should be provided is an argument that regularly features in defence applications. It is an argument that sometimes sits rather uncomfortably with the fact that the prohibition which the statute has created *only* applies to evidence which otherwise satisfies the test of relevance in relation to the issues at large in the case.

[35] In my opinion, the evidence specified in this application was relevant in relation to the allegation of assault which occurred in the course of the car journey which immediately followed on from the consensual act of intercourse. The Crown's contention was that the violence which they say the accused engaged in was motivated by jealousy. In this

situation, it did seem to me that it was relevant to lead evidence of undisputed circumstances which could explain what led to such jealousy. I concluded that if the evidence was relevant for this purpose then it also satisfied the cumulative test set out in section 275.

[36] I did not decide the application on the basis that the evidence specified was relevant in relation to the allegation of rape said to have occurred after the journey had ended and both were at the accused's house. Part 3 of the application contends that the issues at the trial to which this evidence is relevant include the issues of consent and reasonable belief. In the course of her submission, the advocate depute contended that the evidence of the consensual sexual act would be of relevance to the issue of whether consent was present subsequently during the course of the act at the accused's home. She submitted that the complainer's credibility in stating that the second episode was non-consensual was enhanced by the fact that she accepted having consensual sexual intercourse earlier. She did not explain how the evidence would be relevant to the issue of reasonable belief.

[37] Since the application was not opposed by the defence I did not hear submissions on this aspect of the application. However, I was left with the sense that it was a submission that sat rather uneasily alongside the Crown's parallel submission that consent on one occasion was of no value in demonstrating the presence of consent on another.

CODA

[38] The Lord Justice General sitting with Lords Brodie and Pentland on 27 February 2020 considered an appeal in relation to this opinion. The court's decision was recorded as:

> " … having heard counsel for the appellant and the Advocate depute in reply, agreeing with the terms of the report to this court by the judge at first instance, affirmed the decision of the court at first instance, refused the appeal and decerned."