APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 2
HCA/2017/000526/XC

Lady Paton
Lord Menzies
Lady Clark of Calton

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL

by

HER MAJESTY'S ADVOCATE

Appellant

against

AD

Respondent

Appellant: Cameron (sol adv) AD; Crown Agent
Respondent: Fyffe (sol adv); Bruce & Co, Arbroath

9 January 2018

Proposed amendment of docket to include time-barred offences

[1] The question in this appeal is whether allegations concerning certain sexual offences, said to have been committed by the respondent during 1973 to 1974 against a complainer PC, may competently be included in a docket in an indictment libelling other alleged sexual offences during 1973 to 1996 against complainers AVD, JAD, AD, and LH, when a judge has

ruled that the expired 12-month time-bar relating to the alleged offences involving PC should not be retrospectively extended in terms of section 65 of the Criminal Procedure (Scotland) Act 1995.

[2] It is necessary to set out a summary of events. The first 10 entries below are not in precise chronological order, as they reflect the terms of an indictment ultimately served upon the respondent on 17 November 2016. Subsequent entries are in chronological order.

Charges in the indictment

> *13 April 1973 to 12 April 1984*: The respondent's alleged lewd and libidinous behaviour towards his step-daughter PC, born on 13 April 1969 (Charge 1 in the indictment).
>
> *13 April 1981 to 13 April 1984*: Further alleged lewd and libidinous behaviour towards PC (Charge 2).
>
> *January 1980*: The alleged rape of PC (Charge 3).
>
> *20 August 1975 to 19 August 1977*: The respondent's alleged lewd and libidinous behaviour towards his step-son AVD, born on 20 August 1970 (Charge 4).
>
> *13 April 1973 to 19 August 1977*: Alleged wilful ill-treatment of AVD (Charge 5).
>
> *August 1977*: The alleged sodomy of AVD (Charge 6).
>
> *4 April 1976 to 3 April 1977*: One occasion of alleged lewd and libidinous behaviour by the respondent towards his step-son JAD, born on 4 April 1967 (Charge 7).
>
> *1 July 1980 to 30 June 1983*: Alleged lewd and libidinous behaviour towards AD, a male born on 1 July 1967 (Charge 8).
>
> *May 1996*: An alleged indecent assault on LH, an adult female (Charge 9).
>
> *13 April 1973 to 12 April 1981*: Alleged lewd and libidinous behaviour towards PC in London (ie outwith the jurisdiction, but included in a docket to the indictment).

Other events in chronological order

May 1996: PC provided a statement to the police relating to alleged sexual abuse by the respondent. At that time, the police had no corroborative evidence.

November 1996: The respondent was interviewed. He made certain equivocal admissions which were insufficient for corroboration.

January 1997: PC's mother gave a statement which provided corroboration for some of PC's complaints.

April 1997: The respondent was again interviewed.

16 July 1997: The respondent was put on petition on charges relating to behaviour towards PC as set out in Charges 1, 2, and 3 in the indictment which was eventually served on the respondent on 17 November 2016 (see below). No record of the petition now exists.

16 July 1998: The 12-month period relating to the petition expired. It is not known why the Crown permitted the 12-month period to expire, although the advocate depute appearing before a judge in a later motion for the extension of the 12-month period (see below, 20 January 2017) submitted that:

> " … it was reasonable to proceed on the basis that a decision was taken not to indict the accused within the 12-month period because of the paucity of evidence then available (page 4 of Lord Burns' Note dated 2 February 2017)".

November 1998: PC's brother JAD approached the police and gave a statement about alleged abuse at the hands of the respondent, explaining that he did so in order to assist his sister's case. It is not clear why the Crown did not at that stage seek a retrospective extension of the 12-month period (pages 4-5 of Lord Burns' Note).

7 March 2000: JAD died.

2 March 2009: The respondent attended at a police office and confessed to sexually abusing PC. An occurrence report was completed. Although the respondent had made admissions, he had done so without legal advice. The procurator fiscal appeared not to have JAD's statement (page 7 of Lord Burns' Note). No further action was taken at that stage.

November 2015: AVD provided the police with a statement about alleged sexual abuse at the hands of the respondent. The respondent denied any such abuse. The police made a report to the procurator fiscal.

19 January 2016: The respondent appeared on petition in relation to alleged offences against PC, AVD and JAD.

17 November 2016: An indictment was served upon the respondent. The indictment contained the nine charges set out at the beginning of this summary of events, including Charges 1, 2 and 3 specifying sexual offences against PC. There was also a docket relating to alleged lewd and libidinous behaviour towards PC in London.

12 December 2016: The Crown lodged a minute in terms of section 65 of the 1995 Act, seeking a retrospective extension of the 12-month period in respect of the first three charges concerning PC, as that period had expired on 16 July 1998 as noted above. The remaining charges were not affected by the expiry of the 12-month period.

20 January 2017: A hearing on the section 65 minute took place before Lord Burns.

2 February 2017: Lord Burns refused to grant the retrospective extension. The relevant passage from his decision can be found in paragraph [5] below. There was no appeal.

July 2017: The Crown intimated their intention to call PC to give evidence relating to Charges 1, 2 and 3 for evidential purposes only, to invite the jury to accept her evidence along with that of AVD, the late JAD (whose evidence was to be led in terms of section 259 of the 1995 Act), and AD, and to conclude that the behaviour libelled in Charges 1, 2 and 3 formed part of a single course of criminal conduct systematically being pursued by the respondent (the *Moorov* doctrine).

July 2017: The defence lodged a minute taking a preliminary objection to the admissibility of evidence to be led in respect of Charges 1, 2 and 3. Submissions were made before Lady Scott.

24 July 2017: Lady Scott issued a Note ruling that the indictment could not proceed in a form which contained the time-barred Charges 1, 2 and 3, as to do so would be incompetent. However the possible use of the docket procedure in terms of section 288 was raised.

26 July 2017: The Crown moved the court to allow the indictment to be amended by deleting Charges 1, 2 and 3 and amending the docket to the indictment by inserting the deleted charges in paragraphs 2, 3 and 4 of the docket. The motion was opposed, and was continued to 25 August 2017.

25 August 2017: The continued motion to amend was heard by Lord Glennie. A defence minute (number (4) dated 30 July 2017) was before the court. The minute contained paragraph 2(a) objecting to the amendment; paragraph 2(b) objecting to the leading of evidence in relation to Charges 1 to 3 (or paragraphs 2 to 4 of the docket); and paragraph (3), a plea in bar of trial in relation to those charges/paragraphs, on the ground of oppression. Lord Glennie refused the Crown's motion, and provided written reasons in a Note dated 25 August 2017 (see paragraph [7] below). The Crown appealed. Lord Glennie provided a Further Note date-stamped 20 October 2017.

1 November 2017: The Crown's appeal was heard before this court. The matter was taken to *avizandum.*

Section 65 of the Criminal Procedure (Scotland) Act 1995

[3] Section 65 of the Criminal Procedure (Scotland) Act 1995 provides *inter alia:*

"**Prevention of delay in trials**

(1) Subject to subsections (2) and (3) below, an accused shall not be tried on indictment for any offence unless

(a) where an indictment has been served on the accused in respect of the High Court, a preliminary hearing is commenced within the period of 11 months; and

(aa) where an indictment has been served on the accused in respect of the sheriff court, a first diet is commenced within the period of 11 months;

(b) in any case, the trial is commenced within the period of 12 months,

of the first appearance of the accused on petition in respect of the offence.

(1A) If the preliminary hearing (where subsection (1)(a) above applies), the first diet (where subsection (1)(aa) above applies) or the trial is not so commenced, the accused

(a) shall be discharged forthwith from any indictment as respects the offence; and

(b) shall not at any time be proceeded against on indictment as respects the offence."

Section 288BA of the 1995 Act

[4] Section 288BA of the 1995 Act provides:

"**Dockets for charges of sexual offences**

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it-

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to-

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that-

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to-

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element."

Lord Burns' refusal of a retrospective extension of the 12-month period

[5] In his Note dated 2 February 2017, Lord Burns set out the history and the submissions, and at page 6 continued:

> " … I am unable to conclude that the Crown discharged the burden upon it to satisfy me that there was a reason for requiring this retrospective extension to the 12 month period which …might justify the extension sought. I accept that the Crown justifiably took no further action to serve an indictment within the 12 month period. However, in December 1998 the procurator fiscal was sent the statement of JD [ie JAD]. The advocate depute accepted that that statement would have been capable mutually to corroborate a number of the allegations made by the complainer and it would have therefore been open to the Crown to consider prosecution on both sets of allegations on application for an extension of the 12 month period in respect of the allegations of PC at that time. While the advocate depute attempted to ascribe the failure to take action as an error, he was unable to identify the nature of that error.

He could give me a range of possibilities from total ignorance of the existence of section 65(3) on the part of the procurator fiscal to considering it "inappropriate" to make such an application. Since the nature of the error is not identified I am unable to conclude that the error is excusable. Furthermore there is another explanation. It may be that the procurator fiscal at the time considered that the evidence advanced by JD was not of sufficient quality to justify an application being made. Again I have no means of knowing whether that was the case and, if it was, [on] what basis that conclusion might have been reached. This case therefore falls short of the situation in cases such as *Lauchlan and O'Neil* v *HMA* a decision of the appeal court of 5 June 2009 where the court was able to conclude that a decision not to proceed was taken after "careful and reasoned analysis" (see paragraph 24) and *DMcL* and *CG* quoted above.

In any event, even if the Crown could have identified the reason for no steps having been taken after December 1998 to obtain an extension, as Mr Fyffe pointed out, there remains the further circumstance that in 2009 another opportunity arose to revive these charges which was not taken. It is unclear why, after receipt of the occurrence report of 1 May 2009, no further action was taken. More admissions were made at that stage by the accused in relation to the allegations by the complainer. The Crown was informed in that report that the accused had previously been interviewed in 1996. There was however no reference to or consideration of the statement of JD which would have been available mutually to corroborate the allegations of PC. No explanation is advanced as to why that information was not taken into account at that time. It seems to me that that can be ascribed to fault on the part of the Crown in failing to have a system which would identify previous information which could be used to corroborate charges being considered. The Crown is unable to explain why that error was made and cannot show that it is capable of being excused (*Early* paragraph 22).

In these circumstances I am not satisfied that the Crown has advanced circumstances which might justify the grant of an extension and I consider that the Crown fail at the first stage.

Even if I had concluded otherwise, I would not have exercised my discretion in favour of the Crown. This is a retrospective application to prosecute charges which are up to 43 years of age. The extension sought is exceptionally long at over 18 years. While they are very serious, and, as the advocate depute pointed out, the complainer remains willing and anxious to give evidence upon them, having regard to the whole history of this matter and the way in which it has been dealt with by the Crown over the intervening period, I do not consider that it would be in the interests of justice to grant such an extraordinary extension to the 12 month period. Four decades have passed since some of these events are said to have taken place which will cause difficulties in the preparation of any defence to them. Furthermore, the charges will rely for corroboration upon, among other matters, the evidence of the statement of JD which would have to be introduced by section 259 of the 1995 Act. That raises a question of the fairness of prosecuting charges 1 to 3 now when those charges and the charges relating to JD could have been prosecuted prior to the death of JD in

March of [2000]. In my judgment, no sufficient justification can be advanced for so long an extension to the statutory 12 month period. In the circumstances the application is refused.

Lady Scott's decision that the indictment, as framed, was incompetent

[6] In her Note issued on 24 July 2017, Lady Scott stated:

"**Decision**

I do not accept the issue here is simply about the admissibility of evidence. There is a clear issue of procedure here. The proper starting point is that the accused remains indicted on charges which have been ruled as incompetent. The indictment containing charges where an objection to those charges has been taken and sustained cannot be proceeded with, irrespective as to whether or not a conviction on them is sought.

The Advocate Depute [is] seeking to treat the charges as now, in effect, some kind of 'evidential' charges.

This fails to address the effect of the ruling [that] they are time barred. The position here in my view is quite different to the situation where evidence has been led and charges withdrawn or so called 'evidential charges' have been libelled and intimated as such at the outset. This indictment in its present form containing the incompetent charges cannot proceed. I do not consider these charges can simply be re-interpreted as suits.

I am fortified in this view by the introduction of statutory dockets which were introduced to address the leading of evidence on *inter alia* an incompetent charge. They provide an appropriate mechanism here. They also provide qualifying requirements or limitations to safeguard the admission of such evidence.

S288BA of the 1995 Act provides at ss(4)

> 'It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.'

Accordingly I sustain the objection that it is not competent to proceed on this indictment containing the incompetent charges 1, 2 and 3."

Lord Glennie's Notes dated 25 August 2017 and date-stamped 20 October 2017

[7] In his Note dated 25 August 2017, Lord Glennie reasoned as follows:

"[13] For the accused, Mr Fyffe, who spoke first, submitted that the real question before the court was not one of the admissibility of the evidence but of the competency of amending the docket in the particular circumstances of this case. He emphasised that it was a question of competency. He accepted that in general it was competent to amend a docket. However, the docket was included within and was therefore part of the indictment: see section 288BA(1) ("an indictment … may include a docket …"). That being so, the terms of section 65(1A) of the 1995 Act were clear: the accused "shall be discharged forthwith from any indictment as respects the offence" and "shall not at any time be proceeded against on indictment as respects the offence". Simply moving the offences from one part of the indictment to another part (the docket) did not assist the Crown; the accused was still being proceeded against on the indictment as respects these offences even though the Crown could not seek a conviction against him for those offences. The terms of section 288BA(4), which provided that it did not matter that the offence referred to in the docket could not competently be dealt with by the court, did not assist the Crown; that was focusing on a different question, such as where the docketed offence took place outwith the jurisdiction, and in any event that provision could not override the statutory prohibition in section 65 against proceeding against the accused on indictment as respects the offence. So far as concerned the Crown's application to amend the docket (which logically came prior to his minute in respect of the amendment) that involved the exercise by the court of its discretion. Lord Burns had already ruled (in his Note, on the question of whether to extend time) that allowing the extension of time, and therefore allowing these offences to be proceeded with, would be unfair to the accused in terms of his ability to prepare a defence in respect of matters which are alleged to have occurred so long ago. That same reasoning applied whether these matters were libelled in charges 1 to 3 or were simply included within the docket; the difficulties faced by the defence would be the same in either case and, because the evidence on these charges would be used to corroborate that on other charges, the potential prejudice just as great. Those same factors applied also to the motion in bar of trial.

[14] For the Crown, the advocate depute submitted that the question was really one of admissibility. He submitted that even without the amendment to the docket he was entitled to lead evidence of the matters formerly included in charges 1 to 3. There was no lack of fair notice – fair notice had been given (both in the original version of the indictment and in the proposed amendment to the docket) of the matters in respect of which evidence was to be tendered. Nor was there any difficulty as regards relevance, since those matters, if proved, would be directly relevant (by way of the doctrine of mutual corroboration) to the other charges libelled. The purpose of section 65 of the 1995 Act was to prevent delay in trials. It was not concerned with the admissibility of evidence. The effect of that section was that, if the time limits were not met, the Crown could not seek a conviction on any charge on the indictment which had become time barred, but it had nothing to say about the leading of evidence (even on the same matters) insofar as that evidence

was relevant to any charges that remained "live". As a matter of discretion, it would be wrong to refuse to allow the docket to be amended. So far as concerned the case on oppression, the question was whether it could be said at this stage that the course of action proposed by the Crown would irretrievably prejudice the trial of the accused in a way which it was beyond the power of the trial judge to cure by an appropriate direction to the jury. That was a high test which had not been met.

Decision and Reasons

[15] After conclusion of oral argument, I adjourned briefly to consider my decision. On returning to court I indicated that I would give my decision in summary form but that, if requested for the purposes of an appeal, I would set out my reasoning in greater detail.

[16] My decision was as follows.

(1) I refused leave to amend the docket to include the matters previously contained in charges 1 to 3 of the indictment.

(2) I upheld (in so far as necessary and for the avoidance of doubt) the paragraph 2(a) of the Minute objecting to the amendment.

(3) I upheld paragraph 2(b) of the Minute and ruled that the Crown was not entitled to lead evidence relating to the matters formerly in charges 1 to 3 of the indictment (which the Crown had attempted to amend into the docket).

(4) In light of these rulings, I did not require to rule on the plea in bar of trial.

I was requested to give my full reasoning in writing. These were and are my reasons.

The Proposed Amendment to the Docket

[17] I considered that Mr Fyffe was correct in his argument as to the effect of section 65(1A) of the 1995 Act. The effect of the particular charges being time barred was that the accused was discharged from the indictment "as respects the offence" and could not be proceeded against on the indictment "as respects the offence". The term "as respects" the offence was very wide. The section did not say simply that he could not be proceeded against "for" the offence. Further, the indictment included the docket. Seeking to prove the matters in the docket was, therefore, proceeding against the accused "on the indictment" as respects the offences contained within the docket, and as such was prohibited by the terms of the section.

[18] For that reason I refused the Crown's motion to amend the docket. And, for the avoidance of doubt, I also upheld the objection to amendment raised in paragraph 2(a) of the defence Minute.

[19] I would just add this observation. If the argument for the Crown was correct, there would appear to be no reason why, after Lord Burns refused to extend time, the allegations in charges 1 to 3 could not have remained as charges 1 to 3, on an undertaking by the Crown not to seek a conviction on these charges. There would have been no need to "move" these allegations to the docket. But Lady Scott appears to have thought that this course was incompetent. I agree with that view. It would be incompetent to do this because it would mean that, contrary to the prohibition in section 65, the Crown would be proceeding against the accused on the indictment as respects these offences (amongst others). But it is difficult to see what difference there is in principle between that position and what is now sought to be achieved by moving these offences to the docket. Being included in the docket, they remain on the indictment, and the same argument applies: contrary to the prohibition in section 65, the Crown would be proceeding against the accused on the indictment as respects these offences (amongst others).

[20] I should mention that, in support of his argument that it was not competent to include within a docket matters which were time-barred in terms of section 65 of the 1995 Act, Mr Fyffe referred me to *D McL* v *HMA* [2015] SCCR 391. He submitted that the grant of the extension of time in that case proceeded on the assumption that, unless time was extended, the evidence in respect of those time-barred offences could not be led at all, whereas it could have been had the docket route been available. I was not attracted to this argument. It seemed to me to read too much into the absence of any reference in the opinion of the court to the docket procedure. It did not appear to me that the court in that case had considered the point. Mr Fyffe also referred to remarks made by Lord Mackay of Drumadoon at paragraph [44] of his opinion in *HMA* v *McPhee* 2007 SCCR 91, from which he sought to draw the inference that if an offence was time-barred under section 65, it was not open to the Crown, in proceedings on indictment, to lead evidence in relation to that offence for the purpose of obtaining corroborating evidence for other charges. I am not persuaded that Lord Mackay of Drumadoon had this point in mind, nor did he have in mind the docket procedure, the legislative provisions for which had not by that time been brought into force.

[21] Quite apart from the question of competency, I would in any event as a matter of discretion have refused the Crown's application for leave to make the amendment by introducing these matters into the docket. It seemed to me that all of the matters relied upon by Lord Burns (set out at paragraph [9] above) for refusing to extend time (at the second stage, had he got that far) applied in equal measure here. I adopt that reasoning *mutatis mutandis*. The potential prejudice to any person having to defend accusations in respect of matters alleged to have happened over 40 years ago cannot be overestimated.

[22] There is, perhaps, a difference between the situation which faced Lord Burns and that with which I am concerned. That is that if Lord Burns had granted an extension of time it would have exposed the accused to the possibility that he would have been convicted of these three offences along with the other offences on the indictment, and in due course sentenced for all those offences. By contrast, no conviction is now sought in respect of those matters, since they are proposed to be put in the docket for evidential reasons only and to provide a basis for evidence to be led corroborating other charges. In my opinion, however, that is a distinction without any real difference. The inclusion of these matters in the docket is sought by the Crown because it considers that it needs, or may need, to rely upon this evidence to corroborate evidence in support of other charges. There is, presumably, the possibility that without evidence in relation to the matters proposed to be put in the docket those other charges will fail for want of corroboration. On that analysis the inevitable difficulties faced by the accused in having to defend himself on these matters may be critical to the question of whether he is convicted of other charges and whether he loses his liberty as a result.

[23] It may be argued that the potential difficulties likely to be faced by the accused in answering the allegations which are proposed to be inserted in the docket are not different from the difficulties that he may face in defending himself against the remaining charges in the indictment. Charges 4 to 8 are concerned with events which are alleged to have happened at about the same time – hence, of course, their relevance from the point of view of corroboration. That may be true, but it does not, in my view, provide an answer. Let it be assumed that the accused will face similar difficulties in defending himself on charges 4 to 8. So what? Why should that mean that he should also face an additional three charges and be subjected to the same difficulties in defending himself against these, with potentially serious consequences should he fail?

[24] It was not suggested by the advocate depute that the Crown would be unable to proceed on the other charges if the amendment were to be refused. This was not, therefore, a case like *D McL* v *HMA* [2015] SCCR 391 where the court was influenced, in granting an extension of time in relation to certain charges, by the fact that, unless those charges could be proceeded with, other charges (in another petition) could not proceed because of the lack of corroboration.

The Leading of Evidence Relating to These Matters

[25] I also upheld the objection raised in paragraph 2(b) to the Crown leading evidence on those matters. The point, of course, only arose for decision if, as I did, I refused the Crown motion to amend the docket so as to include what had previously been charges 1 to 3 on the indictment. I approached the question on the basis that the charges had been deleted as charges 1 to 3 but had not been amended into the docket.

[26] It was accepted by the advocate depute that the general rule, expressed somewhat loosely, is that evidence may not be led to prove the commission of any offence other than those libelled (or docketed) in the indictment. As I understood it, however, he submitted that this was all part of the rule about the requirement for relevancy and fair notice. He referred me to *Nelson* v *HMA* 1994 SCCR 192 at 203 C-D where it was stated that:

> 'The Crown can lead any evidence relevant to the proof of a crime charged, even though it may show or tend to show the commission of another crime not charged, unless fair notice requires that that a crime should be charged or otherwise referred to expressly in the complaint or indictment.'

He also referred me to *McIntosh* v *HMA* 1986 JC 169 at 172. Although I accept that the test is ultimately one of relevancy and fair notice (see *Nelson* at page 199D), I did not consider that these authorities assisted his argument. In the circumstances of this case fair notice did require that these matters, namely the matters which had originally been in charges 1 to 3, should be charged or otherwise referred to expressly in the indictment before evidence could be led in relation to them. By contrast with *McIntosh*, where the matters narrated in the deleted charge formed part of the sequence of events leading up to the commission of the offences libelled in the remaining charges, and were directly relevant to prove the *mens rea* relative to the later actions, the matters contained within deleted charges 1 to 3 here were not incidental matters of criminality forming part of the narrative or chain of events leading up to the offences libelled in the charges remaining on the indictment: rather, they related to separate matters altogether, even though the Crown sought to contend that they all formed part of a single course of criminal conduct so as to support its case on mutual corroboration. Nor was it right to regard their earlier introduction and deletion as being sufficient to give notice that evidence would nonetheless be led to prove them. On the contrary, the purpose of section 65 was to prevent such matters being proceeded with on indictment after they had become time-barred. Further, the whole thrust of Lord Burns' decision was that it was much too late to allow these charges to be insisted upon, not least because of the prejudice to the accused of having to defend them. In those circumstances, so it seemed to me, the fact that these matters were originally on the indictment as charges 1 to 3, and the fact that the Crown had applied to amend to put them in the docket, was not sufficient to amount to fair notice. I considered that evidence in support of these matters was not admissible unless the allegations were included in the docket. Since I had refused leave to amend the docket to include these matters, the evidence was not admissible.

Oppression

[27] Since I had refused to allow the amendment and had ruled that the evidence relating to the matters previously libelled in charges 1 to 3 could not be [led], I saw no need to deal with the third part of the accused's minute relating to oppression."

[8] In his Further Note date-stamped 20 October 2017, Lord Glennie added:

"[1] I have now had sight of the Note of Appeal lodged on behalf of the Crown in this case. I have been asked whether, in light of what is contained therein, I wish to add anything to my Note of 25 August 2017.

[2] I only wish to say this. In paragraph 6(i) of the Note of Appeal it is suggested that I held that the provisions of section 65(1A) of the Criminal Procedure (Scotland) Act 1995 encompassed the admissibility of evidence. This mis-states my decision. My decision was that section 65(1A) prevented the inclusion of these matters in the docket, since the docket was part of the indictment, even though, being in the docket, they were not matters on which the Crown sought a conviction. My decision about the inadmissibility of evidence flowed from my decision that the docket could not be amended to include these matters. The Crown summary of my decision puts it the other way round.

[3] I am not sure that this adds anything of substance, but I thought I ought to clarify the position.

[4] There is nothing further that I wish to add."

The Crown's submissions in the appeal court

Amendment of the indictment

[9] The advocate depute accepted that the respondent could not be charged on indictment with the alleged offences contained in former charges 1, 2 and 3. To that extent, he could not be "proceeded against". But Lord Glennie had erred in reaching the decision he did. The Crown was entitled to lead and to rely upon the evidence which was proposed to be in the docket unless that evidence had been unfairly obtained. Unfairness or oppression or conduct in breach of Article 6 of the ECHR would disentitle the Crown from relying upon such evidence: but if the ground of objection was another reason (for example,

section 65 and time-bar, or lack of jurisdiction) then the Crown was entitled to lead and rely upon the evidence.

[10] The purpose of section 65 was to prevent delay in trials, to prevent an allegation from hanging over an accused for a considerable time. The respondent had had the benefit of section 65 in that he could not be prosecuted or sentenced for those alleged offences. Nevertheless the Crown was entitled to use that evidence: cf *Potts* v *Gibson* 2017 JC 194. Even if an accused had been acquitted of offences, evidence relating to those offences might be used in a docket. The advocate depute advised that he was aware of one case where the indictment libelled sexual offences committed against complainers A, B and C. Pleas of "Not guilty" in respect of those charges had to be accepted by the Crown on the information then available. However new complainers D, E and F came forward. Also B volunteered new information about more serious charges. The accused then appeared on indictment using the earlier evidence (to which "Not guilty" pleas had been accepted) incorporated in a docket to the indictment. The accused was at risk of a custodial sentence only in respect of the new charges, and in that way the accused had the benefit of section 65. Similarly in the present case, the respondent could not be convicted of any alleged offences concerning PC, nor did he have to face sentence on those matters. The respondent was not being "proceeded against" in respect of charges 1, 2 and 3: he could not be convicted of those charges.

[11] Section 65 was a procedural safeguard. The respondent had had the full benefit of section 65: he could not be prosecuted or convicted of the alleged offences in charges 1, 2 or 3. The key words were "proceeded against". Those words meant "charged on indictment and at risk of conviction". It did not follow from the "discharge" of the respondent from certain alleged offences libelled in an indictment that the events referred to were not

relevant and admissible in relation to other charges. By contrast with certain statutory offences containing time-limits (which could only be prosecuted within the time-limit) section 65 was simply concerned with the period of 12 months from the petition. The other charges involving AVD, JAD, and AD were of a similar vintage, the only difference from the charges involving PC being that the respondent had not been put on petition in relation to those charges. Once on petition on a particular charge, section 65 required that the trial on that charge took place within the 12 month period (thus avoiding the accused having the allegations in the petition hanging over him).

The admissibility of PC's evidence

[12] The advocate depute submitted that, for PC's evidence to be admissible, it had to be relevant to the proof of the charges libelled in the indictment; also fair notice had to be given to the accused of the Crown's intention to lead that evidence (*Nelson* v *HM Advocate* 1994 JC 94 at page 104C-D).

[13] In the present case, fair notice would be given either by the original charges 1, 2 and 3, or by the amended docket. The Crown's intention was to lead evidence from PC even if the docket was not amended (*McIntosh* v *HM Advocate* 1986 JC 169 at pages 172-173, a pre-docket case), on the view that Lord Glennie was not correct in his construction of section 65 and the meaning of "proceeded against on indictment as respects the offence".

[14] As for the question whether PC's evidence would be relevant, it was submitted that it was permissible to use evidence led on the basis of a docket (rather than a charge) to be used for mutual corroboration of the charges in the indictment (*Lauchlan and O'Neill* v *HM Advocate (No 2)* 2015 JC 75 paragraph [6]). Evidence which could not result in a conviction could be used to provide corroboration (*Lauchlan cit sup* paragraphs [27] to [29],

and [31]; *Cannell* v *HM Advocate* 2009 SCCR 207). In the present context, there was no appreciable difference between the effect of section 65 and offences outwith the jurisdiction: certain offences could not form the basis of charges in the indictment, but could nevertheless, if evidence was accepted as credible and reliable, constitute relevant evidence insofar as providing mutual corroboration and thereby assisting in the proof of another charge.

[15] The defence might rely upon *DMcL* v *HM Advocate* 2016 JC 25, paragraph [21]. However in *DMcL*, the court was not addressing the question which had arisen in the present case, and too much should not be taken from *DMcL*.

Oppression

[16] The argument concerning oppression would arise if the court held that the evidence was otherwise admissible and could be led by the Crown. It was submitted that it would not be oppressive within the definition set out in *McFadyen* v *Annan* 1992 JC 53, at page 60, to allow the evidence to be led. The jury would be invited to accept the evidence of PC, and to find her credible and reliable. But if the matters she spoke of were relevant, and if the respondent was given fair notice concerning those matters, it was not oppressive to include the alleged offences concerning PC in the docket, or to lead her evidence at the respondent's trial. While it might be argued that the respondent would not have a chance to go to a jury and clear his name in relation to those alleged offences by obtaining a "Not guilty" verdict in respect of charges 1, 2 and 3, it was the Crown's contention that the respondent was placed in a better position by the docket procedure, as he could not be "proceeded against" in respect of those offences. Each case would depend on its circumstances. If, in a trial, a complainer A gave credible evidence of sexual abuse perpetrated by the accused, but the

only other complainer B refused to speak resulting in a lack of corroboration and the abandonment of the case, it was not necessarily unfair in a later trial involving the same accused and other complainers (who had later come forward) to allow the Crown to rely upon A's evidence by the docket procedure. Lord Glennie had not in fact come to any view in respect of the second argument concerning oppression. It was not being suggested that it would be oppressive to lead evidence on the other charges (involving AVD, JAD, and AD), and those offences were of a similar type and age (cf the appeal court ruling in *HM Advocate* v *ARK* 2013 SCCR 549 at paragraphs [20] and [24], where the defence had contended that as a result of the passage of time, there was a lack of exculpatory witnesses and materials).

Conclusion

[17] The court should allow the appeal; reverse Lord Glennie's decision; allow the docket to be amended as sought; and remit the case for trial on the amended indictment. It was acknowledged that the point raised in this case, combining the time-bar in section 65 and the docket procedure in section 288BA, had not been the subject of a previous decision by a court.

The respondent's submissions in the appeal court

[18] Mr Fyffe invited the court to refuse the appeal. He adopted the reasoning of Lord Glennie, as set out in his Note dated 25 August 2017, and his Further Note date-stamped 20 October 2017.

Competency and section 65

[19] There was no authority precisely in point. The case of *DMcL* was of assistance,

although not entirely on all fours. It was not in the interests of justice to adopt the course advocated by the Crown. Section 65 was much wider than the Crown suggested. The key words in section 65 were: the accused "shall not be tried on indictment for [the] offence … the accused shall be discharged forthwith from any indictment as respects the offence, and … shall not at any time be proceeded against on indictment as respects the offence". Section 65 did not say that the accused may "avoid conviction", or that the Crown was prohibited from "seeking conviction". If Parliament had intended to allow everything up to the point where the Crown sought conviction, the section would have been differently phrased.

[20] The Crown sought to relocate charges from one part of the indictment to another part. The docket was part of the indictment (section 288BA(1)). If the accused was "discharged … from [the] indictment", that ran counter to the concept of moving offences from one part to another part of the indictment. If all that Parliament meant was that the accused "could not be charged", it would have said so.

[21] The docket would be read out to the jury. Evidence would be led on the basis of the docket. The jury would be invited to believe PC and to accept her evidence as credible and reliable (ie to find that what she said was "true", which was of the essence of a trial). The jury would be invited to use PC's evidence as corroboration of other witnesses' evidence. Even although there would be no verdict of "guilty" or "not guilty" in relation to PC's complaint, and even if no sentence was imposed on that matter, such an approach was in effect a trial or proceedings on indictment against the respondent on charges of which he had been discharged. The only difference from the previous indictment was that the Crown would not be asking for a conviction in relation to the offences in the docket. The judge would direct the jury to come to a view on the credibility and reliability of PC and, if

accepting her evidence, to use it for the purposes of the *Moorov* doctrine in relation to the charges concerning other complainers. It was too limited an approach to restrict the words "tried on indictment" and "proceeded against on indictment" in the way suggested by the Crown. A trial was not restricted to evidence, speeches, charge, the jury delivering a verdict, and a sentence being imposed. A witness might not speak up, the Crown might withdraw a charge or charges and not achieve a conviction, but what had taken place was still a "trial".

[22] In conclusion, section 65 was not a narrow section, as the Crown suggested. The section should be given its ordinary meaning. The whole process upon which the Crown was seeking to embark was covered by section 65. There would be a trial on the indictment, and the docket was part of the indictment. The court should conclude that the Crown's proposed course of action was contrary to section 65.

Fairness/oppression

[23] Lord Glennie had taken into account all relevant factors, including the procedural history and Lord Burns' refusal of a retrospective extension of time as not being in the interests of justice (paragraph [9] of his Opinion). Lord Glennie had exercised his discretion by refusing to allow amendment and in deciding that PC's evidence was inadmissible. That was an entirely appropriate exercise of discretion at first instance, with which the appeal court should be slow to interfere. Even if the view was that Lord Glennie had not been exercising his discretion and was deciding a matter of law, it was always open to the first instance court to conclude that it would be unfair to allow the evidence: that was what Lord Glennie had done. To lead evidence of allegations – held not to be in the interests of

justice to be allowed to proceed – was unfair. The accused would have to face the allegations, but by a different means. Lord Burns' decision had not been appealed.

[24] Thus even if the defence were wrong in the approach taken to section 65, Lord Glennie was not wrong in his approach to fairness. The offences were ones in relation to which Lord Burns had ruled that it was not in the interests of justice to extend the time-bar. Nothing made it "in the interests of justice" to proceed as the Crown now proposed.

Discussion

Competency

[25] The docket procedure was introduced by section 63 of the Criminal Justice and Licensing (Scotland) Act 2010. We were advised that the procedure has been used in a variety of situations. Examples given by the advocate depute included:

- Cases where it was known that the complainer would give evidence of a rape, but there was no corroborative evidence. The formal charge in the indictment was of a lesser sexual offence, and the allegation of rape was contained in a docket.
- A case in which sexual offences against complainers A, B and C were libelled. On the evidence then available, the Crown was obliged to accept pleas of "Not guilty" in respect of those complainers. Subsequently new complainers came forward. Also B volunteered new information about more serious charges. The accused appeared on indictment with the earlier evidence (to which "Not guilty" pleas had been accepted) incorporated in a docket in that indictment.
- A situation in which an alleged sexual offence, part of a pattern of sexual offences, occurred outwith the jurisdiction. That offence could be included in

> the docket, and evidence relating thereto led to assist in the application of the *Moorov* doctrine (*Lauchlan and O'Neill* v *HM Advocate (No 2)* 2015 JC 75 paragraph [29]; *Cannell* v *HM Advocate* 2009 SCCR 207).

[26] There is no precedent for the particular sequence of events which has occurred in the present case. In particular, there has been no decision concerning the competency of inclusion in the docket of alleged criminal conduct specifically ruled "out of time" by a judge refusing to grant a retrospective extension in terms of section 65 of the 1995 Act.

[27] In our opinion, the answer depends upon a proper construction of sections 65 and 288BA, read in the context of the 1995 Act as a whole.

[28] As Lady Scott correctly decided in her Note issued on 24 July 2017, it would be incompetent to permit an indictment containing charges 1, 2 and 3 to go to trial. The respondent had appeared on petition on 16 July 1997 on charges which were in substance the charges 1, 2 and 3 in the indictment. The 12-month time period stipulated in section 65 had expired on 16 July 1998. No extension of the period was sought until 12 December 2016, when the Crown requested a retrospective extension. In his ruling dated 2 February 2017, Lord Burns refused to grant such an extension, for the reasons noted in paragraph [5] above. Accordingly in terms of section 65, the respondent shall not be tried on indictment "for those alleged offences"; he has been "discharged … from any indictment as respects" those alleged offences; and he "shall not at any time be proceeded against on indictment" as respect those alleged offences. Thus, as Lady Scott explained in her Note of 24 July 2017:

> "**Decision**
>
> I do not accept the issue here is simply about the admissibility of evidence. There is a clear issue of procedure here. The proper starting point is that the accused remains indicted on charges which have been ruled as incompetent. The indictment containing charges where an objection to those charges has been taken and sustained

> cannot be proceeded with, irrespective as to whether or not a conviction on them is sought.
>
> The Advocate Depute is seeking to treat the charges as now, in effect, some kind of 'evidential' charges.
>
> This fails to address the effect of the ruling [that] they are time barred. The position here, in my view, is quite different to the situation where evidence has been led and charges withdrawn, or so called 'evidential charges' have been libelled and intimated at the outset. This indictment in its present form, containing the incompetent charges, cannot proceed …"

We agree. In our view, it would not be competent to seek to prosecute the respondent on an indictment containing charges which were in substance those time-barred charges.

[29] In the application of the docket procedure to the present case, three matters are of note:

1. There is no dispute that the alleged offences involving PC are "connected with [the sexual offences] charged in the indictment" (section 288BA(1)). The Crown proposes to lead PC's evidence to provide corroboration for the evidence of the other complainers by means of the *Moorov* doctrine, thus satisfying the requirements of section 288BA(1) and (2)(b)(ii).
2. The docket which includes the alleged conduct involving PC is in the form of a "note apart from the offence charged", thus satisfying the requirements of section 288BA(3).
3. In terms of section 288BA(4):

   > "It does not matter whether the act or omission [included in the docket], if it were instead charged as an offence, *could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding* (emphasis added)."

[30] In our opinion, subsection (4) extends to *any* act or omission which, "if it were instead charged as an offence", could not competently be dealt with by the court in which

the indictment was proceeding. Thus section 288BA extends, for example, to a situation where there had been alleged criminal conduct occurring outwith the jurisdiction: the conduct complained of could be included in a docket if it formed part of a sequence of events, thus providing (or assisting in providing) corroboration of the offence(s) libelled in the indictment by means of the *Moorov* doctrine (*Lauchlan and O'Neill* v *HM Advocate (No 2)* 2015 JC 75 paragraph [29], *Cannell* v *HM Advocate* 2009 SCCR 207).

[31] Similarly it would be incompetent for the Crown to seek to try an accused on an indictment for alleged criminal conduct which had been ruled time-barred in terms of section 65. But in our opinion, the conduct complained of might be included in a docket if it forms part of a sequence of events capable of providing corroboration in terms of the *Moorov* doctrine.

[32] On behalf of the respondent it was argued that the wording of section 65 does not permit such an approach. We disagree. We do not accept that leading the evidence of PC on the basis of conduct described in a docket amounts to trying the respondent on indictment for the alleged offences referred to in the docket, or proceeding against him as respects the alleged offences. The respondent is not being "tried on indictment" or "proceeded against on indictment" for those matters: he is being tried on indictment and proceeded against on indictment for the matters involving AVD, JAD, AD, and LH. What the Crown seeks to achieve is convictions against the respondent in respect of his alleged criminal conduct against the complainers AVD, JAD, AD, and LH. The Crown seeks to have the respondent punished by an appropriate sentence in respect of those matters. The Crown does not seek to have the respondent convicted or sentenced in respect of any criminal conduct referred to in the docket concerning PC. On one view, what is contained in the

docket is background material which may, or may not, assist in establishing facts relevant to the proof of one or more of the formal charges in the indictment.

[33] In our opinion therefore, while it is correct that it would be incompetent for the Crown to seek to include in the indictment formal charges 1, 2 and 3, section 288BA(4) expressly permits the Crown to include such incompetent material in the docket. Accordingly it is our view that, on a proper construction of sections 65 and 288BA, the docket may be amended as sought by the Crown.

Oppression

[34] The purpose of section 65 is to prevent delays in trials. It focuses upon the putting of an accused on a formal petition containing certain charges and thereafter, with that formal accusatory step having been taken, the formal trial of the question whether or not the accused has committed those offences must, as ordained by Parliament, take place within a 12-month period. Section 65 prevents an open-ended delay once the formal step of putting the accused on petition for certain offences has been taken. But where an accused has not been put on petition, it is often the case that historic sexual abuse charges are of considerable antiquity. Decades may have passed. There is no time-bar for the prosecution of crimes (other than time-bars imposed by statute: no such statute applies in the present case). Cases involving allegations of historical sexual abuse are regarded as matters of considerable gravity. Public policy in this jurisdiction requires such offences to be prosecuted, despite the passage of time (cf the observations of Lord Justice General Carloway in *Potts* v *Gibson* 2017 JC 194). In this particular case, the Crown was, in our opinion, hampered to some extent by the delayed and uncoordinated disclosures by some of the complainers.

[35] Ultimately we have not been persuaded that a fair trial cannot take place in respect of the matters alleged in respect of AVD, JAD, AD and LH by reason of the inclusion of paragraphs 2, 3 and 4 of the docket in the indictment as it is to be amended. Nor are we persuaded that there is some other compelling reason why the trial should not proceed. (*Potts* v *Gibson* 2017 JC 194 paragraph [21]). We consider, contrary to the submissions of the solicitor-advocate for the respondent, that the inclusion of the matters referred to in paragraphs 2, 3 and 4 of the docket as it is to be amended do not involve a trial of the respondent in respect of those matters. The inclusion of the act or omission in the docket makes it clear that this is not an offence charged against the respondent. He is not being put to trial in respect of said act or omission. The question of a fair trial in respect of the act or omission specified in the docket as it is to be amended does not arise. There is to be no trial of the respondent in respect of charges 1, 2 and 3 of the indictment. As this court has confirmed (in paragraph [28] above) the inclusion of such charges would be incompetent. The refusal of the retrospective extension in terms of section 65 reflected the court's justifiable conclusion that a retrospective extension of the 12-month period by a period of over 18 years was, in the circumstances, an excessive extension which should not be granted. But it does not follow from that decision that the leading of evidence about the alleged criminal conduct by means of the docket procedure would necessarily be oppressive. Charges remaining on the indictment relate to alleged criminal behaviour against *inter alios* complainers AVD, JAD and AD, said to have been committed during the years 1975 to 1983. The defence have taken no plea in bar of trial on the ground of oppression in respect of those charges.

[36] Accordingly it is our opinion that the plea of oppression taken in respect of the allegations in charges 1, 2 and 3/paragraphs 2, 3 and 4 of the docket, should be repelled.

Decision

[37] For the reasons given above, we shall allow the Crown appeal; reverse Lord Glennie's decision of 25 August 2017; allow the indictment to be amended as sought by the Crown; and remit the case for trial on the amended indictment. For the avoidance of doubt, it is our view that the evidence of PC relating to the events referred to in paragraphs 2, 3 and 4 of the docket as it is to be amended is admissible at the trial (section 288BA(5) of the 1995 Act).