APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 68
HCA/2018/541/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

NOTE OF APPEAL AGAINST CONVICTION

by

SG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Fyffe (sol adv); Paterson Bell
Respondent: Prentice QC (sol adv) AD; the Crown Agent

24 October 2019

[1] The appellant was convicted *inter alia* of two charges of assault on his then partner. The first was a charge of assault to injury in January 2018. The second was of assault to severe injury and permanent disfigurement, which also involved an act of rape, on 25 February 2018. The appeal is against conviction on that latter charge, in relation only to

the rape element thereof, on the basis that no reasonable jury properly directed could have convicted the appellant of rape.

The evidence

[2] The complainer's evidence was that at the time in question she had broken contact with the appellant and blocked his number so he could not contact her. She had ended the relationship some two or three weeks earlier. On the night of the assault she had been at a night club in Kirkcaldy and had been dropped off at her flat in the early hours. Whilst she was putting the bins out, she saw the appellant in his car, and her next recollection was of coming to in his flat, with a sore head. The clear implication was that he had struck her on the head and abducted her. Evidence about this was led without objection and was then emphasised and developed in cross-examination. This occurred shortly after 0300 hrs, perhaps about 0320. When she came to, the appellant had her phone and forced her to supply the PIN code and unlock it before searching it. The appellant forced her at knife point into the bathroom, and made her stand in the bath. The non sexual elements of the assault took place in the bathroom. The complainer maintained that she was then forced into the bedroom, stripped and raped. She was crying, bleeding from her face and asking him to stop. A further violent assault occurred in the living room of the flat, when she was punched on the face causing blood to pour all over her. They both returned to the bedroom where the appellant apologised for what he had done. He then fell asleep. Avoiding waking the appellant she left and went to the police station but could not get help as it was unmanned. She went to her grandmother's house. The grandmother gave evidence that the appellant came to her door shaking, crying, covered in blood and very upset. She said that the appellant had raped her.

[3] The trial judge notes that in relation to the events alleged in relation the severe physical assault there was:

> "photographic evidence of the Complainer's condition in the aftermath and these showed significant facial injuries. This lent powerful support for the part of the charge that alleged that on the morning of 25 February 2018 the Complainer had been punched about the head by the Appellant and that these injuries were severe and to the Complainer's permanent disfigurement".

Photographs also showed copious blood on the bathroom floor, toilet and bath. There was scientific evidence supportive of intercourse between the appellant and the complainer having occurred around the time in question. The appellant did not give evidence and did not advance a case of consent. A defence of alibi was not withdrawn but no evidence was advanced in support of it.

[4] The defence highlighted aspects of the evidence which were relied on as undermining the complainer's evidence of abduction and her evidence that there had been no recent contact between her and the complainer. Telephonic evidence showed a text message from the appellant's phone to that of the complainer at 2252 hrs on 24 February stating "Come to mine later. Love you. Contact me. xx". A subsequent text from his phone to hers, at 0323 hrs stated "Long you be you think? x". The evidence showed five unanswered calls from the appellant's phone to that of the complainer between 0308 and 0347. There were three calls going the other way, namely at 0319 for 3 seconds; at 0320 for 2 minutes and 28 seconds; and at 0343 for 33 seconds. The calls from the complainer's phone showed up on the appellant's phone as from a restricted number.

[5] It was submitted to the jury that the clear inference from these messages was that not only had the parties been in contact, the appellant had invited the complainer to his house, and was asking, in the early hours how long she would be. The complainer said that she did not receive these messages, but it was submitted that her evidence on this was not credible

standing the general number of the calls, and the making of calls from her number. It was asserted that some support for the suggestion that the complainer had been invited to the flat, and gone willingly, came from CCTV evidence from an area of Markinch near her home at 0348 hrs on the morning in question. This showed a vehicle which was said to be similar to that of the appellant's in the vicinity of the appellant's home, a person which could have been a man or a woman walking in the direction from the complainer's home to that of the appellant, with a further image of the car with a front seat passenger who could not be identified, although it was a person with long hair, like the complainer. The complainer denied in each case that the person was her. It was acknowledged that the quality of the recording was extremely poor and little could be taken from it alone, but that in conjunction with the telephone evidence it constituted circumstantial evidence which tended to undermine the complainer's evidence of abduction, and presented a different picture, consistent with communication between the parties, an agreement to meet and the appellant picking the complainer up in the vicinity of Markinch station. The defence also sought to rely on the evidence of a witness Heggie, a neighbour of the appellant, who claimed to have heard someone leave the appellant's house at about 0500hrs, followed by what he thought was the sound of the appellant's car and about 30-45 minutes later two people, a man and a woman returning, and sounding jovial. It was recognised that the timing of this did not fit with the evidence of either the phone calls or the CCTV, but it was relied on as being inconsistent with an account of abduction earlier that morning. There was evidence of glasses of alcoholic beverages within the appellant's flat, including spiced rum of a kind which the complainer favoured, and it was submitted that this might not be consistent with an account of abduction, but rather with normal social intercourse. There was medical evidence that the complainer had a bump on the back of the head, but it was submitted that

this could not relate to any alleged abduction since what she had originally told police was that she had a sore cheek when she woke up, not a sore head.

[6] It was submitted to the jury that on the basis of the forensic evidence the Crown had not ruled out the possibility that the sexual intercourse between the complainer and the appellant had taken place on the 24th, not on the morning of the 25th. These matters were all addressed in support of the appeal, along with one other point relating to photographs of the bedroom where the rape was alleged to have occurred. The photographs do not show blood, notwithstanding that the complainer maintained the violent assault which caused her to bleed profusely had taken place prior to the rape. However, it was also acknowledged that the complainer was not asked about this at all; that the photos showed an undercover with a further cover on top so that the undercover could not be seen; that there was some suggestion in evidence that bedding found rolled in the corner had actually been on the bed at the time; and that in any event there was no evidence that the bedding had been examined, so it could not be said that there was no blood present, only that no blood could be seen on that part of the bedding visible in the photographs. Other points which had been advanced to the jury were considered by the solicitor advocate for the appellant to be general points of credibility and were not founded on in his argument in support of the appeal.

Submissions for the appellant

[7] The grounds of appeal assert that "no reasonable jury could have concluded that the complainer was a credible and reliable witness in relation to the allegation of rape". It was conceded that there was a sufficiency of evidence and acknowledged that where there existed a sufficiency of evidence an appeal of this kind will succeed only in exceptional

circumstances (*Harris* v *HM Advocate* 2012 SCCR 234). The test was a high one, namely whether no reasonable jury properly directed could have returned the verdict in question (*Birnie* v *HM Advocate* [2012] HCJAC 112; *King* v *HM Advocate* 1999 JC 226). In addressing that issue the court requires to carry out an assessment of the reasonableness of the jury's verdict with the benefit of its collective knowledge and experience (*AJE* v *HM Advocate* 2002 SCCR 341).

[8] Presenting his argument on the basis of the criticisms of the complainer's evidence as summarised above, the solicitor advocate for the appellant submitted that the complainer's evidence, viewed objectively was of such poor quality that no reasonable jury could have convicted on the charge of rape. It was noted that the trial judge himself, in his report, had expressed the view that the complainer's evidence of the abduction was evidence which no reasonable jury could have accepted.

The trial judge's report

[9] In his report the trial judge identified a number of aspects within the evidence before the court which would have entitled the jury to question the complainer's credibility and reliability. In particular:

(a) Her evidence that she had prior to the events which the charge concerned ended her relationship with the appellant were contradicted by the evidence including phone records on the night in question;

(b) The complainer's evidence as to the means by which she claimed to have been overpowered by the appellant and taken to his flat was similarly put in to question by available CCTV footage, the evidence of the appellant's neighbour, circumstantial

evidence on the contents of the room and the fact such aspects had not been libelled against the appellant.

(c) Her evidence that the rape took place on the bed, after she had been violently assaulted and bleeding, was not consistent with the forensic evidence; and

(d) Her evidence that the appellant had threatened her from prison was contradicted by agreed evidence. Her withdrawal of evidence of another attack by the appellant following a VIPER parade was agreed between the parties.

The trial judge notes that there were, however, factors favourable to her credibility and reliability. In particular the jury would have been entitled to take in to account:

(a) the fact that soon after leaving the flat she had told her grandmother that she had been raped.

(b) She had shown distress at the time of telling her grandmother, though her facial injuries and the physical assault would also have been a factor for the jury to bear in mind in that connection and may have been the true reason for the distress.

(c) Her grandmother's evidence, with reference to her original police statement was that the complainer had told her that she had been taken hostage by the appellant.

(d) Evidence from the Forensic Scientist witness that sexual intercourse had probably occurred that morning, and the appellant had not sought to rely upon a plea of consensual intercourse, his counsel advancing in cross examination that no intercourse had taken place at all.

The CCTV footage showed that the appellant had been in the vicinity of the complainer's home at the time in question.

[10] The trial judge acknowledged that matters of reliability and credibility were matters for the jury alone. In his view, however, the appellant had a good argument that a

reasonable jury would not have been persuaded to the relevant standard of the charge of rape given the broader doubts as to the complainer's credibility and reliability on aspects of her evidence.

[11] The jury should have taken a very cautious approach to the complainer's evidence of rape since unlike the assault (which was corroborated by her injuries) it depended to a great extent on her own testimony.

Submissions for the Crown

[12] The complainer did not alter her position in respect of the central matter at issue- that she had been raped by the appellant. The matters which the appellant relied upon and sought to criticise the complainer about were matters peripheral to the offending. The context of the complainer's evidence was that she had been consuming alcohol and cocaine. The discrepancies relied upon might have caused the jury to doubt the complainer's credibility or reliability on the central issue, but ultimately did not. It was not unreasonable for the jury to accept the complainer as credible and reliable on the central issue.

[13] The appellant's main focus was a criticism of the complainer's evidence on the rape but that evidence was not before the jury in isolation. The forensic evidence indicated recent penile penetration of the complainer's vagina by the appellant, with a high probability that it had occurred on the day in question, with a lesser possibility that it had taken place the day before. No evidence of consensual intercourse within the relevant timescale was elicited by the appellant. There was corroboration of the complainer's account in the recent distress spoken to by her grandmother, as well as a *de recenti* statement tending to support the credibility of the complainer.

[14] The appellant did not give evidence or state a position at police interview as to the allegation. Applying *Bakhjam* v *HM Advocate* 2018 JC 127, per the Lord Justice General Carloway at paragraph 35, no other position other than a denial of intercourse was before the jury. The appellant's other arguments and reliance on evidence had little weight.

Analysis and decision

[15] The submission for the appellant was that the appeal should succeed only so far as the rape element of the charge was concerned, it being maintained that no reasonable jury could have accepted the complainer's evidence on that matter. There were however several difficulties facing the appellant in presenting the appeal on this basis. The first and most obvious is a concession that in respect of the violent physical assault, to severe injury and permanent disfigurement, which the complainer said occurred during the same incident as the rape, the jury were entitled to find her a credible and reliable witness and to convict. Standing the evidence of the findings at the locus and the medical evidence such an approach is inevitable. But it does make it difficult for the appellant: the effect is that it is maintained that her evidence as to the alleged abduction was so undermined that in respect of the rape no reasonable jury could have convicted, yet in respect of the violent assault they were entitled to do so. How can the complainer's evidence about the alleged abduction be said to be so fatally undermining of the complainer's evidence in relation to the rape, if it does not do so in relation to the assault? What is it about that evidence which is so tied to the rape as to have this effect? It is not an answer to say that there was corroboration available in respect of the vast quantities of blood in the flat and the physical injuries. There was also corroboration available in respect of the rape, a factor for which the submissions for the appellant fail to make adequate account. There was evidence corroborative of recent

intercourse, and no alternative account to that of the complainer was placed before the court. There was recently exhibited distress. It was not, and could not, be suggested that the intercourse on the occasion in question was consensual. (The trial judge's directions on this were somewhat confused, but it is clear that any misdirections, such as a direction that an absence of reasonable belief was an essential part of the charge which required corroboration, or a direction that the jury might be entitled to acquit on the basis of the special defence of alibi, which was not spoken to in evidence, were favourable to the defence). All that the defence could suggest was that the Crown had not ruled out intercourse having taken place on the 24th, but in the absence of evidence from the appellant this appears to be entirely speculative.

[16] The points made about the complainer's evidence relating to the alleged abduction were all made by to the jury in the defence speech. The jury rejected them. Nor is this a case where the evidence all pointed one way. The evidence of the witness Heggie could not fit in any way with the evidence of telephone messages and CCTV relied upon by the defence. The CCTV evidence was accepted as having little weight on its own, and only being of significance in the context of the messages from the appellant to the complainer. The evidence in relation to the absence of blood on the photographs took the matter nowhere.

[17] The trial judge did express the view that the evidence of abduction was not evidence which a reasonable jury could have accepted. That may be so, but there was no requirement for them to accept such evidence in order to convict, and indeed they did not even have to deliberate on the matter since it did not appear on the indictment. The trial judge also noted that certain aspects of the evidence "should have given the jury pause for thought": again, that is maybe so but the jury had detailed submissions on all these matters and eventually concluded that they could accept the evidence of the complainer. The test in an appeal such

as this is not whether a reasonable jury might have accepted or rejected certain elements of the evidence; the test is whether on the evidence as a whole, supportive of the complainer or undermining of her evidence, no reasonable jury could possibly have convicted. In this case the only question is whether a reasonable jury could have convicted of the rape. At no point does the trial judge explain why concerns over certain aspects of the complainer's evidence as to how she got to the flat should, standing the corroboration and lack of alternative explanation, undermine the whole of her evidence to the extent that no reasonable jury could have convicted of the rape which she maintained had occurred inside the flat. As the Advocate Depute pointed out, on this aspect of her evidence the core elements had remained the same throughout. The trial judge acknowledged in his report that there were factors favourable to the complainer's reliability and credibility, which he enumerated. However, he does not seem to have placed these in the balance when expressing his own views on the complainer's evidence.

[18] The trial judge in his report in any event places undue weight on CCTV footage of poor quality, and the evidence of the witness Heggie, which could not be accepted as accurate if the CCTV footage did show the appellant's car. The trial judge appeared to place considerable significance on the evidence of the photographs of the bed as not revealing any blood, going as far as to say (incorrectly) that no blood staining was found on the bed linen, and to refer later (again incorrectly) to the "lack of blood on the bedsheets". In fact the linen was not examined and there was no evidence at all about whether there was or was not blood on any of the bedding. As the solicitor advocate for the appellant accepted, this was entirely neutral evidence which did not advance his case. The trial judge's assertion that "The evidence showed that earlier assaults by the appellant had not ended the relationship and that she had continued to have consensual sex with the appellant. The jury would have

had to weigh up carefully the interaction between the Appellant's violence [and] the complainer's willingness to have consensual sex in the context of such a relationship" are mystifying in the context of this case, where no issue of consent arose.

[19] The test which has to be applied in an appeal of this kind is a strictly objective one. This was a typical case in which there were elements of the complainer's evidence which supported her credibility and elements which allowed it to be challenged. The task of the jury was to assess what weight to attach to these factors. There is in our view no basis for suggesting that issues surrounding the credibility or reliability of the complainer's evidence of what happened before she got to the flat meant that her evidence of what happened thereafter was so lacking in credit that no reasonable jury could have convicted the appellant of the charge in question. The appeal must accordingly fail.

Postscript

[20] In order to assist with the presentation of this appeal a transcript of the evidence given by the complainer was obtained. She gave evidence over two days. We had the opportunity of reading that transcript in advance of the hearing. We wish to comment on two matters which did not form part of the appellant's argument but which seem to us to be of importance in the proper conduct of solemn cases and in particular cases involving allegations of sexual offending.

First

[21] The first relates to the importance of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. In many cases which feature allegations of sexual offending there will be applications made to elicit evidence in terms of section 275 of the Act. These will normally be dealt with at the preliminary hearing. Such applications require to be made in

writing and the court's decision on any such application will be recorded in the minutes. In the present case an application was presented to the court at the preliminary hearing on 22 June 2018. It ran to four pages. The court's decision is set out in the minute for that hearing.

[22] It is unlikely that the judge who conducts a particular trial will be the same judge who had earlier presided at the preliminary hearing. It is therefore essential for a judge who is to preside over a trial involving sexual offences to determine, in advance of the start of the trial, whether there has been such an application in the case and, if so, to familiarise himself with the content of that application and the court's decision thereon.

[23] At page 18 of the transcript of the second day of the complainer's evidence, there is noted an exchange during which the trial judge asked the appellant's solicitor advocate, Mr Fyffe, whether there had been an earlier application under section 275. This was well into the cross-examination, which had begun the day before.

[24] The exchange discloses that the trial judge did not know whether an application under section 275 had been made or not. He did not have a copy of the application. He went as far as to make an observation to the effect that this was a common feature in cases over which he presided.

[25] We would wish to emphasise that it is the duty of the trial judge to ensure that he has available to him, prior to the commencement of the trial, all of the materials which he considers will be necessary in order to be properly informed. In a case involving allegations of sexual offending this will always include a copy of any application made under section 275 and a note of the court's decision on that application.

Second

[26] The appellant in the present case was represented by an able and experienced

solicitor advocate. The transcript makes it clear that he engaged in well thought out and effective cross-examination of the complainer in respect of a number of aspects of her evidence. Despite this, the trial judge decided to intervene during that cross-examination on a number of occasions. Some of these interventions were entirely innocuous and were in the manner of clarifications. The reason for some other interventions was less easy to discern. On a number of occasions the judge appeared to be repeating or re-visiting the line of cross examination which had just been advanced by Mr Fyffe. Examples can be seen at pages 186/187 of the transcript of the first day of the complainer's evidence and at pages 16, 40, 72, 101 and 113 of the transcript of her second day's evidence. There was no obvious reason for doing so and the points had been made clearly by Mr Fyffe.

[27] If a judge intervenes in such a manner during the examination of a witness there is a danger that an observer might conclude that he was engaging in cross-examination, or was seeking to undermine the testimony being given. In the present case that appears to have been the view which the complainer herself formed at one stage (pages16/17), causing her to respond to the judge's intervention by saying:

> "I've done nothing wrong here. Can I get a break please?"

When the judge queried with her why she wanted a break she responded by saying:

> "My head is just fried. I'm the victim in this and I'm getting made out to just, I don't know, it's like, it's so hard for me to explain.

[28] The restrictions on the function of a trial judge in examining a witness are well known. In the context of an accused person giving evidence they are elucidated in the opinion of the Lord Justice Clerk in the case of *Ernest Livingstone* v *HM Advocate*, 22 March 1974, as approved by the court in *Tallis* v *HM Advoca*te 1982 SCCR 91:

> "I must deprecate the practice of such constant interruptions by a presiding judge. Basically his function is to clear up any ambiguities that are not being cleared up either by the examiner or the cross-examiner. He is also entitled to ask such questions as he might regard relevant and important for the proper determination of the case by the jury, but that right must be exercised with discretion, and only exercised when the occasion requires it. It should not result in the presiding judge taking over the role of examiner or cross-examiner. Normally the appropriate time to put such relevant questions as he may think necessary for the proper elicitation of the truth is at the end of the witness's evidence, and not during the course of examination or cross-examination."

[29] There is no reason to think that these observations should not have similar application in the context of a complainer giving evidence of a serious sexual assault.