APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 43
HCA/2021/35/XC

Lord Justice General
Lord Woolman
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

JAMIE FISHER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Bovey QC; Tod & Mitchell, Paisley
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

19 March 2021

Introduction

[1] The appellant appeared at a First Diet in Paisley Sheriff Court on 22 January 2021. The indictment libels two sexual assaults on RK at different addresses in Paisley; contrary to section 3 of the Sexual Offences (Scotland) Act 2009. The first was in December 2017 by repeatedly rubbing her vagina over her clothing. The second was in January 2018 by the same method and by seizing her breast and repeatedly thrusting his erect penis into her

buttocks over her clothing. There is then a docket giving notice that the Crown intend to lead evidence of another sexual assault, this time on LP at a third address in Paisley in April 2018 by touching her breast and vagina under her clothing and thrusting his erect penis into her buttocks over her clothing.

[2] The significant feature of the case is that the appellant has been acquitted of the conduct referred to in the docket. The reason why all three charges were not tried together is that the two charges on this indictment were only reported to the respondent some 19 days prior to the trial arising out of the April 2018 incident. The appellant lodged four separate minutes; each complaining about the docket. Three are relevant in the appeal. They contend that the inclusion of the docket is (i) incompetent, (ii) oppressive and (iii) incompatible with Article 6 of the European Convention. The sheriff repelled these objections. The appeal concerns whether he was correct to do so. The appellant seeks to add an argument based on Article 8, which was not before the sheriff.

Legislation

[3] Section 288BA of the Criminal Procedure (Scotland) Act 1995, as inserted by the Criminal Justice and Licensing (Scotland) Act 2010 (s 63), provides that:

> "(1) An indictment… may include a docket which specifies an act … that is connected with a sexual offence charged in the indictment…
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> (2) … an act… is connected… if it –
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> …
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> (b) relates to –
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> …
>
> (ii) a series of events of which that offence is also part.
>
> …

> (4) It does not matter whether the act …, if it were instead charged as an offence could not competently be dealt with by the Court … in which the indictment … is proceeding."

The Sheriff's reasoning

[4] The sheriff took as his starting point the terms of the statutory provisions. While it would be incompetent to include the act which was specified in the docket as a charge, section 288BA(4) permitted the Crown to include it on the indictment. The appellant was not being prosecuted for the act in the docket (*HMA* v *AD* 2018 JC 109 at para [32]) but only in respect of the two charges. The question of a fair trial did not arise (*AD* at para [35]). Even when there had been an acquittal on a charge, the evidence may remain available in aid of other charges (*Lauchlan and O'Neill* v *HM Advocate* 2015 JC 75). The presumption of innocence had no bearing on any matter contained in the docket, whether relating to a conviction or otherwise (*AD* at para [32]). The jury would require to be satisfied that the witness speaking to the docket act was credible and reliable. The court could not look behind the earlier acquittal and reach any conclusion upon the jury's assessment of LP's credibility and reliability. A failure by the Crown to bring all outstanding charges against the appellant in the one indictment was not oppressive. Having held that the insertion of the docket was competent, the test for oppression was not met.

Submissions

Appellant

[5] The appellant's submissions were wide ranging. In summary, they were that the inclusion of the docket was contrary to the common law principle that, where a point had been determined by the courts, it was not open to the parties to re-litigate the same point.

The docket violated the presumption of innocence; contrary to Article 6. It breached the appellant's Article 8 right to respect for his private life, particularly his reputation.

[6] In the absence of express language or necessary implication, the courts presumed that even the most general words in a statute were intended to be subject to fundamental rights (*R* v *Home Secretary ex p Simms* [2000] 2 AC 115 at 131), including those not in the Convention (*R (Anufrijeva)* v *SSHD* [2004] AC 604 at para 27). Although section 288BA was broad enough to include the conduct narrated in the docket, the court should read it down to exclude conduct of which an accused had been acquitted.

[7] A person could not be made to thole an assize more than once. This was the plea of *res judicata* (Trayner's *Latin Maxims* 553; Scottish Law Commission: *Discussion Paper on Double Jeopardy* July 2009 paras 1.10 & 1.11; in European terms "*ne bis in idem*"). The plea of *res judicata* presented a bar to a new trial, if it appeared that the initial trial, whether resulting in a conviction or an acquittal, had related to the offence which was subsequently libelled *(Hall* v *Associated Newspapers* 1979 JC 1; *HM Advocate* v *Cairns* 1967 JC 37 at 45; Hume II viii 479, cited in *Fairweather* (1836) 1 Swin 354 at 370).

[8] A docket containing an allegation of which the accused had been acquitted was a second attempt to establish guilt. *R* v *Z* [2000] 2 AC 483, which permitted the leading of evidence of events which had been contained in charges on which the accused had been acquitted, had departed from *Sambasivam* v *Public Prosecutor, Federation of Malaya* [1950] AC 458 and should not be followed. In *R* v *Mahalingan* [2008] 3 SCR 316 (at para 17) the Supreme Court of Canada upheld issue estoppel as a rule preventing re-litigation of decided issues.

[9] The *res judicata* principle was subject to extensive exceptions, including those in the Double Jeopardy (Scotland) Act 2011. To restrict *res judicata* to cases in which the accused

was being prosecuted for the same offence was too narrow. *HM Advocate* v *DE* (unreported) IND/2020-2608 had failed to recognise the principle of *res judicata*.

[10] The Sheriff erred in failing to hold that it was oppressive for the Crown to include such a docket or to attempt to lead evidence in support of the allegations contained in it. Where the Crown had had the opportunity to prosecute the appellant in respect of all the allegations on the same indictment, their proposal now to seek a conviction in respect of RK's allegations was oppressive.

[11] For the Crown to lead evidence, which demonstrated the appellant's guilt of an offence of which he had been acquitted, was to act incompatibly with his Convention rights. *Pasquini* v *San Marino* (No. 2) [2020] ECHR 743 referred (at para 49) to the second aspect of the protection afforded by Article 6(2), which arose when criminal proceedings had terminated and new proceedings had followed. This involved respect for any acquittal (*Allen* v *United Kingdom* (2016) 63 EHRR 10 at paras 102-4). There was a consistent line of authority on this dating back to *Minelli* v *Switzerland* (1983) 5 EHRR 554. Without respect for an acquittal, the fair-trial guarantees of Article 6.2 could become theoretical and illusory.

[12] Once criminal proceedings had resulted in an acquittal, it had been said that the presumption of innocence had no continuing relevance, except to prohibit a public authority from suggesting that the acquitted person should have been convicted (*R (Hallam)* v *Justice Secretary* [2020] AC 279 at paras 47, 78, 86, 126, 132, cf 184 and 207). By including the docket the Crown, as a public authority, were disputing the appellant's acquittal.

[13] In terms of Article 8 the appellant was entitled to respect for his private life, including his reputation (*Axel Springer* v *Germany* (2012) 55 EHRR 6 at para 83). The protection overlapped with that afforded under Article 6.2 (*Pasquini* at para 48). The Crown, by leading evidence relating to a charge of which the appellant had been acquitted, breached

his right to respect for his private life, particularly his reputation. This argument had not been put before the sheriff, but it had been identified by counsel instructed for the appeal. Interference with Article 8 rights could be assessed by asking the five questions posed in *R (Razgar)* v *Home Secretary* [2004] 2 AC 368 (at para 17). The docket was an interference with the appellant's right to respect for his private life. It had consequences of such gravity as potentially to engage Article 8. That interference was in accordance with the law and was necessary in the interests of the prevention of crime. However, the interference was not proportionate to the legitimate public end sought to be achieved.

[14] The court required to reach a decision on the proportionality of the interference (*Smith and Grady* v *United Kingdom* (2000) 29 EHRR 493 at para 13). Balancing the interference with the appellant's right to respect for his private life against the interests in the prevention of crime, the docket procedure was damaging to his reputation. There were cases where the circumstances involved a legitimate public interest in a course of action (*Akinyemi* v *Home Secretary* [2020] 1 WLR 1843 para 39). The public interest in allowing the docket procedure here was weak. The charges relating to all three complainers could have been dealt with in the first trial. Finality was undermined by rehearing the allegations. The significance of acquittals should be acknowledged. The docket complainer may feel undermined should there be a second acquittal. The allegations were not of the first seriousness. The youth and previous good character of the appellant did not present a need for a second airing of the docket allegations.

Respondent

[15] The advocate depute submitted that the terms of section 288BA were clear. They allowed the Crown to use the docket procedure to lead evidence relating to an allegation of

which the appellant had been acquitted after trial, provided that it was "connected with a sexual offence charged in the indictment". The statutory wording readily encompassed the inclusion of acts amounting to a sexual offence of which the accused had previously been acquitted.

[16] The Crown sought here to rely on the evidence of the docket complainer in support of the substantive charges. The appellant was not, however, being tried in relation to the acts specified in the docket. There would be no determination in relation to those acts, such as involved a collateral undermining of the acquittal. The trial judge would explain the status of the docket at the outset of the trial and formulate appropriate directions *(HM Advocate* v *Moynihan* 2019 SCCR 61 at paras 15, 18 & 21; *HM Advocate* v *AD* 2018 JC 109 at para 32). The evidence relating to the docket was being used to corroborate the evidence on the charges on which the appellant had been indicted. The Crown was not seeking to "assert the guilt of a person whose innocence has been established" (*Sekanina* v *Austria* (1994) 17 EHRR 221 at para 36).

[17] The test for oppression (*McFadyen* v *Annan* 1992 JC 53) was not met. A failure to bring all outstanding charges against the appellant on one indictment was not oppressive.

[18] The presumption of innocence had no bearing on any matter contained in a docket, (*HM Advocate* v *Moynihan* at para 16). It was merely a mechanism for giving notice to the accused that evidence might be led in support of those facts. The plea of *res judicata* was therefore misconceived.

[19] The Article 8 arguments had not been advanced before the sheriff. Accordingly, they could not form part of an appeal under section 74 of the 1995 Act (*Follen* v *HMA* 2001 SCCR 255*)*.

Decision

The necessity for corroboration

[20] The criminal law specifies that no person can be convicted on the testimony of a single witness. There must be corroboration. In a sexual offence case, that will normally consist of testimony from another person about facts and circumstances which confirm or support the direct evidence of the complainer about the events libelled (*Fox* v *HM Advocate* 1998 JC 94, LJG (Rodger) at 107). Although *de recenti* distress of a complainer may provide an element of corroboration in relation to a lack of consent to whatever the complainer testifies had happened to her, it may often not do so in relation to the acts libelled (*Smith* v *Lees* 1997 JC 73, LJG (Rodger) at 80-81). Statements which are made by a complainer after the event cannot do so either (*Morton* v *HM Advocate* 1938 JC 50, LJC (Aitchison), delivering the opinion of the Full Bench, at 52-53.

[21] To these limitations may be added perhaps the most significant factor. Sexual offences are seldom witnessed by others. They often cannot be proved even if: (a) the complainer is regarded as manifestly credible and reliable; and (b) there is evidence, such as a *de recenti* statement, which bolsters those qualities of her testimony. It follows that an accused person may be acquitted even although the jury accepted the complainer as an entirely truthful and dependable witness. The case may have failed to prove because of a lack of acceptable corroboration. These difficulties have led the Crown to rely to a substantial extent on the principle of mutual corroboration.

[22] Mutual corroboration does not equate precisely with what is termed "similar fact evidence" which is admissible in some other jurisdictions (eg *R* v *Z* [2000] 2 AC 483). As a generality, evidence of similar facts is inadmissible. It cannot amount to corroboration. However, if there are facts which are so similar in terms of time, place and circumstances

such as could demonstrate that the individual incidents libelled were component parts of one course of conduct persistently pursued by the accused, then these facts may be proved in order to provide the necessary corroboration (*Adam* v *HM Advocate* 2020 JC 141, LJG (Carloway), delivering the opinion of the court, at paras [26]-[28]). Something more than a propensity to commit the type of crime libelled is required.

Procedure

[23] The facts which provide mutual corroboration of one charge are usually libelled as another charge on the indictment. In such a case, the jury will be directed that they need to accept the testimony of more than one complainer before returning a guilty verdict on any charge. This will often mean that the jury will require either to find the accused guilty of more than one charge (involving different complainers) or otherwise acquit him of all charges. There are exceptions, including where, although a jury accept a complainer's testimony, they cannot be satisfied that the conduct fell within the time libelled (see eg *Cannell* v *HM Advocate* 2009 SCCR 207), or at a place within the jurisdiction. There are several circumstances in which it will not be competent for the Crown to seek a conviction on another charge. Obvious examples are charges which involve actings outwith Scotland or which are time-barred for one reason or another.

[24] In the latter circumstance, as it was put in *Lauchlan and O'Neill (No 2)* 2015 JC 75 (LJC (Carloway), delivering the opinion of the court):

> "[27] If the Crown maintain that evidence of facts, which could constitute a separate crime, is relevant to prove another, usually more serious crime, they can libel that subsidiary crime for evidential reasons… That is so even if the charge is actually incompetent for some reason… Evidence can be introduced in respect of the subsidiary charge, even if the Crown cannot seek a conviction in respect of it… Such evidence will remain for the jury's consideration on the principal charge…".

The court may determine that there has been insufficient evidence to prove a particular charge and may sustain a no case to answer submission. In that event, the evidence in relation to that charge may remain relevant to proof of another charge and is available for that purpose (*HM Advocate* v *Mair* 2014 JC 137, LJC (Carloway), delivering the opinion of the court, at para [9]). The evidence, in relation to a charge which has resulted in an acquittal, does not become incompetent or inadmissible relative to other offences which are libelled. Where a person has been previously acquitted or convicted of a charge, it is open to the Crown to libel that charge again for evidential reasons, even although they cannot seek a conviction on that charge (see also *HM Advocate* v *AD* 2018 JC 109, Lady Paton, delivering the opinion of the court, at para [25]). *Quantum valeat*, this appears to be akin to the position on similar fact evidence in England and Wales (*R* v *Z*, Lord Hope at 487).

The Statutory Amendment

[25] Section 288BA (1) of the Criminal Procedure (Scotland) Act 1995 was introduced by the Criminal Justice and Licensing (Scotland) Act 2010 (s 63). It was intended to allow the Crown to lead evidence of facts and circumstances which could provide corroboration of the testimony of a complainer in a sexual offence. The prescribed method is to include a docket in the indictment which specifies the potentially corroborative facts. It is important to observe that those facts must meet the test for mutual corroboration. They must narrate "conventional similarities in time, place and circumstances … such as demonstrate that the individual incidents are component parts of one course of criminal conduct persistently pursued by the accused" (*Lauchlan and O'Neill* v *HM Advocate* at para [32] citing *MR* v *HM Advocate* 2013 JC 212, LJC (Carloway), delivering the opinion of the Full Bench, at para [19]). The competency of using section 288BA (1) in this manner was recently made

clear in *HM Advocate* v *Moynihan* 2019 SCCR 61 (LJC (Dorrian), delivering the opinion of the court, at para [9]).

[26] The docket procedure has been in place for over a decade. The issue of *res judicata* does not arise. There is no question of the appellant being convicted of an offence of which he has already been acquitted. That acquittal is not challenged and remains a matter of public record. All that is happening is that the docket complainer will be led as a possible source of corroboration. The presumption of innocence, which applies to the charge libelled, remains firmly in place. It is not affected.

[27] Section 288BA is unambiguous. It specifically includes acts which could not competently be dealt with by the court (s 288BA(4)). The existence of acts which were tried and resulted in a person's acquittal is one obvious example. The jury will not be asked to return a verdict on the docket narrative. They will simply be directed that, if they find the docket complainer to be credible and reliable, they may, if the other features necessary for mutual corroboration are present, find that the testimony of the complainer on the charges libelled on the indictment is duly corroborated.

Oppression

[28] "Whether oppression can be established depends on the particular facts and circumstances, including the Crown's conduct, the seriousness of the charge and the public interest in ensuring that crime is prosecuted" (*Potts* v *Gibson* 2017 JC 194, LJG (Carloway), delivering the opinion of the court, at para [16]). It is not unusual for an accused person to complain about being tried on several charges, especially if these are not linked in time, place or circumstances. The accused has the option of moving for a separation of charges; the test being whether the prosecution on two or more charges would create a material risk

of real prejudice (*Toner* v *HM Advocate* 1995 SCCR 697, LJC (Ross), delivering the opinion of the court, at 704). Such motions are seldom granted, even where there is no connection between the charges (see Renton & Brown: *Criminal Procedure* (6th ed) para 9-53, quoting from Hume: *Commentaries* ii 172). In this case, the peculiarity is that the appellant complains of the opposite; that the present charges ought to have been accumulated in the earlier indictment.

[29] Had the procedure on two or more petitions been running roughly in parallel in terms of time, an accused could move to conjoin the charges, were the Crown to have indicted them separately. This would be a highly unusual step, and not one which an accused would normally contemplate as being in his interests. Were it made, it is unlikely that the Crown would oppose it. In this case, the first indictment was about to go to trial when the present complainer reported the events now charged. Had the Crown sought to delay the trial in order to add the present charges, the appellant would almost certainly have opposed such a move; given that it would have increased the number of complainers from two to three. That would not, in itself, have been a good ground of opposition, but delaying the trial would certainly have been. The Crown have explained why, in terms of the timings, the present charges were not added to the earlier indictment. The undoubted inconvenience and stress of facing two trials is a factor which must be taken into account in assessing matters. That is, of course, something which, in a different evidential state, may have occurred in any event. When balanced with the public interest in ensuring that what are relatively serious charges are prosecuted, it cannot be said that the actings of the Crown in proceeding with a second indictment which involves different charges and a different complainer, and adding the docket for evidential reasons, were oppressive.

The European Convention

Article 6.2

[30] The presumption of innocence in Article 6.2 operates to ensure, amongst other things, the application of the burden and standard of proof during a criminal trial (*Allen* v *United Kingdom* (2016) 63 EHRR 10 at para 93). It also prevents any public officials, or the court, from making any premature expressions of the appellant's guilt. In relation to the indictment in this case, the presumption will be applied to the trial of the charges.

[31] Outwith the context of the original criminal trial, and in order to ensure that the presumption of innocence in Article 6.2 is practical and effective, there is an implied obligation on public officials and authorities to continue to refrain from treating persons, who have been acquitted of a criminal charge, as if they were guilty of that charge (*Allen* at para 94, followed in *Pasquini* v *San Marino (No. 2)* [2020] ECHR 743 at paras 33 and 48-49). According to *R (Hallam)* v *Justice Secretary* [2020] AC 279, the sole relevance of the presumption, once the original criminal proceedings are concluded, is to prohibit the authorities from asserting that the acquitted person should have been convicted. If that were the correct interpretation of the extent of Article 6.2, the continuing application of the presumption could have no bearing on the present proceedings because it is not being suggested that the appellant should have been convicted of the act libelled in the docket.

[32] The dissenting judgment of Lord Reed in R *(Hallam)* points to a broader application of the presumption to post-acquittal proceedings when it can be shown that there is a link between the acquittal and the subsequent proceedings. In cases in which civil proceedings had followed the acquittal, *Allen* (at para 104) had held that the necessary link would be established in relation to subsequent proceedings if the:

> "subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indication of the appellant's possible guilt".

The idea is that, if the civil proceedings call into question the acquittal, then Article 6.2 will be both engaged and breached.

[33] Care must be taken when applying general *dicta* to different situations. A*llen* and *Pasquini* were both concerned with subsequent civil proceedings, notably the award of civil compensation following acquittals in the criminal courts. It was held in both cases that, notwithstanding the existence of a link between the criminal and civil proceedings, the application of Article 6.2 did not mean that a civil determination against an acquitted person was precluded even although it involved another examination of the person's participation in the relevant events (see eg *Pasquini* at para 52). What was made clear was that the later civil court had to take care not to make any statement which imputed criminal liability for the acts under consideration. As was said in *Allen*, after an exhaustive analysis of the various situations in which the post-trial aspect of the presumption in Article 6.2 had been hitherto been analysed:

> "125. … there is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings. As illustrated by the Court's existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted.
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> 126. In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with art 6(2)…" (see also *Pasquini* at para 51).

In *R (Hallam)*, Lord Reed illustrated (at paras 157 to 160) the importance of this use of language under reference to two similar Norwegian cases; one of which involved an

imputation that the person had committed the offence of which he had formerly been acquitted and the other which did not.

[34] In this case, the court is not considering subsequent civil proceedings. It is dealing with subsequent criminal proceedings. Article 6.2 is engaged in relation to the charges. The docket averments are clearly linked to the charges, but the question is whether they are linked to the earlier acquittal in the sense explained in the European jurisprudence sense of impugning it. The docket averments are not so linked. There is no question of the court reviewing the outcome of the prior criminal proceedings. There is no need to mention the prior proceedings in any forthcoming trial, although the appellant may elect to do so. There will be no analysis of the earlier criminal verdict. There will be no review or evaluation of the testimony in the previous criminal trial, although it may be referred to if an inconsistency appears. There will be an assessment of the appellant's participation in the events which led to the former criminal charge, but that will only be in the limited context of determining whether that participation met the test for mutual corroboration relative to the charges libelled in the indictment. It cannot, and will not, call into question the correctness of the previous acquittal.

[35] For these reasons, the court does not consider that the use of a docket, which contains averments about an event of which the accused has been acquitted, amounts to a breach of the presumption of innocence in Article 6.2. In that respect it agrees with the decision of Lord Weir in *HM Advocate* v *DE* (unreported) IND/2020-2608.

Article 8

[36] The raising of compatibility issues is, along with other preliminary issues, regulated by statute. Since the issues here involve an attack on the competency of the docket and the

admissibility of the relative evidence, they required to be raised by way of preliminary issue minute and dealt with at a first diet (1995 Act, ss 71(1C)(2) and 79(1) and (2)(a)(i) and (b)(iv)). This is how the appellant proceeded in relation to the common law and Article 6 contentions. These were duly determined by the sheriff. In order to raise these issues before this court in advance of a conviction, leave to appeal from a decision of the court at first instance is required (1995 Act s 74(1)(2A)(b)). Since a compatibility issue based on Article 8 was not raised before the sheriff, it was neither decided by him nor was leave given to pursue it in an appeal. The appeal on this ground is therefore incompetent. However, as there is a subsisting appeal on other grounds already before the court, and the matter could be raised in the event of a conviction (albeit that leave would be required then too), the court will address the issue.

[37] In gauging proportionality for the purposes of the application of Article 8 of the Convention, it should be borne in mind *in limine* that, as distinct from the position in *R (Razgar)* v *Home Secretary* [2004] 2 AC 368, the appellant's life is not at risk as a result of the inclusion of the docket in the indictment or by virtue of the criminal proceedings. Accepting for present purposes that the prosecution of the appellant may engage his Article 8 right to respect for his private life, the inclusion of the docket is necessary, as the appellant conceded, in the interests of the prevention of crime. It may also be in the interests of public safety and the protection of health and morals. The outcome of the prospective trial will not, as already explained, result in any statement from the court or the Crown which impugns the earlier verdict of acquittal. The appellant's reputation in that regard will remain untainted. The new charges which he faces are relatively serious; they are being prosecuted on indictment. Having regard to the need to use the evidence of the facts narrated in the docket as corroboration in order to prove those charges, and to the absence of any other

available evidence to provide a sufficiency of evidence, the inclusion of the docket is a proportionate interference, in accordance with the law, having regard to the legitimate public interest which is sought to be achieved.

[38] The court notes the appellant's submissions on the absence of the (rape shield) protections in section 274 of the 1995 Act, but those afforded to complainers by the common law remain. This is not, in any event, a matter which adversely affects the appellant. The potential effect on the docket complainer of an acquittal on the new charges is not his concern. The court assumes that the position will be adequately explained to her by the Crown. In short, the court does not consider that the inclusion of the docket amounts to an infringement of the appellant's Article 8 right.

Conclusion

[39] For these reasons, the appeal is refused. In advance of the trial the Crown will require to move the sheriff to allow the docket to be amended by deleting the references to the acts narrated amounting to a "sexual assault" and to the 2009 Act. The docket should state simply the facts, evidence of which is potentially corroborative of that of the complainer in the two charges.