APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 41
HCA/2022/000172/XC

Lord Woolman
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

CROWN APPEAL UNDER SECTION 74

by

HER MAJESTY'S ADVOCATE

Appellant

against

RS

Respondent

Appellant: Kennedy; John Pryde & Co
Respondent: Prentice QC solicitor advocate; Crown Agent

13 June 2022

Introduction

[1] The respondent has been indicted in the Sheriff Court at Kirkcaldy on seven charges. All of them arise out of his relationship with his former partner. Only charges 1 and 4 are relevant to the present appeal.

[2] Charge 1 libels a common law breach of the peace, which includes an allegation that the respondent inserted his fingers into the complainer's vagina to check her genitals for

sexual activity. The conduct is said to have occurred on various occasions between October 2003 and October 2010. Charge 4 contains similar allegations relating to the period from October 2010 until February 2020. These are libelled as a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, including an allegation that the respondent on various occasions demanded that the complainer have sex with him and uttered abusive remarks if she refused.

[3] A docket appended to the indictment gives notice that the Crown intends to lead evidence that on various occasions between December 1999 and August 2019 the respondent penetrated the complainer's vagina with his penis without her consent. The aspect of digital penetration was added to both charges by amendment at a continued first diet on 22 April 2022, the same diet at which the application giving rise to this appeal was finally dealt with.

The legislation

[4] Section 288C(1) of the Criminal Procedure (Scotland) Act 1995 provides as follows:

> "An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings … in respect of the offence."

A "relevant hearing" is one at, or for the purposes of, which a witness is to give evidence (subsection (1A)).

[5] Subsection (2) sets out a list of the sexual offences to which the section applies. It includes indecent assault and offences under sections 2 and 3 of the Sexual Offences (Scotland) Act 2009 (sexual assault by penetration and sexual assault, respectively).

[6] Subsections (3) and (4) are in the following terms:

> "(3) This section applies also to an offence in respect of which a court having jurisdiction to try that offence has made an order under subsection (4) below.

> (4) Where, in the case of any offence, other than one set out in subsection (2) above, that court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated, for the purposes of this section, in the same way as an offence set out in that subsection, the court shall, either on the application of the prosecutor or *ex proprio motu* make an order under this subsection."

Section 288D makes provision for the appointment by the court of legal representation where the accused does not have a solicitor.

The Crown application

[7] The Crown sought a section 288C(4) order from the sheriff prohibiting the respondent from conducting his own defence should he at any stage dispense with legal representation. In support of the application the Procurator Fiscal depute provided a narrative of the evidence which it anticipated the complainer will give at trial. This includes allegations of non-consensual penetration of her vagina with his penis, *per* the docket, and digital penetration to check her genitals for sexual activity, as libelled in charges 1 and 4. The Crown contended that there was a substantial sexual element to these charges. The defence submitted that "substantial" meant something that can subsist by itself and to a real extent. The respondent's sexual demands of the complainer, fell within the general coercive and controlling behaviour libelled. The digital penetration was not sexual, standing the respondent's motivation and the absence of any sexual gratification.

The sheriff's decision

[8] The sheriff refused to make an order for the following reasons. There was no indication that the respondent intended to conduct his own defence. His sexual demands, while "not insignificant", were not a substantial element of charge 4. The digital penetration

was not of a sexual nature. The complainer was not expected to say the respondent did that as a precursor to sex. It was not accompanied by any words, actions or gestures of a sexual nature. It was more in keeping with a medical examination, however perverse that might sound. It formed part of the respondent's coercive and controlling behaviour but it was not sexual. In the sheriff's experience of other cases this was a common feature of controlling men, which the Crown had in the past agreed did not amount to sexual activity. There was no basis for distinguishing the respondent's case.

Analysis

[9] A court is not precluded from making a section 288C order merely because an accused person is at present represented and in making the application the Crown took a pragmatic approach in seeking to ensure that the trial would not be interrupted. There is the further consideration that one important consequence of an order made under section 288C is that a complainer enjoys the protection against questioning as to sexual history provided by section 274 of the 1995 Act.

[10] Had charge 1 specifically libelled indecent assault and charge 4 libelled a contravention of section 2 or section 3 of the Sexual Offences (Scotland) Act 2009, this issue would not have arisen. However, the fact that the digital penetration, if proved, would in all probability, amount to an indecent assault or a contravention of section 2 or 3 of the 2009 Act, as the case may be, is significant. Such offences could have been proved against the respondent irrespective of his motivation. (*cf Grainger* v *HM Advocate* 2006 JC 141 at p145, paragraph graph [17] per Lord Justice Clerk (Gill)).

[11] What is meant by "substantial" under section 288C(4)? The Crown contends that it refers to the seriousness of the sexual conduct. The defence submits that it denotes the

threshold, meaning the extent to which the conduct can be said to be sexual in nature. It is not necessary for this court to attempt a definition. An analogy may be drawn with the notification provisions in section 80 of the Sexual Offences Act 2003. The court declined to define "*significant* sexual aspect", save that it should be given its ordinary meaning in the context of the aims of the legislation concerned (cf *Hay* v *HM Advocate* 2014 JC 19 at p30-31, paragraph graph [52] and p27-28, paragraph graph [33] per Lord Justice Clerk (Gill)). We adopt the same approach to "*substantial* sexual element" and we interpret it in the context of Parliament's aims in enacting section 288C. The test is not whether the sexual element is a substantial part of the charge but whether the charge contains a sexual element which is itself substantial.

[12] While there is a line of authority suggesting that the motivation for an offender's conduct is relevant (cf *Sorrell* v *Procurator Fiscal (Greenock)* [2020] SAC (Crim) 2, paragraph [14]; *Sutherland* v *HM Advocate* 2017 JC 268 at p271, paragraph [19] and p276, paragraph [32] per Lord Turnbull; *McHugh* v *Harvie* 2015 SCL 987, p989, paragraph [5] and p990, paragraph [9] per the Lord Justice Clerk (Carloway)), all of those cases were decided in the context of the notification requirements. Moreover, it is questionable whether a sexual motivation is even a prerequisite in that context (*cf W* v *HM Advocate* 2013 SCL 253, where there was no suggestion that the respondent had penetrated the complainer for the purposes of sexual gratification). See also *Ferguson* v *HM Advocate* [2021] HCJAC 51. That discussion is, however, for another day

[13] There is a distinction to be drawn between the two lines of authority. Where the notification requirements are in question, evidence will have been led at trial or a narrative of the facts read following a guilty plea. At that stage it will be possible to determine whether there was a significant sexual aspect to an offender's behaviour. As the Lord Justice

Clerk said at paragraph [40] of *Hay*: "Experience shows that often the evidence puts a different complexion on the case from that which is shown in the Crown summary."

[14] Section 288C(4) requires that there "appears to be a substantial sexual element" - a less stringent test. This is logical since, while it is a significant step to deprive an accused of the opportunity to defend himself if he chooses so to do, it does not have the far-reaching consequences that attach to being made subject to the notification requirements as a sex offender: see *Hay* at paragraph [35].

[15] The background to section 288C was briefly discussed by this court in *McCarthy* v *HM Advocate* 2008 SLT 1038. Following upon the raising of certain concerns about accused persons cross examining their alleged victims in person, the Scottish Parliament enacted the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which introduced sections 288C and 288D into the 1995 Act. They were plainly conceived for the protection of witnesses.

[16] The question for us is this. Did the sheriff err in holding that there was not a substantial sexual element in the alleged offences? There was some discussion as to the effect of the material in the docket but the implications of it were not fully argued we prefer not to express any opinion on it at this stage. Leaving aside that material, however, the complainer is expected to give evidence of digital penetration of her vagina other than in the course of consensual sexual activity and of the respondent having abused her when she refused his sexual demands. Whether the section is interpreted in a purposive way or the issue is approached through the lens of common sense, it admits of only one answer

[17] Allowing the complainer to face the sort of intimate questioning envisaged is precisely what the section is designed to prevent. Non–consensual digital penetration on its own is a substantial and serious sexual crime. It does not have to be accompanied by words

or actions of a sexual nature. What is libelled is a gross violation of the complainer's sexual autonomy. An allegation of abusing someone because they would not give in to sexual demands also contains a substantial sexual element.

[18] Even if motivation were relevant, it is difficult to conceive how it could be taken into account at the stage of considering a section 288C order, when the accused denies that he committed the offences, but if his motivation for digital penetration was indeed to check whether the complainer had engaged in sexual activity then that could not be anything other than sexual.

[19] For the foregoing reasons we are satisfied that the sheriff erred.

[20] The Crown appeal is granted and we remit the case to the sheriff so that he can make an order under section 288C and to proceed as accords

Postscript

[21] This prosecution does not have a particularly long history but it has already taken up an inordinate amount of court time.

[22] The case called for a First Diet on 3 August 2021 and was adjourned until 31 August 2021 to allow counsel to be instructed and for consideration of the Crown's application. On 31 August the diet was adjourned until 14 September 2021 on defence motion. The partner dealing with the case had been diagnosed with Covid-19 and the case had not been diarised correctly. On 14 September the diet was further adjourned, this time until 12 October, to allow counsel to consider any objections to the docket, although the respondent was represented by a solicitor from Inverness, apparently from the firm who were the principal agents. It is minuted that the defence conceded that due to the nature of the charges the accused would not be in a position to conduct the trial without representation but the court

did not grant the application, nor for that matter refuse it at that stage. It seems to have been left in limbo. On 12 October the court was told by a local agent that sanction had recently been obtained for counsel and it is noted in the minutes that the application "is currently irrelevant". The diet was adjourned yet again until 26 October "for the defence to obtain further instructions and have consultations with their client". On 26 October a trial diet was assigned for 25 April 2022 and a "pre-trial hearing" was assigned for 15 February for the Crown to lodge an application under section 275. Nothing is said in the minute for 26 October about the application under section 288C (4). A local agent appeared again. On 15 February the same local agent appeared and the Procurator Fiscal depute said that an application under section 275 was not to be lodged at that stage but made a motion for an order under section 288C(4). The local agent indicated that he did not have instructions in relation to that matter and on Crown motion the diet was continued until 1 March for the Crown motion to be considered, on the basis that if it were granted an application under section 275 would be lodged. On 1 March, a different agent appeared and the motion was renewed. Incredibly, the defence agent said that he was not instructed in relation to that motion and a further hearing was fixed for 8 March. The sheriff then presiding highlighted his concern about the situation and made it clear that the principal agents should either instruct counsel, provide full instructions to local agents or appear themselves so that the motion could be considered. On 8 March counsel appeared and advised that there had not yet been full disclosure by the Crown and a Crown application under section 275, on which she required to take instruction, had only been received the previous night. Certain discussions were held about these matters and the minutes record that it was "advised until an order has been granted by the court in terms of section 288C an application in terms of section 275(1) could not be made". However, rather than dealing with the application for on

order under section 288C the court simply continued the diet until 22 March "to allow the defence to take further instructions and to determine further procedure". The diet of 22 March was continued administratively until 29 March. On that date counsel advised the sheriff, the sixth sheriff who had dealings with this case in court, that the Crown motion under section 288C(4) would be opposed. The Crown moved to amend the indictment by adding in certain words to the docket, as far as we can see. The minute then records that the Crown were seeking an order in terms of section 288C(4), as if that was not already well known, and "after discussions" it was "decided that this could be argued at a further hearing". Such a hearing was fixed for 19 April and, when the case called on that date, the local solicitor who had appeared on 12 and 26 October and 15 February appeared again and said that neither the principal agents nor counsel was able to attend. No reasons for this inability are minuted. Once again this local agent did not have instructions in relation to the motion. The diet was adjourned until 22 April. During the submissions at that diet the Crown sought leave, which was granted, to amend charges 1 and 4 by insertion of the reference to digital penetration. Having heard from counsel the application under section 288C(4) was refused, giving rise to this appeal. The trial diet was until 15 August 2022 to allow the appeal to be argued.

[23] This is a sorry tale of mismanagement and ineptitude. It displays a lack of urgency and a seeming inability or unwillingness to grapple with a straightforward question. It is inexplicable to us, and neither the advocate depute nor counsel were able to assist us in this regard, why the application was not granted on 14 September 2021 when the point was conceded. Instead, the case has just been churned from diet to diet with nothing being achieved. Even now at least one section 275 application is outstanding. As with Preliminary Hearings, parties should treat First Diets as the end of their preparation, not the beginning

of it, if the system is to work as intended. Ideally, the court should be in a position to deal with all applications when the case first calls. This case is an egregious example of what happens when matters are not dealt with as they should be.