



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 17
HCA/2019/386/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

BASHARAT KHAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson (sol/adv); Paterson Bell Solicitors
Respondent: A Edwards, QC, AD; the Crown Agent

18 March 2020

[1] On 6 June 2019, at the High Court in Edinburgh, the appellant was found guilty of a charge which libelled that:

“... on 4 September 2017, at the Travel Lodge Hotel, Dreghorn Link, Edinburgh you ... did assault [AK] ... and did punch her on the head, push her on the body causing her to fall, remove her clothing, restrain her, force her legs apart and penetrate her vagina with your penis and you did thus rape her: CONTRARY to section 1 of the Sexual Offences (Scotland) Act 2009”.

A co-accused was acquitted of a separate charge of raping the complainer at the same location and on the same date. The appellant was sentenced to 6 years imprisonment.

[2] The ground of appeal advanced on the appellant's behalf concerned the directions given by the trial judge on adoption of prior statements.

The evidence

[3] The complainer testified that she had gone to the Travel Lodge with an acquaintance and his friend, the co-accused, at about midnight on 3 September 2017. She and the two men had gone straight to a bedroom where there were others having what the trial judge describes as a "gathering". One of these was the appellant. The complainer had had some alcohol, but was not drunk, and taken a few puffs of a cannabis joint. She had consensual intercourse with her acquaintance and then fell asleep. Shortly thereafter she was aware of being penetrated vaginally by another man, who came to be identified as the co-accused. Later, when she was awake, there were three men left sitting on the floor, including the appellant. The appellant attacked her by pushing her onto a double bed and smacking her on the mouth with the back of his hand. He pulled her leggings and underpants down, lay on top of her and raped her. She had kept saying that she did not want this. After the incident she got dressed, left the room and took a taxi home. She had no money to pay for the taxi. She was too scared to contact the police, but disclosed what had happened to a person at her doctor's surgery on the following day. She had also spoken to a friend, BP, a couple of days later and told him that she felt as if she had been drugged and raped. Although the advocate depute took from the complainer that she had spoken to the police in the aftermath of the events described, the only specific point elicited about this was that the complainer did not tell the police about being penetrated by another man immediately after

having consensual intercourse with her acquaintance. There was no exercise of adoption embarked upon.

[4] In cross-examination on behalf of the co-accused it was contended that the complainer had been paid to have consensual intercourse with both the man she referred to as her acquaintance and the co-accused. Counsel embarked upon various enquiries into what the complainer had said, or had not said, to persons after the incident, including the taxi driver, the person at the GP surgery and BP. These questions were designed to cast doubt on the credibility of the account which the complainer had given in evidence and were no doubt founded upon the authority provided for by section 263(4) of the Criminal Procedure (Scotland) Act 1995 (i.e. the use of a prior different statement). Questions were also asked about how the complainer had got to the hotel and, in particular, what the atmosphere was like when she got into the bedroom. The complainer said that she did not feel very comfortable and was actually quite scared. The complainer was examined about the content of a statement she gave to the police on the evening of 8 September. She acknowledged that her signature appeared on every page. Counsel's questions were designed to elicit that the account given in the statement did not correspond in certain ways with the account given by the complainer in evidence. This included the proposition, accepted by the complainer, that she did not tell the police about having intercourse with another man immediately after the episode of consensual intercourse with her acquaintance. Counsel's proposition was that the complainer had not told the police about this because she didn't want to tell them that she had had sex with her acquaintance and then with the co-accused when other men were also in the room.

[5] Cross-examination on behalf of the appellant commenced with reference to the same police statement. Counsel wished to explore apparent discrepancies between what the

complainer had said in evidence and what was recorded in the statement about the extent of her prior association with her acquaintance. Although the relevance of this line of enquiry is not entirely obvious the complainer insisted that the content of the statement was incorrect on this point. The complainer was asked various questions about the conduct of others within the room and about her involvement with them. A line about whether the injury to the complainer's mouth which she had attributed to the appellant was in fact caused by a fall at some earlier stage was developed. Reference was made to a second statement, given by the complainer on 10 September 2017, in which she had given an account of this fall. The statement of 10 September was returned to in relation to a description of what the complainer had been wearing. A discussion about how the appellant was able to remove this clothing was engaged in. The statement of 8 September was then revisited on the question of whether or not the appellant had ejaculated inside the complainer and whether or not he was wearing a condom. Counsel sought to elicit that the complainer had told the police the truth on that occasion.

[6] The principal source of corroboration of the charge against the appellant was from AS, a 39 year old male who had been one of the other men in the room when the rape was said to have occurred. He gave evidence that he had gone to the en suite bathroom at some point. When he returned, the complainer had been on her knees on the floor. The appellant had been next to her, putting his penis next to her face. The complainer was crying. She had been punched in the face when she had tried to collect her belongings. The complainer had been telling the appellant to stop what he was doing. Although he had not seen the punch, he had heard her saying to the appellant, "You punched me in the face", and there was redness visible above her eye. He was clear that he had seen the appellant on top of the complainer having intercourse with her. After it came to an end, the complainer was

shouting, "Can you stop what you are doing?" She was crying and afraid. Examination in chief was completed without any mention of a prior police statement.

[7] In cross-examination on behalf of the co-accused it was elicited that on the first occasion the witness had been spoken to by the police he had refused to give a statement. Police officers contacted him again on 13 April, around 7 months after the event, and on that occasion he gave them a statement which he had signed. In this statement he had told the police that the only person he saw having have sex with the complainer was the co-accused. This must have been an exercise conducted on the basis of section 263(4) of the 1995 Act. The witness had been revisited around a month later and agreed that on this occasion he told them something different again, although counsel did not elicit what that account was.

[8] In cross-examination on behalf of the appellant the history of the witness's contact with the police in relation to his statements was explored. Production 22, the statement given on 13 April was discussed and the witness agreed that he had signed each page of that document. Counsel attempted to elicit from the witness that what he had told the police in that statement was true. Further detail in relation to this and other issues explored in cross-examination is set out below.

[9] BP gave evidence about meeting with the complainer on the morning of 5 September. What she had told him was explored by the advocate depute, perhaps in the expectation of securing a *de recenti* statement, although nothing of this nature had been explored by the Crown with the complainer. The witness had a poor recollection about these events and he was referred to a statement he had given to the police on 6 September 2017. He acknowledged that he was telling the police the truth at that time and accepted that he must have conveyed the information recorded in the statement. This process appeared to establish that when the complainer first spoke to BP what she told him was that the Asian

men had taken her phone and money and that it was not until later when he accompanied her to a shop that she told the sales assistant in his presence that she had been drugged and raped. This point was developed further by counsel for the co-accused, she having raised the point as a prior inconsistent statement during her cross-examination of the complainer. Counsel for the appellant had no questions for this witness.

The directions

[10] The trial judge gave the jury standard introductory directions on hearsay. She then turned to the statements put to the complainer and the two witnesses. She said:

“You’ll recall that each was asked if he or she had previously made statements to the police and what they were supposed to have said on the earlier occasion or occasions and part of the statements were put to each of them. Those witnesses each accepted firstly that he or she had spoken to the police and secondly that what he or she had told the police was true and that though they couldn’t remember or even disputed some aspects of it now, they had told the police the truth or were at least trying their best in speaking to the police to recollect what had happened.

Because of that, the contents of those statements can serve two purposes: first, they can support or undermine the witnesses’ credibility and reliability. If the earlier statement or statements and what the witnesses say in court are consistent, that could reflect favourably on their credibility and reliability. If they are inconsistent that could reflect adversely on their credibility and reliability, that’s all a matter for you to decide.

But the statements, because they were adopted by the witnesses in the way I have described can also be evidence of the truth of their contents, whatever each witness now said in court. So irrespective of what the witness has said in court, you can accept the statements as evidence of what they contain. So where they differ, you have to decide which version, if either, you accept: what’s in the statement or what the witness has said in court”.

Submissions

[11] The appellant’s submission was that the evidence of the complainer and AS in relation to the statements put to them had been confused. The directions given to the jury were not appropriate. Neither the complainer nor AS had adopted their statements in the

manner described by the judge. It was necessary for the judge to direct the jury regarding the specific circumstances and that it was their decision as to whether or not the statements had been adopted, what parts had been adopted and which aspects had not been adopted. The evidence of the wearing of the condom had been important. Further directions were necessary to explain to the jury the significance or otherwise of the complainer's position about the statement as compared to her evidence. The jury should also have been directed specifically about the adoption by AS of his earlier statement that he had not witnessed any other person having intercourse with the complainer. This had been referred to by counsel for the appellant in his speech, but it was an important aspect in the trial and specific directions ought to have been given about it. The jury had to decide what statement had been adopted or not, as the case may be. They had to be directed about how to consider the evidence of adoption or otherwise and the consequences of the decision they made. These were material misdirections and there had been a miscarriage of justice.

[12] The advocate depute conceded that what the trial judge had said in relation to adoption was inaccurate. It could not be said that the witness AS had adopted the content of his police statement as his evidence. The question as to whether the complainer had adopted the content of her police statement in relation to the issue of the condom was confused. In any event the jury ought to have been directed that it was a matter for them to determine whether or not a given statement had been adopted by the witness – *A v HM Advocate* 2012 JC 343 Lord Bonyon at paragraph [13]. However, the purpose in referring the witnesses to their previous statements was in order to challenge the credibility and reliability of the evidence given, rather than in an attempt to secure adoption of the content of the statements. No aspect of the Crown's case in relation to sufficiency had been dependent upon adoption of evidence. Relying on *Moynihan v HM Advocate* 2017 JC 71 it

was submitted that no directions on adoption were in fact necessary in the circumstances of the present case. In directing the jury that the witnesses had adopted their statements the trial judge had erred in favour of the appellant. There had been no miscarriage of justice.

Discussion

[13] The directions which the trial judge gave commenced at the beginning of page 20 of the transcript of her charge to the jury and continued on to the bottom of page 21. On page 21, as set out above, she dealt first with the import of evidence of prior statements in relation to credibility, and second in relation to proof of fact. The directions in relation to each concept were brief which, in the right circumstances, may be an advantage. However, the directions given were not of the sort conventionally given in relation to prior statements. Nor were the directions consistent with the law of evidence in all respects. For example, as set out paragraph [10] above, the directions included the instruction that if the earlier statement and what the witness said in court was consistent that could reflect favourably on the credibility and reliability of the witness. There was no *de recenti* statement by the complainer founded upon by the Crown and no directions on this topic were given.

[14] It is a well-recognised principle of the law of evidence, as it applies in criminal cases, that prior consistent statements are not admissible for the purpose of supporting the credibility or reliability of the witness concerned – Fraser on Evidence para 12.139, Walker and Walker *The Law of Evidence in Scotland* 3rd ed para 8.3.2. In *KJC v HM Advocate* 1994 SCCR 560 at page 564 the Lord Justice General (Hope) stated:

“Although there is little direct authority on the point, it is clear that as a general rule evidence is inadmissible if its purpose is to show that a witness has previously made a statement which is consistent with the evidence which is given in the witness box. But for criminal proceedings the general rule remains unaltered, except to the extent permitted by sections 147 and 349 of the 1975 Act (now amalgamated into

section 263 of the 1995 Act) of allowing previous inconsistent statements to be put to the witness for the purpose of showing that that witness's testimony in court is unreliable."

[15] No complaint was made in the note of appeal about the direction on credibility. The focus of the appeal was on the directions concerning the concept of adoption of prior statements. The submission, accepted by the Crown, was that the trial judge had been wrong to direct the jury that the statements spoken to had been adopted. Whether the content of any of the statements to which attention had been drawn had in fact been adopted ought properly to have been left to the jury to determine.

[16] The trial judge directed the jury that because the witnesses had accepted speaking to the police and accepted that what they had told the police was true then the statements had been adopted. She went on to explain the effect of that was that the statements could be treated as evidence of the truth of their contents, whatever the witness said in court. As she put it:

"So irrespective of what the witness said in court, you can accept the statements as evidence of what they contain."

[17] We agree with the submission that what the trial judge said to the jury was incorrect and constituted a misdirection. Issues as to the potential adoption of statements by the witnesses concerned are not, as the trial judge suggested in her charge, to be resolved by operation of law. They are matters of fact to be left for the jury to determine as part of their evaluation of the whole evidence before them (*A v HM Advocate* Lord Emslie at para [23]). In order to understand the effect of that misdirection it is necessary to examine the evidence given, and in particular the nature and purpose of the cross-examination which was embarked upon.

[18] Many trial judges will be familiar with the difficulty of identifying appropriate and correct directions as a consequence of the indiscriminate and unfocused use of prior statements in evidence, such as was referred to in *A v HM Advocate* and *Rehman v HM Advocate* 2014 SCCR 166. The trial judge in the appellant's case must have been faced with precisely this difficulty. Three examples will serve to illustrate the point, the first two taken from counsel for the appellant's cross-examination of the complainer and the third from his cross-examination of the eye witness to the rape, AS.

[19] At page 32 of the transcript of the complainer's evidence on the 28 May 2018, the appellant's counsel conducted an exercise in cross-examination which involved reference to production 17, the statement given by the complainer on 10 September 2017. He read a passage from that statement which appeared to be consistent with the evidence just given on that subject by the complainer and asked her to confirm that what she had said to the police was an accurate account of events. This was neither an examination of whether the witness had given a prior inconsistent statement, as authorised by section 263(4) of the 1995 Act, nor was it an exercise in securing adoption, either as authorised at common law or by section 260 of the 1995 Act.

[20] At page 35 of the transcript counsel turned to the question of whether the appellant had ejaculated inside the complainer, according to her account. When the complainer answered by explaining that she didn't know whether or not the appellant had put a condom on counsel responded with the proposition:

“But he ejaculated inside you, didn't he?”

On again receiving the answer that the complainer didn't know, counsel suggested that her memory may have been better in September 2017 and placed Crown production 15 before her, the statement which she had given on 8 September of that year. He took the complainer

to the passages within that statement in which she gave an account of what transpired, which included informing the police that her attacker had ejaculated. He then moved on to the passage in which the statement appeared to record the words:

“He wasn’t wearing a condom”.

Although the complainer still insisted that she did not know whether he was or was not, counsel moved on to the familiar proposition that the complainer was telling the police the truth at the time of giving the statement. Having received the complainer’s confirmation the proposition presented was as follows:

“The truth of it is you know because having looked at the statement of 8 September, you know that he ejaculated and he wasn’t wearing a condom, according to you. And that’s the truth isn’t it”.

[21] The complainer was prepared to accept that these propositions were correct. The evidence of a witness comprises what that witness is able to recollect in the witness box, including what they have been prompted to remember by reference to their statements (*A v HM Advocate*). The witness being prepared to accept that the proposition advanced was correct, it is not obvious that any direction on adoption was in fact necessary in relation to this passage. However, most would no doubt have assumed that counsel had as his purpose securing the adoption of the passages to which attention had been drawn. On that understanding it is difficult to see why the appellant would wish to criticise the judge for directing the jury that the witness had adopted this statement. However, immediately after putting the proposition set out above, counsel’s question, in the form of a proposition to the complainer, was that the truth was, as she knew perfectly well, that the appellant never struck her with his hand and indeed never even had sexual intercourse with her. Whilst it can be important to remember that the process of reading transcripts may not recreate the reality of the trial environment, it is difficult to understand quite how any listener would

have followed what the appellant's position was from these exchanges. Counsel seemed to be trying to have the witness adopt the passage from the statement and the witness was prepared to accept that what she had said was correct. Insofar as the references to the statement were concerned the trial judge gave a direction, the effect of which was that the statement had been adopted. Whilst this direction as it applied to this witness and to this passage may have been unnecessary, it cannot be criticised as being unfair to the appellant.

[22] The witness AS was an eye witness to the acts of intercourse which took place between the complainer and each of the two accused. In examination in chief his evidence included an account of seeing the appellant commit a violent act of rape against the complainer. As set out above, it became clear that he first of all declined to give any information to the police and subsequently gave a statement in which he only mentioned seeing the complainer having sex with the co-accused. He made no mention of the appellant's conduct. When counsel for the appellant began his cross-examination he turned almost immediately to the content of this statement. Without allowing the witness to have the production in front of him, he read the passage in which AS appeared to have told the police that he didn't see anyone else touch the complainer or have sex with after the co-accused had. The following exchange then occurred:

“Question – and that's what you said to the police isn't it?

Answer – yes

Question – and that's the truth isn't it?

Answer – yes

Question – because we know that you signed on page 10 that it was a true, you confirmed it was a true and accurate statement. So that was true what you were telling the police?

Answer – Aye, I feared for my own safety in the room.”

[23] Undaunted, counsel continued in his apparent attempt to secure the adoption of an account in which the appellant was not implicated and which was the opposite of what the witness had said in examination in chief. It involved the following exchange:

“Yeah, I’m asking about the statement you gave to the ... I’ll ask you about what happened in the room shortly, I’m asking you now about the statement that you gave to the police. That statement that you gave to the police said that, ‘After Billy had sex with her, I never saw anyone else touch, have sex with her or anything else.’ And you said that to the police, you’ve confirmed that. And I’m saying to you that’s true, that you never saw anybody else have sex with her or touch her, did you? – Yes. Yes what? – That’s true.”

When, as he indicated he would, counsel did return to what happened in the room the account which the witness gave, insofar as it was explored, was the same as he had given in evidence in chief. No contrary factual position was suggested to the witness by counsel for the appellant.

[24] From reading the transcript we were left with the impression, as can so often be the case in the course of questioning which moves backwards and forwards between an examination of what was said on a prior occasion and what actually happened, that the witness simply did not understand the underlying point which counsel was seeking to make about the prior statement. This was reinforced by the content of re-examination when it was elicited that the witness had given a further statement to the police in which he gave an account of seeing the appellant having intercourse with the complainer. As he put it, “they knew that when they came up and was speaking to me”.

[25] It does not appear that this witness had the benefit of any special measures when giving evidence but it is clear that he was a vulnerable individual. When he began his examination in chief one of the first things he explained was that he had difficulties with reading, writing and understanding. He reiterated his difficulty with understanding matters during cross-examination. When counsel for the appellant directed him to the

statement which he appeared to wish to have the witness adopt he read out a passage which included the words "Police have read this back to me in the presence of an appropriate adult and I can confirm it is a true and accurate statement." Both counsel and the trial judge have a duty to ensure that a witness such as this does properly understand what he is being asked to comment upon.

[26] To suggest that this witness gave evidence, by way of adoption, that he did not see any sexual contact between the complainer and the appellant is entirely artificial. It is a proposition which required to be advanced on the basis of ambiguous answers to questions which lacked the qualities of straightforward precision and clarity such as were essential in fairness to this particular witness. At best for the appellant the statement contained a prior inconsistent account. Yet it is difficult to understand what the complaint is. In his speech to the jury counsel for the appellant founded upon the fact that AS had agreed with him that what he had told the police was the truth. The direction which the trial judge gave was to the effect that the witnesses had adopted their statements because they accepted that what they had told the police was true. The jury were therefore enabled to treat the statement by AS as evidence of the truth of its content. If, as we think, there was no meaningful adoption then the misdirection was in the appellant's favour.

[27] Whether directions on prior inconsistent statements, or on adoption, will be necessary will of course depend on the use to which the participants wish to put any such evidence. Such directions ought only to be framed if they have any application. That is likely to be influenced by the content of counsel's speeches. In the present case it was only counsel for the appellant who made any mention of prior statements in his address to the jury. The passages he relied upon were those which we have rehearsed. As we have said, in our view, no directions on adoption were in fact necessary.

[28] Where such directions are appropriate it will be necessary for the jury to be directed on how adoption arises. Put simply, if a witness accepts that “his statement contains the truth ... [it] becomes part of his evidence” (*Rehman v HM Advocate* Lord Justice Clerk (Carloway) giving the opinion of the court at para [49]). However, this is a requirement which involves more than just an isolated acceptance by the witness at some passage in his testimony that he told the truth in giving a statement to the police. Adoption occurs when a witness says that he told the police the truth and that a particular statement to which he has been referred is correctly attributed to him/her (*Rehman v HM Advocate* para [52]). If the witness does not accept that the prior statement was true, it is not evidence in the case and is available only as a check on the credibility of what he said in the witness box (*A v HM Advocate*).

[29] In the present case there were certain passages in the evidence of the complainer where her attention was drawn to parts of her statement which she insisted were inaccurate – see transcript for 27 May at pages 80 to 81 and transcript for 28 May pages 18 and 19. These passages were drawn attention to by counsel for the appellant in his speech (transcript page 76) when he reminded the jury that the complainer had insisted that parts of her statement were not true and accurate. The matters concerned were trivial and of no relevance to the appellant’s case or to his defence but they serve to underline the point that the jury require to determine for themselves whether any given part of a statement has been adopted or not and that they can only do so on the basis of properly framed directions.

[30] The misdirections complained about were in the appellant's favour. There has been no miscarriage of justice. The appeal is therefore refused.