SHERIFF APPEAL COURT

[2016] SAC (Crim) 3
SAC/2015/15/AP

Sheriff Principal Scott QC
Sheriff Beckett QC
Sheriff Principal Lockhart

OPINION OF THE COURT

delivered by SHERIFF J. BECKETT Q.C.

in

APPEAL BY STATED CASE

by

SRS

Appellant;

against

PROCURATOR FISCAL, TAIN

Respondent:

Appellant: Mackintosh; Faculty Services
Respondent: Goddard AD; Crown Agent

10 February 2016

Introduction

[1] The appellant was found guilty after trial on 1 and 4 September 2015 on a summary complaint at Tain Sheriff Court of a charge of assault:

> "On 31st March 2015, at [an address in Alness], you did assault BS, Police Scotland, and did headbutt and punch her to the face and seize her by the neck to her injury."

[2] Mr Mackintosh, advocate for the appellant, confirmed that the appeal was only concerned with the appellant's conviction, leave to appeal against sentence having been refused.

[3] The background to the offence was that the appellant's partner SS is the daughter of the complainer BS. BS had been looking after SS's two children. When the appellant and SS returned to collect the children, words were exchanged and it was alleged that the appellant assaulted BS as charged. One of the children present, AM aged 10, was to be a witness in the trial.

The trial

[4] From the stated case it is apparent that the complainer gave evidence in support of the libel. The Crown case included photographs of the complainer, proved by joint minute to have been taken on 31 March 2015, showing a black eye and grazes and abrasions to her neck. It was also agreed by joint minute that on being interviewed by the police, the appellant had said that he had been attacked by BS, but he denied assaulting her. In due course, the appellant gave evidence denying that he was assaulted and he adduced the evidence of SS, an eye witness, who said that the appellant had not assaulted BS, he had been assaulted by BS.

[5] In its case, the Crown had intended to adduce evidence from AM by CCTV from a remote site in Inverness. On 4 September, when AM was due to give evidence, the child was not to be seen in the room in which she was due to give evidence. The sheriff reports that,

> "a member of the staff of VIA entered the room and advised the court that AM was in attendance but was distressed and refusing to enter the room and give evidence. I adjourned to allow attempts to be made to persuade AM to enter the room and try to

> give evidence. I re-convened the court about 10 minutes later. I was advised by the Respondent's depute that AM was hysterical and she, the Respondent's depute, had been able to hear her shouting and crying in the background when the videolink was open. I decided that I could not and would not require the child to attend in the video room given what I had been told."

[6] In terms of section 259(2)(e)(i) of the Criminal Procedure (Scotland) Act 1995, the Crown moved to admit AM's evidence in the form of a statement made by her at 6.35pm on 31 March 2015. In the statement, AM had told the police that shortly after 6pm that day, she had been present in the kitchen with the complainer when the appellant came in, began to shout, pushed the complainer, head-butted her and threw her against the wall. He dug his nails into the complainer's neck, causing bleeding.

[7] With reference to *MacDonald* v *HM Advocate* 1999 SCCR 146, a case concerning section 259(2)(e)(ii), the appellant's solicitor objected on the basis that the witness could not be held to have refused to answer questions or to accept the admonition to tell the truth as required by the statute. Secondly, it was contended that since there was otherwise sufficient evidence in the case, it was not necessary or competent to admit evidence via section 259. No authority for that latter proposition was advanced at any stage and it was not pursued in the appeal.

[8] The sheriff admitted the evidence, being satisfied that what had been reported to him fell within the scope of section 259(2)(e)(i). Notwithstanding the objection which had been taken, Crown and defence agreed by joint minute that the statement of AM had been noted by a PC Corcoran on 31 March 2015.

[9] The sheriff reports in paras 13-15 of his note:

> "(13) The appellant gave evidence in line with his statement to the police, claiming that BS had attacked him. He denied striking her in any way that could explain the injuries clearly seen in the photographs. SS gave evidence that was exculpatory of the appellant, claiming BS had attacked him. She denied the appellant's defending

himself had resulted in the injuries seen in the photographs. SS gave evidence that BS had injuries before they arrived at the scene. There was nothing in the police statement of AM about whether BS had any injuries before the appellant and SS arrived or whether she was uninjured. Beyond this there was no other evidence in support of the assertion of SS.

(14) I found BS to be a credible and reliable witness. She gave her evidence in a low key and calm manner. She responded appropriately to cross-examination. Other sources of evidence came from the joint minute produced, which are of course proved facts. These supported BS's position. The evidence of AM is corroborative, the photographs show injuries [which] are consistent with the attack spoken of by BS and described by AM. I did not find the appellant and SS to be credible or reliable. I found their evidence to be fatally flawed by the lack of any credible explanation for the injuries it was admitted BS had shortly after the alleged incident.

(15) The application for stated case in so far as it relates to conviction is confined to various attacks on the admission of AM's evidence via section 259. Taking these in the order they appear in the application I would comment that 2 a) i) was not argued before me. I was aware however of the decision in *HM Advocate* v *McKenna* 2000 SCCR 159 and the need for the court to proceed in compliance with the European Convention on Human Rights, even though no compliance issue is raised. I applied the test set out in *McKenna*, the evidence of AM was not the sole or principal evidence against the appellant. BS had given clear and unequivocal evidence against the appellant. It remained open to the appellant to challenge the circumstances in which the statement of AM was made."

The sheriff goes on to suggest that it was open to the appellant to call the police officer who noted the statement of AM if it was desired to explore the circumstances more fully.

[10] The sheriff stated three questions of which two related to conviction and the third to sentence. The issues raised in this appeal relate to the construction of section 259(2)(e)(i) and whether the admission of AM's statement as hearsay rendered the trial unfair. Whilst the question of fairness was not raised in the trial, it did feature in the application for a stated case. The sheriff declined to state a question in that regard since that issue was not raised in the trial. The appellant sought to introduce a question by adjustment which the sheriff

rejected for the same reasons.[1] We acceded to counsel's invitation, in terms of section 182(5)(f), to allow an extra question to be considered and to renumber question 2 as question 3. Accordingly, these were the questions we required to answer:

1. Was I entitled to admit the evidence of AM in the form of a statement given by her in terms of section 259(2)(e)(i) of the Criminal Procedure (Scotland) Act 1995?

2. Did I err in failing to conclude that the hearsay evidence of AM was unfair to the appellant and breached his right to a fair trial in terms of article 6?

3. Was I entitled to convict the appellant?

Submissions

[11] Counsel for the appellant accepted that in the agreed evidence of the photographs and the appellant's statement there was, on the analysis of the court in *Gilmour* v *HM Advocate* 1994 SCCR 133, sufficient material to provide corroboration of the complainer's evidence without the statement of AM.

[12] Counsel founded on *MacDonald,* and referred to the passages from the Scottish Law Commission's Report on Hearsay Evidence in Criminal Proceedings (no 149 of 1995) quoted in the opinion of the court given by Lord Coulsfield. Whilst counsel recognised that in the present case the sheriff had proceeded under section 259(2)(e)(i), he had done so erroneously. The provisions should be narrowly construed. It was not enough for a witness to be distressed and to find it difficult to give evidence, there had to be a refusal. It was necessary that the witness should be in the witness box, or in this case the CCTV room, and

[1] "Did I err in failing to conclude that the hearsay evidence of AM was unfair to the appellant and breached his right to a fair trial in terms of Article 6 of the European Convention of Human Rights and accordingly not disregard her evidence as envisaged by the Lord Justice Clerk (Gill) in *N* v *HM Advocate* 2003 JC 140?"

communicate her refusal directly to the court. Counsel was aware that the Crown would found on *Cowie* v *HM Advocate* 2010 JC 51 and sought to distinguish that case on its facts.

[13] Counsel went on to argue that the hearsay evidence of AM had been decisive because the sheriff had used the hearsay alone to discredit the exculpatory evidence of SS. The use made of AM's statement could be seen in paragraph 13 of the sheriff's note. Following the approach of the Lord Justice Clerk in *N,* the sheriff ought to have appreciated that the trial had been rendered unfair and he should have disregarded the hearsay statement of AM. Counsel conceded that his argument was periled on his interpretation of paragraph 13 of the sheriff's note.

[14] In reply, the Advocate Depute supported the sheriff's decision to proceed under section 259(2)(e)(i). Following the approach of the court in *Cowie*, the sheriff was entitled to proceed on the information which he was given and to conclude that the witness had refused to take the oath or, in this case since she was a child under 12, to accept the admonition to tell the truth.

[15] The advocate depute submitted that counsel had misinterpreted the sheriff's note. On any view, the evidence was not decisive. The opinion of the court in *Campbell* v *HM Advocate* 2004 JC 1 demonstrated that even if hearsay evidence was the only source of corroboration, that did not render it decisive as understood in ECHR jurisprudence or necessarily render the trial unfair in article 6 terms. In any event, the jurisprudence had moved on as could be seen by the decision of the majority of the grand chamber in *Al-Khawaja* v *United Kingdom* [2012] 54 EHRR 23. In that case, the admission of hearsay evidence which was decisive did not render the trial unfair.

Decision

[16] Read short, section 259 (1)(a) of the 1995 Act provides that in accordance with the various provisions of the section as a whole, hearsay evidence is admissible, subject to certain qualifications in subsections 1(b), (c) and (d), where the judge is satisfied that the person who made the statement will not give evidence in the proceedings for any of the reasons mentioned in subsection 2. Subsections 2(a), (b) and (c) specify situations where a witness cannot give evidence. Subsection 2(d) provides for the situation where a witness is permitted by the court to refuse to testify lest he incriminate himself. Subsection 2(e) provides:

> "(2) The reasons referred to in paragraph (a) of subsection (1) above are that the person who made the statement—
> (e) is called as a witness and either—
> (i) refuses to take the oath or affirmation; or
> (ii) having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement refuses to do so,
> and in the application of this paragraph to a child, the reference to a witness refusing to take the oath or affirmation or, as the case may be, to having been sworn shall be construed as a reference to a child who has refused to accept an admonition to tell the truth or, having been so admonished, refuses to give evidence as mentioned above."

[17] The court in *MacDonald* was dealing with a situation governed by subsection 2(e)(ii). Three child witnesses had been admonished to tell the truth but were not able to answer questions. In the absence of the trial judge directing them to answer questions, it was determined on appeal that the situation did not fall within subsection 2(e)(ii), the evidence should not have been admitted and the convictions were quashed. The court did not comment adversely on the sheriff's offering a definition of "refuse" from the Concise Oxford Dictionary in these terms: "say or convey by action that one will not accept or submit to or give or grant or gratify or consent; not grant a request made by a person."

[18] Whilst *Cowie* was also concerned with subsection 2(e)(ii), we consider that the observations of the court are relevant. In *Cowie*, a witness had taken the oath and had reluctantly given some evidence on one day. On the next day it was communicated to the court by the macer that the witness was refusing to enter the witness box. The issue for the court was whether this constituted a refusal in terms of the provision. The appellant also contended that the legislation required that the witness be brought into the witness box by force before there could be a refusal. In giving the opinion of the court, the Lord Justice Clerk (Gill) stated, at para 19:

> "In our opinion, the trial judge was right in concluding that by her conduct, the witness had in effect refused to give evidence in connection with the subject-matter of the statement. There is no substance in the contention that sec 259 would have applied only if the witness had been brought to the witness box by force and had thereafter refused to give the relevant evidence. The trial judge was right to accept the word of two officers of the court, both of whom had repeatedly asked the witness to come into the courtroom and give evidence, that the witness was refusing to do so."

[19] Whilst in this case the information came from a member of VIA staff and then from the procurator fiscal depute conducting the trial, there is no material difference and we consider that the sheriff was entitled to be satisfied that the witness had refused to be admonished to tell the truth such that the evidence of her statement was admissible under section 259.

[20] Even if the hearsay evidence was the only source of corroboration, that would not necessarily render the trial unfair, *Campbell* at para 16.

[21] In this case, there was direct evidence from the complainer and there were other sources of corroboration as well as the hearsay evidence. The sheriff was well aware of the nature and limitations of hearsay evidence and of its significance for an article 6 compliant fair trial. The appellant was represented, gave exculpatory evidence and called a witness to

give exculpatory evidence. Counsel did not suggest that the sheriff was unable to conduct a fair and proper assessment of the reliability and credibility of AM's statement. The stated case demonstrates that he was able to do so.

[22] Counsel accepted, correctly, that the hearsay was not necessary for sufficiency. We do not consider it to have been decisive or to have rendered the trial unfair on any analysis. We do not agree with counsel's contention that AM's statement was the only basis on which the sheriff had rejected the exculpatory testimony of SS. We consider that in para 13 of his note, the sheriff was simply noting that AM's statement did not say in terms whether the complainer was or was not injured before the incident. We consider that he gave his reasons for accepting the evidence of BS and rejecting the evidence of SS and the appellant in para 14 of his note.

[23] We note that the ECtHR's interpretation of the impact of article 6(3)(d) has evolved since the cases of *McKenna*, *Campbell* and *N* were decided. We consider that the decision of the ECtHR in *Al-Khawaja* further undermines counsel's contention that the admission of hearsay rendered the trial unfair in article 6 terms. The 15-2 majority of the Grand Chamber held, in para 147:

> "(c) General conclusion on the sole or decisive rule
> 147 The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of art.6(1) . At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, to use the words of Lord Mance in R. v Davis, and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case."

[24] It is unnecessary for us to consider all of the subtleties of the case of Mr Al-Khawaja whose trial was found not to be unfair and his co-appellant Mr Tahery whose trial was found to be unfair. We note that so far as Mr Al-Khawaja was concerned, the only direct evidence on one charge of indecent assault was the hearsay statement of a deceased complainer which was considered by the court to be decisive, para 154. However, *de recenti* statements had been made shortly after the event and there was mutual corroboration, para 156. In these circumstances, the judge's directions and the corroborative evidence were sufficient counterbalancing factors to allow the jury to conduct a fair and proper assessment of the reliability of the deceased complainer's allegations so that there was not a breach of article 6(1) read in conjunction with article 6(3)(d), paras 157 and 158.

[25] For all of these reasons, the appeal falls to be refused. We set out the three questions to be answered in para 10 above. We will answer questions 1 and 3 in the affirmative and question 2 in the negative.