APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 53
HCA/2018/441/XC

Lord Justice General
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

COLIN GRIMASON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: CM Mitchell QC; Faculty Appeals Unit (for Robert Kerr Partnership)
Respondent: Prentice QC (Sol Adv) AD; the Crown Agent

17 November 2020

[1] On 18 June 2018 the appellant was convicted, by unanimous verdict, of an appalling sexual assault perpetrated on a 25 year old school teacher who was a stranger to him. In this appeal he contends that a miscarriage of justice has resulted as a consequence of defective representation at his trial.

[2] The charge of which the appellant was convicted was as follows:

> "On 28 May 2017 at an alleyway near to Munches Street and High Street, both Dumfries, you did sexually assault EC in that you did seize hold of her, pull her into said alleyway, pin her against a wall, kiss her on the mouth, insert your tongue into her mouth, push her to the ground, cause her head to strike the ground, hold her down, put your hands around her neck and compress same, cause her to lose consciousness, all to her injury and to the danger of her life, rip her pants, and did sexually penetrate her vagina in that you did penetrate her vagina with your penis and fingers: Contrary to Sections 2 and 3 of the Sexual Offences (Scotland) Act 2009."

Background

[3] In May 2017 the complainer was living in Glasgow. She had completed a probationary year as a teacher at a school in Dumfries and had travelled back there to spend the weekend with friends she had made whilst working there. On the evening of Saturday 27 May the complainer and a group of female friends went out for the evening in Dumfries, ending up at a nightclub in the town centre called the Venue. During the course of the evening the group met various other friends and associates. The complainer and some others left the nightclub together at closing time, around 3.00am. As she understood it, they were generally making their way towards her friend's home and expecting to get a taxi. She became separated from the group she had left the nightclub with.

The complainer's evidence

[4] The complainer testified that she was approached by a man with a Northern Irish accent. This transpired to be the appellant. Initially one of his friends was present as well. They walked in generally the same direction and were talking to each other. As they came upon an alleyway the appellant took her wrist and pulled her into it, pushed her up against the wall and started to kiss her. At first she laughed at this but told him to stop as she was not interested. When he did not do so and began to kiss her more forcibly she realised something horrible was happening. He pushed her down causing her to hit her head and to

lapse into unconsciousness. She came round with him on top of her. When she tried to shout for help he grabbed her by the throat and started strangling her. The complainer thought that she was going to die but then heard voices in the distance, at which the appellant let go of her, said "Fuck it", and ran off out of the other end of the alleyway.

[5] The complainer managed to get up and make her way out of the alleyway, leaving a number of her possessions behind. She immediately came upon two of her friends who came to her aid. She was bleeding from cuts to her knee and to her elbows. Her hands were covered in blood and she was bleeding from her vagina. She thought that she did not have her underwear on but it transpired that her underpants had been ripped off, leaving her only wearing the waistband. The remaining part was later discovered in the alleyway. Her friends took her to the police station.

Supporting evidence

[6] The Crown led evidence of the appellant's distressed condition on emerging from the alleyway. She told her friends she thought she had been raped. The contents of her clutch bag were found strewn about on the ground in the alleyway. Evidence was led of the findings of a medical examination which took place later in the morning of Sunday 28 May. An area of petechiae and erythema was noted on her right cheek, the petechiae being consistent with strangulation. Two linear abrasions were noted to her upper back and multiple small grazes or abrasions were noted on the right elbow area. Further abrasions were noted to her right knee and to her right thumb. All of these were consistent with being pushed to the ground.

[7] In addition, two fresh linear abrasions were noted on the inner labia minora which had been visibly bleeding and three small abrasions were noted in the area of the posterior

fourchette. These were described as being consistent with digital or penile penetration, or a combination of both.

[8] DNA matching that of the complainer was found on the boxer shorts worn by the appellant and in scrapings taken from his fingernails. These findings were capable of being explained by penile and digital penetration of the complainer. CCTV footage recovered from Dumfries town centre showed the appellant running out of the alleyway and back to the hotel where he was staying.

The appellant's evidence

[9] The appellant was 26 years old at the date of the trial. He worked as a retained firefighter and had his own car bodywork and repair business. He had travelled from his home in Belfast to Dumfries on the weekend of 26 May to compete in an ice hockey tournament. On the Saturday evening he and a number of his teammates went out for a drink in Dumfries town centre. He and his friend Daniel McCall went on to the Venue nightclub afterwards.

[10] The appellant testified that after leaving the nightclub he and Daniel walked around in the area nearby looking for a fast food outlet which might be open. His evidence was that the complainer approached them explaining that she had lost her friends. She appeared to be annoyed about this. She told them she was needing the toilet and asked if they were going to a party. He explained that he and Daniel spent a little time with the complainer trying to help her find her friends, during the course of which they walked back towards the Venue nightclub. As they did so he and the complainer kissed two or three times and there was general flirting between them. Daniel decided to head back to their hotel leaving the appellant and the complainer alone. During the course of the discussion the complainer told

the appellant that she had fallen that evening but he was not able to see any injuries as he could not see her knees on account of the length of her skirt.

[11] As they reached the area of the alleyway it was the complainer who suggested that they should cut through that route as it would take them back to Dumfries High Street where she thought her friends might be. He denied grabbing her by the wrist and pulling her. In the alleyway he kissed her again and then she told him she needed to go to the toilet. She said she thought she could hear her friends, to which he responded that if she was certain that was them he would leave her there and try to catch up with Daniel. He left and as he did so he could see that she appeared to be crouching down, apparently in order to do the toilet. He then made his way back to his hotel and joined his companions. They were all woken in the morning by the police and he was taken into custody.

[12] The complainer's evidence was put to the appellant. He denied pushing her to the ground, he denied causing her head to strike the ground, he denied holding her down, he denied putting his hands around her neck, he denied removing her underwear or having his hands anywhere in her genital region, other than touching her over the top of her skirt when they were kissing. He could not explain how her underpants came to have been destroyed. He denied penetrating her vagina, either with his penis or with his fingers.

[13] In cross-examination the appellant agreed with the proposition that the complainer must have been lying in saying that he took her wrist and pulled her into the alleyway. He could offer no explanation for any of her injuries but denied using any force against her. He speculated that she may have fallen over after he left her. He agreed with the advocate depute's proposition that, as far as he was concerned, the complainer's account of receiving her injuries was a pack of wicked lies. He reiterated that he did not harm her in any way. He reiterated that he had no explanation for the injuries to the area of her vagina.

The note of appeal

[14] The note of appeal makes the overarching complaint that the appellant was defectively represented by his counsel, resulting in an unfair trial and a miscarriage of justice. The specific complaints identified concern the cross-examination of the complainer and the approach taken by counsel in his speech to the jury.

[15] The first proposition in the note of appeal is that counsel for the appellant failed to put to the complainer that she was wrong and lying in her recollection that she had been grabbed, pulled down and strangled by the appellant.

[16] The second proposition is that the tenor of a particular passage of counsel's cross-examination was to the effect that the appellant may have engaged in an event which he understood was consensual, whilst his judgement was affected by alcohol, and that he ceased when he appreciated that the complainer was frightened, or when he realised that his behaviour might be viewed as inappropriate by others. It is said that this line formed no part of the appellant's instructions.

[17] The third proposition is that in his speech to the jury counsel bolstered the standing of the complainer as a credible witness and restricted his criticisms of her evidence to a suggestion that she may have been unreliable. It is said that this submission failed to address or to acknowledge the direct conflict between the complainer's evidence and that of the appellant as to whether he continued kissing her after she made it clear that she did not want to do so and then pushed her to the ground and choked her.

[18] The effect of the cross-examination as identified, and the tenor of counsel's speech, is said to be not in accordance with the appellant's instructions and outwith the scope of any legitimate tactical discretion available. It is said that the contents of the cross-examination of

the complainer and the speech to the jury were likely to have reflected adversely upon the appellant and his evidence in the minds of the jurors.

Submissions

Appellant

[19] In her submissions on the appellant's behalf, Ms Mitchell QC drew attention to the content of the precognition taken from the appellant which was recovered from the case papers. The relevant passage was in these terms:

> "We basically had a bit of a carry on in the alleyway. I accepted that I kissed her on the mouth. I probably put my tongue in her mouth. I did not push her to the ground. I do not remember her head striking the ground I did not hold her down, I did not put my hands around her neck or compress her neck. I did not rip her pants and I did not penetrate her vagina with my penis or fingers or, for that matter, with anything. As far as I am concerned I thought that she was up for a one night stand and as soon as she started showing more interest in finding her friends again I just thought 'Fuck this' and headed back to the hotel."

A special defence of consent, limited to kissing the complainer and putting his hand on the outside of her vagina but not penetrating her in any way, was lodged in advance of trial. Counsel submitted that the appellant's evidence had been consistent, both with the precognition and with the special defence.

[20] Attention was drawn to the terms of the letter responding to the note of appeal from trial counsel. In that letter he explained that he did not consider that he had a sound basis upon which to accuse the complainer of lying but that he did challenge the Crown case against the appellant in his cross-examination of the complainer. He explained:

> "In my cross-examination of the complainer, I was seeking to navigate the fixed points of evidence on the basis that the two conflicting accounts were irreconcilable and collectively amounted to misadventure and misunderstanding rather than malfeasance."

[21] Ms Mitchell submitted that it was obvious from the terms of this letter that trial counsel had appreciated that there were two conflicting accounts. The appellant's position was that he had not carried out the sexual assault which left the complainer injured. The propositions put to the complainer did not reflect the appellant's defence. There was no sense in which his instructions accommodated the suggestion that he had behaved inappropriately whilst his senses were dulled by drink and had only stopped when he appreciated this. The appellant's defence, as conveyed in his instructions, and the complainer's account in evidence, could not have been, and should not have been, sought to be reconciled by defence counsel. Reliance was placed on what had been said by the Lord Justice General (Hope) in delivering the opinion of the court in the case of *Anderson* v *HM Advocate* 1996 JC 29 at page 41:

> "Just as counsel may not tender a plea of guilty unless he has instructions to do so on his client's behalf, so also he may not conduct a defence for a client who pleads not guilty which is contrary to the instructions which he has received as to the basic nature of it. His duty is to act on the instructions which he has been given. How he acts on those instructions is a matter for him, as he is entitled to exercise his own discretion and judgement in the conduct of the defence. What he cannot do is deprive his client of his intended defence by acting contrary to his instructions in this matter."

[21] It was submitted that in the present case the "basic nature" of the appellant's defence was not misadventure and misunderstanding. It was that he had engaged in a short consensual act and did not engage with the complainer in the manner which she described. In particular, the complainer gave unchallenged evidence that she was strangled by the appellant. She was not challenged on this statement which the appellant point blank denied. The appellant's instructions left no room for doubt and no room for strategic decision-making. His position was that he did not conduct himself in the manner described

by the complainer. The consequence was that the account given by the complainer was false and trial counsel was required to cross-examine her on that basis, namely that she was lying.

[22] The written submissions lodged in advance of the appeal reflected the argument set out in the note of appeal concerning the content of trial counsel's jury speech. In oral submissions Ms Mitchell developed this aspect of the appeal a little differently. The first suggestion made was that the contrast between the appellant's own evidence and the extent to which trial counsel had referred to the complainer as a good and credible witness was likely to have led the jury to be confused as to what it was that counsel was saying the appellant's defence actually was. A second complaint was that when counsel was addressing the issue of reasonable belief he gave the impression that he was addressing the entire account as described by the complainer, rather than just the very limited episode of kissing which the appellant claimed was engaged in consensually. The special defence had been narrowly drawn and counsel had not made clear in his speech the differentiation between the aspects of the complainer's account which the appellant accepted and those which he rejected.

[23] Whilst it was accepted that the appellant had given evidence himself, reliance was placed on the decision of the court in the case of *JB* v *HM Advocate* 2009 SCCR 301 in which the appeal was upheld based upon a submission that trial counsel's speech to the jury had undermined the appellant's own evidence to the extent that a miscarriage of justice had occurred. In the present case counsel contended that, in combination, the failure to challenge aspects of the complainer's evidence, the inappropriate suggestions made to the complainer in cross examination and the approach taken in trial counsel's speech resulted in this appellant's own position being undermined and his defence not being presented. As a

consequence he did not receive a fair trial and the verdict returned constituted a miscarriage of justice.

Crown

[24] On behalf of the Crown the advocate depute submitted that the evidential position did not disclose the sort of stark and binary conflict between the evidence of the complainer and the evidence of the appellant which had been identified by Ms Mitchell. An examination of the transcript of the appellant's evidence disclosed a number of passages in which he explained that he did not know why the complainer had given the evidence she had, or suggested that she may have been confused for one reason or another. It was noted that in his evidence the appellant had, on a number of occasions, offered explanations which coincided with the lines of cross examination which had been advanced with the complainer. The strength of the evidence available to the Crown, and the limited and general nature of the appellant's instructions, left a very wide margin of discretion to trial counsel in his representation of the appellant. The criticisms of counsel's conduct were not borne out by scrutiny of the evidence as given by each of the complainer and the appellant.

Discussion

[25] In delivering the opinion of the court in the case of *Burzala* v *HM Advocate* 2008 SLT 61, at paragraph [33], Lord Macfadyen summarised the narrow focus of an appeal based on defective representation in a helpful manner. Shorn of the supporting references, what he said was as follows:

> "Such an appeal, like any other, can only succeed if there has been a miscarriage of justice. That can only be said to have occurred if the conduct of the defence has deprived the appellant of his right to a fair trial. That, in turn, can only be said to have occurred if the appellant's defence was not presented to the court. That may be

> so if the appellant's counsel or solicitor acted contrary to instructions and did not lay before the court the defence which the appellant wished to put forward. It may also be so if the defence was conducted in a way in which no competent counsel or solicitor could reasonably have conducted it and that has been illustrated by reference to counsel having made a decision that was 'so absurd as to fly in the face of reason', or 'contrary to the promptings of reason and good sense'. It is clear, however, that the way in which the defence is conducted is a matter for the professional judgment of counsel or the solicitor representing the accused person. Criticism of strategic or tactical decisions as to how the defence should be presented will not be sufficient to support an appeal on the ground of defective representation if these decisions were reasonably and responsibly made by counsel or the solicitor in accordance with his or her professional judgment."

These principles of law were accepted by both counsel for the appellant and the advocate depute. In the present case, the complaint advanced was that the appellant's defence was not presented to the court because his counsel acted contrary to the appellant's instructions and did not lay before the court the defence which the appellant wished to put forward.

[26] It may be helpful to consider the different aspects of the appellant's complaint in order. The complaint in relation to cross-examination has two parts to it. The first is that the appellant's counsel was required to challenge the complainer in cross-examination to the effect that she was wrong and lying in stating that she had been grabbed, pulled down and had been strangled.

[27] Beyond saying that he did not do these things, the appellant gave no instructions at all as to the nature of the defence which he proposed to advance. The complainer was a complete stranger to the appellant and he had no information about her such as would demonstrate that she was lying, as opposed to, for example, being confused through intoxication or any other reason. At various stages in his own evidence the appellant testified that he did not know why the complainer had given the evidence which she did. He did not know how she had come by her injuries or why she was upset. At one stage in his cross-examination he offered the suggestion that she had perhaps fallen, bumped her

head and jumped to a conclusion. At another stage he denied a proposition put to him by the advocate depute that the complainer's evidence was a lie. It was only when it was put to him by the advocate depute that the complainer's evidence of sustaining her injuries by being pushed to the ground and being attacked by him was nothing but a pack of wicked lies that the appellant assented to that proposition. At paragraph 4 of the appellant's written submissions, which were adopted by Ms Mitchell, it is asserted the "The appellant did not know now why the complainer was saying that the events had occurred."

[28] In these circumstances the court does not accept the submission that the necessary implication of the appellant's general denial was that the complainer's evidence was untruthfully given. There may be circumstances, such as occurred in the cases of *AJE* v *HM Advocate* 2002 JC 215 and *JB* v *HM Advocate*, where supporting evidence is available to demonstrate that witnesses have given untrue evidence for particular reasons. In such circumstances it may be that counsel's presentation of the accused's defence requires to be modelled around that evidence. Other than in such specific situations there is, in the opinion of the court, no basis for an assertion that counsel requires to challenge a witness whose evidence is denied by the accused by the use of any particular language. The language to be used in formulating questions and propositions is pre-eminently a tactical matter for the professional judgement of counsel. In the present case, the court agrees with the view expressed by trial counsel that there was no proper basis for accusing the complainer of lying.

[29] The second complaint concerning cross-examination is to the effect that, at one particular stage, the questions which were asked of the complainer suggested that the appellant's defence was of reasonable belief in consent in relation to the whole episode described by her, rather than just the initial kiss.

[30] An examination of the transcript of the evidence given by the complainer discloses the approach which trial counsel took in cross-examination. He began by asking questions concerning the initial meeting between the complainer and the appellant. He explored her recollection of where this took place and what had been said during the course of their time together. It was apparent that counsel was seeking to demonstrate the limitations of the complainer's recollection and introducing the question of her reliability. He then moved on to examine the nature of certain of her injuries and the circumstances in which the two of them entered the alleyway. Again, he highlighted the limitations of her own recollection and explored other explanations which were consistent with the nature and location of the injuries. He sought, with some success, to demonstrate that the injuries to the complainer's elbows, knee and hand were eloquent of a fall forwards, contrary to her own explanation. He secured the complainer's agreement to the proposition that she was laughing at the stage when the appellant first kissed her. He explored an aspect of the complainer's evidence which suggested she had slipped to the ground rather than that she had been forced. When he sought to address the complainer's evidence of being strangled, whilst he did not put to her directly that this was an incorrect account, he explored with her the photographs which were available and elicited evidence to the effect that there were no marks of bruising around her neck.

[31] Throughout these passages it would have been obvious that the cross examiner was testing and seeking to undermine the reliability of the evidence given by the complainer. Beyond accepting that he kissed the complainer consensually and touched her over her clothing, the appellant's defence was a bare denial. This general level of instruction left the matter of how to advance that defence within counsel's discretion. The lines of cross-

examination which were deployed laid the foundation for a submission in counsel's speech that the complainer's evidence ought not to be accepted.

[32] This is the context in which the passage which followed and which was the subject of complaint requires to be viewed. From the bottom of page 78 of the transcript of the complainer's evidence on to around page 81, trial counsel can be seen to have engaged in a series of questions concerning what brought the episode to an end. Ms Mitchell submitted that in this passage the propositions put were contrary to the appellant's instructions. Rather than suggesting a brief encounter comprising nothing more than a kiss, it was submitted that the jury would have understood trial counsel to be suggesting that the whole episode as described by the complainer did occur but that the appellant had mistakenly thought she was consenting, not appreciating, on account of his intoxication, that she was in fact resisting and frightened until the point when he stopped and left.

[33] It may be that there are certain criticisms which can be made about this passage. For example at page 79 it can be seen that counsel referred to the point where, on the complainer's evidence, the appellant had said "Fuck it" and left. He then put the proposition that:

> "And did that, or could that be because at that point it is abundantly clear to him that you are frightened and you don't want anything to do with this?

At page 80 it can be seen that this was followed up by the proposition that the appellant's "prompt departure" was because the encounter had gone from:

> "what might be described as an amorous advance to being something that clearly is not being viewed that way by you and might not be viewed by other people that way".

[34] On one view, it may be thought that these propositions strayed somewhat from the appellant's account as set out in his precognition. On the other hand, neither the advocate

depute nor the trial judge appeared at the time to consider that the line of cross-examination had extended beyond the limited scope of the special defence intimated, since neither interrupted to challenge counsel to this effect. However, at best for the appellant this was a short passage within a cross-examination which was otherwise conducted within the scope of his general denial. The appellant gave clear evidence on his own behalf of the limited nature of his contact with the complainer and this was reflected in the directions given by the trial judge, which included at page 18 of the transcript of his charge the following:

> "Now, in this case, Colin Grimason is saying that he denies the allegation set out in the charge other than that at the relevant time he kissed (the complainer) inserted his tongue into her mouth and put his hand on the outside of her vagina but he maintains that he did not penetrate her vagina in any way and that she was consenting to all of that …"

[35] In these circumstances it cannot be said that the consequence of the manner in which this short passage of cross-examination was conducted was that the appellant's defence was not placed before the jury. It cannot be said that trial counsel acted contrary to the instructions of the appellant to any material extent and it cannot be said that he did not lay before the court the defence which the appellant wished to put forward. The defence which the appellant wished to put forward was simply that the complainer's evidence should not be accepted in its essential parts. The limited nature of the instructions given by the appellant clearly distinguishes his case from the circumstances which existed in cases such as *AJE* v *HM Advocate*, *JB* v *HM Advocate* and *Winter* v *HM Advocate* 2002 SCCR 720, in each of which particular information was provided to undermine, contradict or explain the evidence relied upon by the Crown.

[36] The final complaint concerns the approach taken by trial counsel in his speech to the jury. In the note of appeal, and in the written submissions, this complaint was to the effect that the decision taken to present the complainer as a credible but not reliable witness was

not in accordance with the appellant's defence and undermined his own evidence. This complaint was based upon the submission which underpinned the first complaint advanced, namely that there was a binary choice to be made between the account as given by the appellant and the account given by the complainer which involved one or other of them telling lies. For the reasons given earlier the court does not accept that this submission was well founded.

[37] The submission in oral argument that trial counsel may have confused the jury as to what the appellant's defence was, was added to by attention being focussed on the passages in the speech in which trial counsel mentioned reasonable belief in consent. It was contended that there was no proper differentiation between the conduct of kissing and touching, to which the appellant's defence of consent applied, and the rest of the conduct described by the complainer which the appellant denied carrying out.

[38] In the opinion of the court there is no valid comparison between the tactical decision which informed counsel's approach as to how to structure his closing speech in the present case and the circumstances which arose in the case of *JB* v *HM Advocate*. In that case a particular line of cross-examination had been deployed in the questioning of the complainers based upon material provided by the accused, who then gave evidence to the same effect. In his jury speech counsel abandoned that line altogether and suggested an entirely different line of defence, which was unsupported by any of the evidence led.

[39] In the present case, trial counsel was faced with an overwhelming body of Crown evidence. The appellant was close to being caught in the act of committing the crime. The complainer was plainly an impressive and intelligent witness who gave her evidence in a measured and careful fashion. In response to all of this the appellant offered a denial but no substantive defence. The options available to trial counsel in what he sensibly and

responsibly could say to the jury were limited, to say the least. Counsel's approach was to acknowledge that the advocate depute had been correct to describe the complainer as an impressive and good witness but to argue that this meant as much weight had to be given to the passages of her testimony which he sought to rely upon as to those relied upon by the Crown. Without seeking to criticise the complainer, counsel then sought to remind the jury of the passages of her testimony in which she had admitted that her recollection was poor and passages in which her testimony appeared to be inconsistent with, or contradicted by, other evidence. In this exercise he invited the jury to reject the evidence of the complainer based upon the foundations which he had laid in her cross-examination.

[40] In the opinion of the court nothing which was said during the course of trial counsel's speech was materially inconsistent with the general nature of the defence instructed. Since it was not the appellant's defence that the complainer was lying, trial counsel cannot be criticised for declining to attack her credibility. Having heard the appellant's own evidence the jury can have been in no doubt that he flatly denied sexually assaulting the complainer. Nothing which was said by trial counsel undermined that position or introduced a material risk of confusing the jury about it.

[41] In the whole circumstances the court was not persuaded that any of the complaints advanced as to the manner in which the appellant's trial was conducted, whether taken individually or in combination, had any merit. The appellant's defence, such as it was, was put before the jury in accordance with his instructions and in light of the margin of discretionary judgement available to his counsel. The appellant was not denied a fair trial and there has been no miscarriage of justice. The appeal must therefore be refused.