APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 70
HCA/2018/25/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

DAVID GLASS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McCall QC; Collins & Co
Respondent: I McSporran QC (sol adv) AD; the Crown Agent

30 October 2018

Introduction

[1] This appeal is about whether hearsay in the form of a witness's signed statement is admissible as evidence of fact under section 259(1) and (2) of the Criminal Procedure (Scotland) Act 1995 when the maker, although generally capable of testifying, is unable to recall either making the statement or the events narrated in it because of the effects of a head

injury. If the statement was, contrary to the decision of the sheriff, inadmissible, the question is then whether its admission resulted in a miscarriage of justice.

Legislation

[2] Section 259 of the 1995 Act provides that evidence of a prior recorded statement is admissible "(1) … as evidence of any matter contained in the statement" where the judge is satisfied *inter alia* that "(a) the person who made the statement will not give evidence … of such matter" because:

> "(2) ... the person who made the statement –
>
> (a) is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner;
>
> (b) ... is outwith the United Kingdom and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner;
>
> (c) ... cannot be found;
>
> (d) ... refuses to give ... evidence in connection with the subject matter of the statement [on the grounds that such evidence might incriminate him];
>
> (e) ...
>
> (i) refuses to take the oath or affirmation; or ...
>
> (f) ... refuses to [give evidence in connection with the subject matter of the statement] ...".

[3] Section 260 of the 1995 Act provides that, where a witness gives evidence, any prior recorded statement is admissible "as evidence of any matter stated in it" if:

> "(2)(b) the witness ... indicates that the statement was made by him and that he adopts it as his evidence."

[4] Section 271M of the 1995 Act provides that:

> "(2) A statement made by [a] vulnerable witness ... shall ... be admissible as the witness's evidence in chief ...".

A person is deemed to be vulnerable if he or she is giving evidence in connection with a sexual offence (s 271(1)(c)(i)). The section will only operate when the court has authorised the use of a prior statement as a special measure (s 271C).

Background

[5] On 7 December 2017, at the sheriff court in Dundee, the appellant was found guilty of four charges of lewd, indecent and libidinous practices. The first two (charges 2 and 3) libelled events occurring between 1987 and 1989 in a caravan at Crail involving: first, WW, then aged 3 or 4, by on various occasions masturbating him on a bed; and, secondly, WW's brother, SW, then aged between 5 and 6, also by on various occasions masturbating him on a bed. SW was deceased by the date of the trial. The third and fourth (charges 4 and 5) libelled events occurring between 1994 and 1996 and involving one complainer, JM, then aged between 9 and 11: first, on various occasions at Anstruther, by causing him to masturbate the appellant in a bath; and, secondly, on one occasion at Cellardyke, by placing the complainer's penis in his mouth whilst he was asleep.

[6] WW spoke to the events in charges 2 and 3, which occurred when the appellant had been baby-sitting. He and his brother had spent considerable periods of time with the appellant, as both his parents had been working and the appellant had baby-sat when his parents were out socialising. WW and his brothers, SW and DW, often stayed over in a caravan owned by the appellant. The appellant was careful to ensure that WW and SW slept in one room, whilst their older brother, DW, slept in another. The appellant had bought many presents for the children and took them out for various treats and adventures. Matters came to light after WW had confided in his parents when he was about 23. He had been drunk. His father had spoken to him and gave evidence that WW had said that he had

been confused about his sexuality and had thought that he might be homosexual because of what had happened

[7] JM spoke to the events in charges 4 and 5, which had also occurred when the appellant had been baby-sitting. This was because his parents needed to spend time away from home when his brother had been ill and in hospital. Again, the appellant had paid for various treats, such as going to the cinema. Before going there, the appellant would insist that he and JM had a bath together. JM's father remembered his son telling him at one point that he did not want to see the appellant again. His father spoke to the troubled life that JM had led as a teenager

[8] The appellant did not testify. He had made a "no comment" at interview. The nature of the cross-examination had been to suggest that the two complainers had fabricated their accounts and that they had shared information about their experiences when they had become adults.

The Application and Decision

[9] Immediately prior to the trial, the Crown had lodged a notice under section 259 of 1995 Act seeking to adduce the evidence of a statement made by DW to a police officer on 20 February 2014. DW had been the complainer on another charge of lewd, indecent and libidinous practices (charge 1) which was said to have occurred on one occasion between 1986 and 1989, when he was aged 6 or 8, at the same caravan as that in charges 2 and 3. The charge involved an attempt to handle DW's penis whilst he was in bed. The statement was in the handwriting of the police officer and was signed by DW and the officer on each page. It was relatively detailed. It referred to the appellant looking after the three brothers when their parents were out, going out with the appellant to shows and buying the boys gifts.

There was a reference to the boys staying overnight in the caravan with the appellant. DW had slept in a different part of the caravan from his brothers. The statement narrated that on one occasion the appellant had tried to touch DW's penis when he was in bed in the caravan. DW had stopped this. The appellant did not attempt to do anything of a similar nature again.

[10] DW was said by the Crown to be unfit and unable to give evidence in any competent manner by reason of a mental condition. It was subsequently agreed by joint minute that DW had permanent memory loss as result of a road traffic accident on 20 February 2017. He had no recollection of giving the statement or the events described in it. At the time of the application, there was a report from a consultant in rehabilitation medicine dated 5 November 2017. The consultant had reviewed DW as an outpatient on three occasions and on each he had shown signs of improvement. DW had made a very good recovery from a significant traumatic brain injury. He had contusions of the frontal lobe, which is the area of the brain that is key to memory function. The consultant reported that it was "entirely probable" that DW's "inability to remember giving a statement and certain previous events is entirely attributable to the extent of the traumatic brain injury". The memory deficits were "in all probability likely to be permanent". The consultant had not tested the level of the witness's amnesia.

[11] The application was opposed on the basis that the relevant part of section 259(2) only applied when a witness was unfit or unable to give evidence. DW could give evidence, even if he was apparently unable to recollect certain events. The sheriff granted the application because he was satisfied that, as a result of his mental condition, DW would be unable to give evidence in any competent manner.

[12] Charge 1 was "withdrawn" by the Crown following a no case to answer submission. The minute records that the submission was "upheld", although there is no record that the appellant was acquitted of this charge. It is simply said that the sheriff told the jury that this charge had been "removed". According to the Crown's Case and Argument, the submission had been made on the basis that the "sole and decisive" evidence on charge 1 had been hearsay. The sheriff had invited the procurator fiscal depute to withdraw the charge because of the complexities of the prospective direction. The PFD had withdrawn the libel, but the sheriff had then sustained the submission (*sic*).

[13] In due course, the Crown asked the jury to take DW's statement into account in respect of the remaining charges The statement was said to have supported the evidence of WW that the brothers had stayed overnight in the appellant's caravan; a matter confirmed by their father but not their mother. It also supported the evidence of WW that he and SW had slept in a different bedroom; the reason for this being that DW had not let the appellant touch him and, it seems to have been speculated, he would have protected his younger brothers in similar circumstances. The appellant had maintained that the evidence of DW was of no relevance.

[14] The sheriff directed the jury that DW had been unable to come to court. The statement was hearsay and was normally not admissible. However, if the jury were satisfied that the statement had been made and accurately recorded and reported, its contents could be regarded as part of the evidence. It could be accepted as proof of fact if the jury accepted it as credible and reliable, but the jury had to bear in mind that it was not given under oath and the witness had not been subjected to cross examination. The jury had not been able to assess DW personally, although the police officer had been asked about his demeanour when DW had given the statement.

[15] In relation to corroboration, the sheriff gave the jury the standard directions on mutual corroboration. In putting it in context, the sheriff said that:

> "this is an all or nothing situation … You've heard the evidence from two complainers … in respect of the charges, namely [WW] and [JM]. You would have to find that both of them were credible and reliable in dealing with their evidence. …[F]or you to convict on these charges, you would have to find that both of them were credible and reliable."

Submissions

[16] The ground of appeal against conviction was that the sheriff erred in admitting the written statement. The appellant submitted that the phrase "in any competent manner" referred to the means of giving evidence (eg in court or on commission) and not to the competency of the witness. There was no suggestion that DW could not have attended court and answered questions. As a generality, it was preferable that a witness should testify in person (*Hill* v *HM Advocate* 2005 JC 259). The use of section 259 should be restricted to situations in which it was necessary. The approach in England and Wales (*Setz-Dempsey and Richardson* (1994) 98 Cr App R 24) was too narrow. The sheriff considered that DW was "unable to give evidence" because he could not recall giving the statement or the events in the libel. The report had not said that DW's memory was affected in its entirety. It referred only to "certain previous events". The phrase "give evidence" should be interpreted in a general sense, rather than construed to mean that a statement would be admissible if a witness could not speak to particular events about which a party wished him to give evidence. The other sub-sections largely referred to circumstances in which a witness could not give evidence at all; eg deceased, abroad, untraceable or refusing to take the oath or to testify (s 259(2)(a)(b),(c) or (e)(ii)). The provisions otherwise applied when a witness refused to give evidence "on the subject matter of the statement" (s 259(2)(d)), such as where he or

she exercised a right not to self-incriminate. The quoted phrase was absent from the earlier sub-sections. Section 260 provided for the adoption of a statement. This supported the idea that "unable to give evidence" meant unable to do so at all. It did not matter, for the application of section 260, that the witness could not remember giving a statement. That could be proved by other means. The admission of the statement had resulted in a miscarriage of justice. The Crown had relied on the statement to bolster the credibility and reliability of WW. The statement had undermined the mother's evidence that the boys had not stayed in the caravan. It may have carried considerable weight in supporting the evidence that sexual acts had occurred in the caravan.

[17] The Crown replied that the purpose of section 259 was to admit exceptions to the prohibition on hearsay in circumstances other than when the witness was dead (Scottish Law Commission Report (No. 149): *Hearsay Evidence in Criminal Proceedings*). Hearsay was to be preferred to a complete loss of the information, when difficulties in obtaining evidence were insurmountable (*ibid* para 5.31; cf, in England and Wales, the Criminal Justice Act 1988 s 116; *R* v *Riat* [2013] 1 Cr App R 2). The fact that a person could turn up at court did not make him an available witness (Phipson: *Evidence* (19th ed) para 30-30; *R* v *Setz-Dempsey* (*supra*) at 27-2, *R* v *AC* [2014] EWCA Crim 371 at para 38). "Mental condition" was not synonymous with "mental disorder. Nevertheless, it was accepted that "in any competent manner" meant testifying in court or otherwise in a competent manner. The witness could have given evidence and the statement could have been put to him (see *Croal* v *HM Advocate* [2014] HCJAC 34). The content of the medical report had been insufficient to merit the grant of the application.

[18] No miscarriage of justice had occurred. Even if the statement had been excluded, there had been no "real possibility of a different verdict" (*GM* v *HM Advocate* 2012 SCCR 80).

The statement would have been introduced using other statutory provisions (ie ss 260 or 271M). Minimal reliance had been placed on the statement. Without it, there was compelling evidence against the appellant; notably the similarities between charges 2 and 3 and 4 and 5. The sheriff had directed the jury that they required to find both WW and JM credible and reliable in order to convict. The sheriff had given the jury thorough directions in relation to the statement and the dangers inherent in accepting it.

Decision

[19] Section 259 of the Criminal Procedure (Scotland) Act 1995, so far as directly relevant to DW's situation, is to the effect that his written statement would be admissible if he could "not give evidence … of ... any matter contained in the statement" because of his "mental condition". This provision is aimed at witnesses who cannot give evidence as a generality because of their mental condition. DW was able to give evidence about the "matter" in the statement. His evidence would, according to the Crown, have been that he could not remember the incident or giving the statement. Such a state of affairs, at least in relation to the event, is not unusual. It does not amount to an unfitness or an inability to give evidence as envisaged by the section. If there were any doubt about that, the particular provision would have to be read *eiusdem generis* with the other exceptions to the prohibition against hearsay. These, with the possible exception of sub-section (f), are all concerned with witnesses who cannot, or will not, give evidence at all because, for example, they are dead, cannot be compelled to attend, cannot be traced or refuse to testify.

[20] Section 259 is not designed to deal with the situation where, for whatever reason, the witness, whilst capable of giving evidence generally, has forgotten about a particular event. In that situation, the witness can be asked, in terms of section 260, whether he "adopts" the

statement bearing his signature. There is no reason to suppose that the witness would have done other than accept that the signatures on the statement were his and that he would, as it is customarily put, have been telling the truth at the material time (*Croal* v *HM Advocate* [2014] HCJAC 34, LJC (Carloway) at paras [7] and [8]). This would have been a manner of giving evidence about the events in a competent manner.

[21] In any event, the material produced to the sheriff was insufficient to support an application of this type. First, the extent of DW's memory loss was not made clear. For example, it was not known, or at least not explained to the sheriff, whether DW was able to speak generally to events in his childhood around the time of the alleged event or specifically to being baby-sat by the appellant in the caravan. If he was aware of these events, he would have been giving evidence about the matters in his statement. The medical report proceeded on an assumption concerning DW's amnesia, which had not been medically attested. For these reasons, the Crown's concession concerning the adequacy of the supporting material was correctly made. Accordingly, the statement ought not to have been admitted as an exception to the prohibition against hearsay. The next question is whether, as a result, a miscarriage of justice has occurred.

[22] The answer to that question is in the negative. It is not entirely clear whether the sheriff did sustain the no case to answer submission and, if he did so, on what basis. There is a record of the submission being "upheld", but no minute of the appellant being acquitted of the charge as a result. If the submission had been sustained on the basis that the hearsay was the "sole or decisive" evidence in relation to charge 1, that decision would have been in error standing the availability of mutual corroboration provided by the witness's brother on charges 2 and 3 (see *Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23 at para 147; *Schatschaswili* v *Germany* (2016) 63 EHRR 680 at para 128). No complex direction would

have been necessary; the decision on whether the sole or decisive evidence was hearsay being a matter for the sheriff. If, as the sheriff directed the jury, the statement continued to be available for consideration in respect of the remaining charges, the use, to which the jury could put it, was not made clear (as it should have been) if, as the sheriff also directed the jury, the only mutual corroboration available was from the two complainers who had testified.

[23] The latter direction appears to have been erroneous. However, it favoured the appellant. It makes it clear that the jury must have accepted the evidence of the two complainers, namely WW and JM, as credible and reliable. Once they had done that, a conviction was bound to follow. Any impact which the statement of DW would have had would, especially standing the limited nature of the conduct alleged, have been minimal. It may have lent support to the allegation that the boys had all stayed overnight in the caravan, but, although the mother denied that this had happened, this was also spoken to by the father. In all these circumstances, no miscarriage of justice has occurred and the appeal against conviction is refused.

Sentence

[24] The appellant was 59 at the time of sentencing. He was unmarried and had never been in a relationship. He was a successful farm contractor, renting machinery to farmers. He owned a number of properties, which he leased. The sheriff imposed an extended sentence of 6 years; the custodial element being 5 years. He noted that, in terms of the Criminal Justice Social Work Report, the appellant did not accept his guilt. The abuse had been carefully planned, with the appellant befriending parents who were in difficult circumstances. The appellant had groomed the children with presents. He was a danger to

children. Both complainers had been left with psychological problems. The sheriff had been aware of an earlier sentence of 3 years and 10 months for analogous offending.

[25] It was submitted that the custodial element of the sentence was excessive. The previous sentence for analogous offences had been imposed in August 2014. It had been in respect of matters occurring after those on the present indictment. By that time, WW and DW had made their complaints and the charges could all have been combined on the same indictment. The appellant had been released from the earlier sentence before the current sentence was imposed. The sheriff had failed to take this into account.

[26] It is not clear from the sheriff's report that he did take into account the cumulative impact of the earlier sentence when selecting the custodial period of 5 years. Had he done so, he would have appreciated that the total of 8 years and 10 months, even for the repeated sexual abuse of young boys in circumstances in which the convicted person had inveigled himself into a position of trust, was excessive. Having regard to the earlier sentence, the court will substitute a period of 3 years imprisonment. The extended element of the sentence was incompetent, having regard to the age of the offences (Crime and Disorder Act 1998 (Commencement No. 2 etc.) Order 1998; 1998 SI 2327). It requires to be quashed.