APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 10
HCA/2020/192/XC

Lord Justice General
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

FARYAD DARBAZI

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McCall QC, Hughes; Murphy Robb & Sutherland, Glasgow
Respondent: Edwards QC AD; the Crown Agent

3 February 2021

Introduction

[1] On 14 February 2020, at the sheriff court in Glasgow, the appellant was found guilty of a charge which libelled that:

> "on 17 December 2018 at Caspian Kebabs Takeaway Restaurant, …Glasgow, you… did sexually penetrate the vagina of [OS]… and did place your arms around her body, manoeuvre her into a booth and repeatedly digitally penetrate her vagina;

CONTRARY to Section 2 of the Sexual Offences (Scotland) Act 2009".

On 13 March 2020 the appellant was sentenced to two years imprisonment.

[2] The appeal concerns the test which requires to be applied when determining whether to allow an accused to state a special defence in the absence of a timeous written notice of an intention to do so.

The Statutory Framework

[3] Section 78(1) of the Criminal Procedure (Scotland) Act 1995, as applied in sexual offences to a defence of consent or the accused's belief of consent by section 78(2), provides that:

> "It shall not be competent for an accused to state a special defence… unless –
> (a) A plea of special defence… has been lodged …
> (b) The court, on cause shown, otherwise directs."

Subsection 78(3) requires the plea to be lodged at or before the First Diet. A special defence is not required if the accused has lodged a defence statement which includes reference to the defence (1995 Act, s 78(1A)). Such a statement is a document setting out (s 70A(9)(a)) the nature of the accused's defence, including any particular defences upon which the accused intends to rely. It should be lodged at least 14 days before the First Diet.

The Procedure

[4] The appellant appeared on petition on 18 December 2018. Disclosure of the Crown statements took place on 25 June 2019. On 15 October 2019, the appellant was indicted to a First Diet on 14 November, when he was represented by an agent and had the benefit of an interpreter, as he had throughout the subsequent proceedings. The defence statement

intimated that the appellant's position was that "if the crimes (*sic*) were committed, [the appellant] was not the perpetrator". The minute of the First Diet records that there was no special defence or section 275 application to be lodged, nor were there any defence lists of witnesses or productions. A trial diet was fixed for 7 January 2020, but this was postponed by joint minute until 28 January because of "difficulties" with the CCTV evidence.

[5] On 28 January 2020, the defence agent, whose firm had represented the appellant from the stage of his police interview, withdrew from acting. The reason for the withdrawal was not recorded. The trial was adjourned until the following day, and then until 30 January, to allow the appellant to seek alternative representation. The court was advised on the latter date that a new agent had been instructed and the defence would be ready for trial on 3 February. On that date, the new agent moved the court to allow a special defence of incrimination to be lodged late. He told the sheriff that he had been instructed to cite YB, who was the proprietor of the restaurant specified in the libel and was an essential witness. YB, it was said, would be able to identify the appellant and distinguish him from the incriminee, namely AA, who had worked at the restaurant with the appellant at the relevant time. The motion was not opposed and was granted.

[6] The trial diet was adjourned until the afternoon. The court was told that the complainer, who was a student teacher, was extremely anxious. At 2.00pm on 3 February 2020 the procurator fiscal depute, who had earlier opposed a further motion to adjourn until 6 February, told the sheriff that not only would YB attend court for precognition by both parties on the following day, but the incriminee, namely AA, would also do so. In these circumstances, the opposition to the adjournment was withdrawn. Throughout the discussions with the court, it had been accepted by the defence agent that the live issue was not what had occurred but who the perpetrator had been. The agent stated that "This case is

all about identification and all ancillary matters can be agreed". The complainer was told about this.

[7] When YB and AA did attend court on 4 February 2020, they both provided statements which incriminated the appellant. The court was informed that it was only at this stage that a formal precognition of the appellant was taken. Contrary to what the defence agent had told the court and had been communicated to the complainer, the appellant's account accepted that he had been the member of staff who had been involved with the complainer (as recorded on the restaurant's CCTV system), but contended that she had consented to the sexual act libelled. Given what he had earlier told the court and what had been communicated to the complainer, the second agent felt obliged to withdraw from acting.

[8] On 6 February, a new (third) agent appeared for the appellant. He had been instructed to withdraw the incrimination and to lodge instead a special defence of consent. The case was adjourned until the following day to allow him to take full instructions; it being intimated that the new special defence may require to be tendered. Bail was withdrawn because of the shifting nature of the appellant's defence and its disruptive effect on the business of the court. The agent was *ex proprio motu* appointed as the appellant's solicitor in terms of section 288D of the 1995 Act, notwithstanding that he was already acting as agent.

[9] On 7 February, the incrimination was withdrawn. The argument then focused on whether the new special defence of consent should be lodged, although late. The defence agent explained that, when the appellant had originally been interviewed by the police, he had been told by his agent that he need not state his position until the trial. The appellant had taken this literally and had not disclosed the true nature of his defence until

precognosed. His instructions to incriminate his fellow worker had been given in a panic. The PFD opposed the motion to allow the defence to be stated on the basis that the appellant had continually attempted to frustrate and delay the course of justice (*Murphy* v *HM Advocate* 2013 JC 60; *Bhowmick* v *HM Advocate* 2018 SLT 95 and *Radic* v *HM Advocate* [2014] HCJAC 76 at paras [22] and [23]).

[10] The sheriff refused to allow the special defence of consent to be "received though late". He held that no cause had been shown to allow this second, contradictory defence late. The sheriff reasoned that the appellant had deliberately and repeatedly failed to comply with his statutory obligation by choosing not to disclose, and then to change, his special defence. The appellant had claimed to have misled his first agent. He then blamed an innocent person for the offence. After that allegation had been rebutted, he had finally claimed for the first time that the complainer had consented.

The Trial

[11] On 11 February 2020 the trial called before a different sheriff. The appellant was represented by counsel. A compatibility issue minute was tendered. This challenged the first sheriff's decision to refuse to allow the late special defence of consent to be lodged. Although there is no minute of 10 February with the papers, it also challenges a decision of the sheriff on that date to refuse leave to appeal against that refusal. At the core of the compatibility issue was a contention that the refusal to allow the special defence of consent meant that the appellant was prevented from properly presenting his defence; contrary to Article 6 of the European Convention. The minute requested the sheriff to allow the special defence to be received or to desert the trial *pro loco et tempore*. The sheriff refused to allow the compatibility minute to be received. There is no minute recording that he considered the

substance of the compatibility minute or, despite the terms of his report, the merits of lodging the new special defence. The handwritten record with the minutes indicates that the sheriff did not consider it appropriate in effect to review the earlier decision of a fellow sheriff, which is what the compatibility minute was designed to achieve.

[12] The trial eventually proceeded on 12 February 2020. According to the sheriff, the CCTV images showed the complainer in a clearly intoxicated state. She had been in the front part of the takeaway but was guided to a booth at the back of the premises by the appellant. A brief episode of sexual activity occurred. The complainer returned to the front of the restaurant and then left the premises. She joined friends in a nearby bar. After a while, she became distressed and told her friends of what had taken place. The police were called. The sheriff provided no other narrative of the evidence at trial.

[13] The court viewed the CCTV images which are as described by the sheriff. They show the complainer in an apparently intoxicated state, although not one that substantially hindered her ability to order her food, pay for it, speak on her mobile, sit down in the booth and later leave the premises. In the absence of a report on the evidence from the sheriff, the parties produced a narrative of the complainer's testimony. The complainer spoke to drinking with friends since noon and ultimately ending up at the Brazenhead in Cathcart Road and then at Nice N Sleazy in Sauchiehall Street at about 9.00 or 10.00pm. She was drunk. Her memory of events in the restaurant was sporadic, but she did speak to the penetration libelled. She could not recall what happened thereafter until she re-joined her friends in Nice N Sleazy. She had recalled what had occurred when she re-joined her friends and the police were called. Some of the police officers who spoke to her did not consider her to have been drunk; others said the opposite. The former incriminee described her as not 100% sober but not so drunk that she did not know what she was doing.

[14] The appellant did not testify.

[15] The sheriff gave the jury standard directions on credibility and reliability, the presumption of innocence, burden and standard of proof and corroboration. He defined sexual assault, including a requirement of lack of consent. He directed the jury on whether the complainer was so intoxicated that she could not have consented. He went on to deal with whether the appellant might have had a reasonable belief that the complainer was consenting.

Submissions

Appellant

[16] The appellant maintained that the refusal to allow the special defence of consent to be lodged meant that the appellant could not adduce evidence in support of his defence. The sheriff had erred in finding that no cause had been shown to allow the late lodging. The appellant had explained why he had not told his agents about what had occurred. The allowance of the defence would not have occasioned any delay. No "special" cause was needed. It was the latter test which, as applied to late applications under section 275 of the 1995 Act, was designed to ensure that sensitive and stressful proceedings were not disrupted (*HM Advocate* v *G* [2019] HCJ 71 at para [28]) or that trials were not interrupted by the need to debate objections (*Bhowmick* v *HM Advocate* 2018 SLT 95 at para [26]). The purpose of the special defence was just to give notice of the line to the prosecution (see, on defence statements, *Barclay* v *HM Advocate* 2013 JC 40 at para [20]). The remedy for late lodging was an adjournment and the penalty was the Crown's ability to cross-examine on the point (*Lowson* v *HM Advocate* 1943 JC 141; *Williamson* v *HM Advocate* 1980 JC 22). A failure on the appellant's part did not mean that cause had not been shown. Part of the

cause may be the significance of the matter to the proceedings (*HM Advocate* v *Montgomery* 2000 JC 111 at 121). Cause would be shown if the allowance of the late defence had been in the interests of justice (*Murphy* v *HM Advocate* 2013 JC 60 at paras [33] and [34]). The appellant had a defence to advance and it ought to have been put to the jury.

[17] The appellant's right to a fair trial, in terms of what was described as the separate jurisdiction of the European Court, had been breached; specifically the right to examine witnesses against him and to secure the attendance of witnesses on his behalf (Article 6(3)(d)). The decisions of the sheriffs had prevented the appellant from giving or adducing evidence (*Murtazaliyeva* v *Russia,* 18 December 2018, App 36658/05 at para 158).

Respondent

[18] The Crown accepted that there were difficulties with the decision to refuse to allow the special defence of consent to be received. It could nevertheless be said that, given the procedural history, to allow an extreme change of position at such a late stage would not have been in the interests of justice (*Murphy* v *HM Advocate* (*supra*)). The right to a fair trial involved observance of the principle of equality of arms under which an accused must have a reasonable opportunity to present his defence under conditions which did not put him at a disadvantage (*Kaufman* v *Belgium* 50 DR 98 at 115). The appellant had been afforded such an opportunity.

Decision

[19] The question for the court is whether the decision to refuse to allow the appellant to state a defence of consent amounted to a miscarriage of justice. The statutory provision (1995 Act, s 78(1)(b)) allows such a defence to be stated, in the absence of a special defence

having been lodged, if "on cause shown" the court so directs. The appellant maintained that no special defence had been lodged timeously because he had misinterpreted the advice which he had been given at the stage of the police interview. This seems highly improbable, but that is what was advanced. That explanation ceased to apply when the appellant tendered the special defence of incrimination. That must have been done on instructions, even although, unfortunately, no precognition setting out the then nature of the appellant's defence appears to have been recorded. The appellant accepted that the defence of incrimination was false. He attempted to excuse that on the basis of panic. This too seems an improbable explanation. The sheriff held that no "cause" existed. That cannot be right. An explanation was tendered. The sheriff must, presumably, have rejected the explanations which were advanced as either implausible or insufficient.

[20] Even if the excuses were false or flimsy, the reality which faced the sheriff at the adjourned diet of trial on 6 February 2020 was that the appellant was advancing a radical change in position and seeking leave to lead evidence showing or tending to show that the complainer had consented to what had occurred in the restaurant. Ultimately, whatever the explanation for the late change of position might be, the test must be where the interests of justice lie (*Montgomery* v *HM Advocate* 2000 JC 111, LJG (Rodger), delivering the opinion of the court, at 121). No matter how careless, or even deliberate, an accused's actions may have been in failing to lodge the appropriate special defence timeously, cause is shown if it is demonstrated that it is in the interests of justice that the application to state the defence be granted (*Murphy* v *HM Advocate* 2013 JC 60, LJC (Carloway), delivering the opinion of the court, at para [33]). This is so even if one factor to be placed in the balance is the public interest in ensuring that, in general and in the particular case, the criminal process is not disrupted unnecessarily (*ibid*). Another factor will be any substantial inconvenience to the

complainer or any witness, but the weight to be attributed to these elements may not be high when compared to the impact of excluding an accused's only defence.

[21] The salutary words of the Lord Justice General (Normand) in *Lowson* v *HM Advocate* 1943 JC 141 (at 145), about the function of rules which are designed to protect the position of the prosecutor, bear repetition:

> "The due observance of them is a valuable safeguard against the introduction of evidence which the prosecutor could have no means of meeting, and the relaxation of the rules prescribed by the section might lead to grave abuses. But … these rules, being conceived in the interests of the prosecution, may competently, and should, be waived where the interests of justice are better served by waiving them than by insisting on them."

[22] What then fell to be placed in the balance? There was no suggestion that, had the appellant been allowed to state the new defence, the trial would have to have been postponed or adjourned. As it happened, it did not take place in any event until almost a week later. It was not suggested that any further inquiries were required or that further witnesses or productions would be needed. No doubt the complainer would have had to be told of, and asked about, the issue of consent. That might well have annoyed and/or distressed her, but, given her position at trial, her answer to any inquiry would have been relatively succinct and would not have prompted any further investigations.

[23] It is readily understandable that the sheriff would have been concerned, if not irritated, with the accused's changes of position. Nevertheless, this sometimes happens. There is no legal bar against an accused changing position in advance of the trial diet. Many accused do so; sometimes on more than one occasion. That is catered for in the statutory provisions governing both special defences and defence statements; even if there was no attempt to follow the latter in this case. The question which the sheriff had to ask himself was one which addressed any potential prejudice to the prosecutor or the complainer in the

trial process as a result of the changes in position. So far as identifiable, no such prejudice was identified. The sheriff simply found that no cause had been shown. In so doing he does not appear to have addressed the critical factor of the interests of justice. He seems to have considered "cause" simply in the sense of whether a good reason for failing to lodge a timeous special defence had been proffered. That was an error.

[24] The next question which the sheriff required to ask was one directed towards the prejudice which might be caused to the appellant in being prevented from stating what he was now maintaining was his defence to the charge. The appellant was no longer maintaining that he had not been involved in whatever had occurred with the complainer in the restaurant. To that extent, the issue at trial was narrowed, from one of whether it had been the appellant who had been involved in the events, to one of whether a crime had been committed. The refusal to allow the appellant to state a defence of consent meant, put bluntly, that he was deprived of his defence. That is a very serious matter indeed. In the circumstances of the appellant's position, the interests of justice required that he be allowed to state that defence.

[25] Just what the trial was supposed to be about, after the refusal to allow consent to be addressed, is unclear. If the appellant was not able to adduce evidence of consent, or a reasonable belief in consent, what were the issues for the jury? They should certainly not have been about the two matters upon which the sheriff specifically elected to direct the jury. They could not have been whether the complainer was so intoxicated that she could not consent. That was not what the Crown had libelled (cf *Maqsood* v *HM Advocate* 2019 JC 45). A libel of sexual assault on a complainer who is incapable of giving consent because of intoxication is materially different from what was alleged in the appellant's case. The issues could not have been about whether the appellant reasonably believed that the complainer

was consenting, given that he had not testified to that effect and was prohibited from raising that issue by the refusal to allow the defence to be stated. It is surprising that the appeal cases, which have been decided over recent years on this very point (eg *Maqsood* v *HM Advocate* (*supra*), LJG (Carloway), delivering the opinion of the court, at paras [16] and [17], and citing *Graham* v *HM Advocate* 2017 SCCR 497 at para 23), appear to have been overlooked by the trial sheriff.

[26] There may be extreme cases, notably those which would involve a postponement of a trial, in which the court may refuse to allow an accused to present a positive line of defence because he has manifestly, or perhaps deliberately, refused to comply with the procedural rules for doing so. These rules are laid down in statute. These extreme cases would have to be rare events in which the prosecutor and/or the complainer are seen to be materially prejudiced by that postponement. If, on the other hand, the trial can proceed as scheduled, without any need to undertake substantial new investigations, the balance, so far as the interests of justice are concerned, must be weighted heavily in favour of allowing the defence to be stated, especially if it is the only defence; provided that the trial can then proceed. The prosecution will then have the advantage of pointing out the accused's late changes of position to the jury and, possibly, cross-examining him on that basis (eg *Williamson* v *HM Advocate* 1980 JC 22).

[27] The court is satisfied that, notwithstanding the lateness of the application to allow the appellant to state his defence, the refusal to allow him to do so amounted to a miscarriage of justice. In reaching that determination, it is not necessary to have recourse to Article 6 of the European Convention. The Convention does not form a separate code which is applicable, independent of domestic principles of fairness. Rather, it permeates the whole system (*Gorrie* v *MacLeod* 2014 SCCR 187, LJC (Carloway), delivering the opinion of the

court, at para [13] and citing *Osborn* v *The Parole Board* [2014] 1 AC 1115, Lord Reed at para 55). The right of an accused to be able to present his defence, by testifying and/or by calling witnesses, has long been deeply ingrained in Scots criminal procedure. It constitutes more than sufficient compliance with Article 6, including Articles 6(3)(c) and (d), of the Convention. No compatibility issue arises.

[28] The court will allow the appeal and quash the conviction.