



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 43  
HCA/2020/8/XC

Lord Justice General  
Lord Justice Clerk  
Lord Menzies  
Lord Glennie  
Lord Turnbull

OPINION OF LORD CARLOWAY, the LORD JUSTICE GENERAL

In the

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

by

CH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: M Jackson, QC; Basten Sneddon**  
**Respondent: A Cameron, AD, Sol Adv; Crown Agent**

13 October 2020

[1] I am in full agreement with the reasoning of your Ladyship, the Lord Justice Clerk, particularly on the analysis of the concepts of relevancy and collateral matters following *CJM v HM Advocate* 2013 SCCR 215. This appeal should be refused. I also agree with the opinion of Lord Turnbull.

[2] The appellant is charged with raping the complainer after a night out with her and a female friend of the complainer. The libel is that, when the complainer was incapable of giving consent as a result of her consumption of alcohol, the appellant removed her clothes, tied her up and penetrated her vagina with his penis. The appellant's account is that the events libelled did not take place. He seems to accept that the complainer was under the influence of alcohol to some extent, since the appellant maintains that she was smelling of alcohol.

[3] In that state of affairs, the issues for trial are very straightforward: (1) was the complainer so drunk as to be incapable of giving consent; and (2) did the appellant have sexual intercourse with her while she was in that state. Anything which does not bear upon these two issues is irrelevant.

[4] The appellant seeks to lead evidence that, before going out with the complainer and her friend, he had had intercourse with her at the *locus*. At the material time, the appellant maintains that the complainer "came on to him" in a disinhibited manner, but he repelled her advances. He did not remove her clothes, tie her up or rape her. He did have intercourse with her on the following day.

[5] This is a classic case of an accused person attempting to deflect the jury's attention away from the real issues for trial by introducing irrelevant and collateral matters. Whether a complainer consented to have intercourse with an accused on different occasions is not normally relevant to the whether she consented to intercourse at the material time (see *SJ v HM Advocate* [2020] HCJAC 18, Lord Turnbull at paras [56] and [57], Lord Pentland at para [79]). It may be relevant in certain circumstances, including to explain scientific findings, but these are not present here where the issue is not concerned with consent at all but with the state of the complainer and whether intercourse took place.

[6] The general approach to relevancy and collateral matters was, it was hoped, made clear by the Full Bench in *CJM v HM Advocate* (*supra*, LJC (Carloway), with whom at least Lords Menzies and Brodie and Lady Cosgrove agreed, at para [27] *et seq* under reference to the authorities, including *Brady v HM Advocate* 1986 JC 68, LJC (Ross) at 197-198). It is regrettable that, despite several clear opinions of the court over the years since then, some judges and sheriffs have continued to fail to apply what ought to be well known rules of evidence in favour of determining what they consider to be fair, looking primarily, if not exclusively, at the interests of the accused rather than, in addition to his Article 6 right to a fair trial, the wider interests of justice, including the rights of the complainer (*CJM v HM Advocate* (*supra*) LJC (Carloway) at para [44]).

[7] Even if the evidence were relevant and not collateral, it is prohibited by section 274 of the Criminal Procedure (Scotland) Act 1995. This excludes evidence which tends to show that a complainer has at any time engaged in sexual behaviour not forming the subject matter of the charge. Section 275 does allow exceptions to this but, for the reasons given by your Ladyship, they do not apply to the appellant's case. This is because the evidence, which the appellant seeks to lead, is both irrelevant to the appellant's guilt and its probative value is not likely to outweigh the prejudice to the proper administration of justice, notably in connection with the complainer's dignity and privacy. The admission of this evidence or line of questioning would, as already observed, deflect the jury's attention away from the libel and onto other matters which occurred either earlier or later than the events with which the trial ought to be concerned.

[8] The facts which the appellant seeks to prove do not come close to forming part of the *res gestae* for the reasons given by Lord Turnbull under reference to *Cinci v HM Advocate* 2004 JC 103 and *O'Shea v HM Advocate* 2015 SCCR 66. In so far as it may be suggested that

these facts are relevant on the basis of either common sense or logic, Lord Turnbull's reference to the *dicta* of Justice L'Heureux-Dube in *R v Seaboyer* [1991] 2 SCR 577 (at 679) is entirely apposite as are those which make a distinction between the relevance of a long standing affectionate relationship and specific acts of sexual intercourse. *R v A (No 2)* [2002] 1 AC 45 was not referred to in the submissions by either party to the court. This was no doubt a considered decision. Suffice it to say, it predates the *dicta* of Lady Hale in *R v C* [2009] 1 WLR 1786 (at para 27) which might be seen as more reflective of modern thinking and values.



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OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

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**Introduction**

[9] This is an appeal under section 74 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") against the decision of the preliminary hearing judge refusing paragraph i(a) of the appellant's application under section 275 of the 1995 Act. This part of the application was not opposed by the Crown.

**The Legislation**

[10] **“274 Restrictions on evidence relating to sexual offences**

(1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainant —

(a) is not of good character (whether in relation to sexual matters or otherwise);

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainant —

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; or

(d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

...

**275 Exception to restrictions under section 274**

(1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that —

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour[, ] or to specific facts demonstrating —

(i) the complainant’s character; or

(ii) any condition or predisposition to which the complainant is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper

administration of justice arising from its being admitted or elicited.

(2) In subsection (1) above—

(a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature;

(b) “*the proper administration of justice*” includes—

(i) appropriate protection of a complainer’s dignity and privacy; and

(ii) ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies, relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury’s verdict,

...

(3) An application for the purposes of subsection (1) above shall be in writing and shall set out—

(a) the evidence sought to be admitted or elicited;

(b) the nature of any questioning proposed;

(c) the issues at the trial to which that evidence is considered to be relevant;

(d) the reasons why that evidence is considered relevant to those issues;

(e) the inferences which the applicant proposes to submit to the court that it should draw from that evidence; and

(f) such other information as is of a kind specified for the purposes of this paragraph in Act of Adjournal.

....

(6) The court shall state its reasons for its decision under subsection (1) above, and may make that decision subject to conditions which may include compliance with directions issued by it.

(7) Where a court admits evidence or allows questioning under subsection (1) above, its decision to do so shall include a statement—

(a) of what items of evidence it is admitting or lines of questioning it is allowing;

(b) of the reasons for its conclusion that the evidence to be admitted or to be elicited by the questioning is admissible;

(c) of the issues at the trial to which it considers that that evidence is relevant.

(8) A condition under subsection (6) above may consist of a limitation on the extent to which evidence—

(a) to be admitted; or

(b) to be elicited by questioning to be allowed,

may be argued to support a particular inference specified in the condition.

(9) Where evidence is admitted or questioning allowed under this section, the court at any time may—

(a) as it thinks fit; and

(b) notwithstanding the terms of its decision under subsection (1) above or any condition under subsection (6) above,

limit the extent of evidence to be admitted or questioning to be allowed.”

## **Background**

[11] The application related to a charge of rape in the following terms:

“(003) on an occasion between 1 July 2017 and 31 July 2017, both dates inclusive, at [an address in Fife], you... did assault [the complainer] ... and did whilst she was intoxicated with alcohol and incapable of giving or withholding consent, remove her clothing, bind her body with ropes, bind her hands with rope, attach a bar to her ankles, repeatedly penetrate her vagina with your penis and you did thus rape her: .....;”

## **The defence application**

[12] The application is introduced with a statement that the appellant denies having sexual intercourse with the complainer on an occasion when she was incapable of withholding or giving consent due to her being intoxicated.

## ***The evidence to be elicited***

[13] The evidence sought to be admitted or elicited was that the appellant was introduced



to the complainer by Crown witness number 5 ("A") during July 2017. They became "Facebook friends" and communicated for about a week before arranging a night out which included "A". The appellant picked up the complainer in his car from near the house which he understood she occupied with her ex-partner. Before meeting up with "A" the complainer and the appellant returned to the locus of charge 3 and had consensual sexual intercourse on 2 occasions.

[14] The complainer and "A" were drinking alcohol during the night out, but the appellant was not as he was driving. The complainer returned to the locus with the appellant. There she "came on to him" because she had been drinking and was behaving in a disinhibited manner. He refused to engage in any sexual activity with the complainer because he has an aversion to the smell of alcohol. The complainer was annoyed and frustrated at this. The following morning he had consensual sexual intercourse with the complainer.

*The nature of the proposed questioning*

[15] This was specified simply as putting this version of events to the complainer, leading it from the appellant, and putting questions relevant thereto to "A".

*The issues at the trial to which the evidence was said to be relevant*

[16] The only specification given under this heading is the assertion that the appellant denies the allegation in charge 3, and that the "evidence referred to at para 1 (a) is his account of events at or around the time of the alleged offence".

*The reasons why the evidence is considered to be relevant*

[17] It is asserted that the evidence "is an account of the two days that the [appellant] spent with the complainer", is contrary to her anticipated evidence and "serves to rebut the allegation that she has made and that informs the libel in charge 3".

*The inferences which the applicant proposes to submit to the court that it should draw from the evidence*

[18] These are said to be that the appellant is a credible and reliable witness, and that the jury should be cautious before accepting the account of the complainer.

**The decision of the Preliminary hearing judge**

[19] The preliminary hearing judge granted the application but only so far as capable of establishing that the accused and complainer went out on a night out. The preliminary hearing judge did not regard any evidence about the appellant and complainer having sexual intercourse on occasions other than that in the libel as relevant. The libel was one of having intercourse with the complainer whilst she was intoxicated and thereby unable to give consent. The preliminary hearing judge considered that nothing had been put before her to indicate that there was anything of any relevance in evidence that the complainer had consented to have sexual intercourse with the appellant, while not intoxicated, on other occasions.

**The appeal**

[20] A Note of Appeal has been lodged but this does not in fact specify any ground of appeal, nor does it contain any legal propositions. It does not state where the preliminary hearing judge can be said to have erred in her reasoning or why her decision should be impugned. Rather it simply asserts that, the appellant's evidence differing from that of the complainer, he "should be allowed to give his version in full given that he would be giving evidence of events said to have taken place during a forty eight hour period surrounding the alleged offence". It is further asserted that if the appellant is not allowed to "give his position in full in relation to that 48 hour period his evidence will inevitably be disjointed

and have gaps in it which will adversely impact on his credibility". It is asserted that the appellant's position that he did not wish to undertake sexual activity with the complainer when she was drunk was "bolstered by his evidence that he was willing to have sexual intercourse [with her] very shortly before and after the time of the alleged offence when she was sober, and not smelling of alcohol".

### **Submissions for the appellant**

[21] There was a narrow period of time when the couple were in each other's company. Were the appellant prohibited from explaining his position that sexual activity occurred prior to and after but not at the time of the alleged incident the jury would have from him only a blank denial of the offence. This came close to denial of the appellant's right to give evidence, at least in any meaningful way.

[22] While it was recognised that section 274, as a general rule, precluded evidence relating to sexual behaviour of the complainer other than that forming the libel of the charge, section 275 (1)(a)(i) allowed evidence of sexual behaviour of the complainer to be led if "the evidence demonstrates the complainer's character".

[23] The primary reason the appellant wished to be allowed to lead the evidence was to allow him to give his version of events in order to rebut the complainer's evidence. The evidence if accepted would have a negative impact on the assessment of the complainer's credibility and/or reliability which is a way of demonstrating her character.

[24] Section 275(1)(b) allowed evidence of previous sexual behaviour of the complainer to be led if that occurrence or those occurrences of behaviour or facts were relevant to establishing whether the accused was guilty of the offence with which he is charged. The evidence was relevant because it was the appellant's version of events. The present case

was one of the situations where the evidence of sexual activity not referred to in the charge was so closely related to the alleged offence in time, place and character that it was not collateral. The issue of consent did not arise because the appellant says that the specific episode of intercourse libelled in the charge did not occur. The appellant maintains that on return to the locus, the complainer “came on to him” because she had been drinking and was behaving in a disinhibited manner. He refused to engage in any sexual activity with her at that time because he has an aversion to the smell of alcohol. The complainer was annoyed and frustrated at this. It was recognised that assertions that the complainer “came on to” the appellant might require an application, but assertions that she was drunk and acting in a disinhibited manner would not.

[25] Section 275(1)(c) allowed the evidence in question to be admitted if the probative value was significant and was likely to outweigh any risk of prejudice to the proper administration of justice arising from its admission. The evidence was significant because without it, the appellant would be severely hampered in explaining his version of events should he choose to give evidence - there would be inexplicable gaps in his account. The complainer’s dignity and privacy would remain appropriately protected if the evidence were to be admitted.

[26] Counsel for the appellant recognised that as the courts had stated that consent had to be given at the time that sexual activity libelled in the charge was said to have taken place (*GW v HM Advocate* [2019] HCJAC 23), evidence of previous consent to sexual activity between the same parties would rarely be relevant (*Oliver v HM Advocate* [2019] HCJAC 93). Each case was different and fell to be decided on its own facts and circumstances (*HM Advocate v JW* [2020 HCJ 11], Lord Turnbull at [30]). The present application however, did not relate to the issue of consent but rather whether the allegation libelled in charge 3

took place. While the majority of the authorities in this area related to applications made where the issue was one of consent and not whether the activity labelled in the charge actually took place, it was submitted that the dicta of the court in *Oliver v HM Advocate* [2019] HCJAC 93 at paragraphs 4, 9 & 10 may nonetheless be of assistance to the court. In that case the court considered that evidence of sexual activity within a short period after an alleged incident could be relevant, and admissible as bearing on credibility.

### **Submissions for the Crown**

[27] It was submitted that the preliminary hearing judge did not err in law in refusing to allow the evidence, notwithstanding that the Crown had not opposed the admission of the evidence at the original hearing.

[28] Charge 3 described an allegation of the complainer being intoxicated and incapable of giving or withholding consent at the time of penetrative sexual activity, which the appellant denied. The central issues for the jury were (1) whether the appellant engaged in penetrative sexual activity at that time; and (2) if he did, whether the complainer was incapable of giving or withholding her consent.

[29] The complainer denied that there was any consensual sexual intercourse either before or after the incident labelled. Such matters, it was submitted, were thus not readily identifiable, were disputed and were collateral. They were irrelevant at common law as regards either of the two central issues for the jury to determine- *LL v HM Advocate* 2018 JC 182; *Oliver v HM Advocate* [2019] HCJAC 93; and *HM Advocate v JW* [2020] HCJ 11.

[30] *Esto* the evidence was admissible at common law, its admission was prohibited under section 274, and none of the exceptions in section 275 was made out. The application failed to specify adequately the issues at trial to which the evidence sought to be admitted

was relevant, the reasons why that evidence was relevant and/or the inferences a jury could reasonably draw from that evidence as required in terms of section 275(3)(c),(d) or (e).

[31] The appellant's description that the complainer had been drinking, was behaving in a disinhibited manner, "came on to him" and he refused to engage in sexual activity with her at this time, was his account of the subject matter of the charge. The written submissions for the Crown asserted that a section 275 application was not required to lead this evidence. However, in oral submission the Advocate Depute referred to the Preliminary Hearing Bench Book, para 9.2.4 of which stated that:

"Unless a particular type of sexual conduct is libelled within the charge it is suggested that it cannot be the subject matter of the charge. Any other interpretation creates uncertainty and has the potential to defeat the objects of the legislation which include that the complainer is not ambushed unfairly.

Accordingly if the accused wishes to say that sexual activity other than that referred to in the libel took place on the occasion which features in the charge, it is suggested that he requires to make a section 275 application."

It was recognised that differing views on this matter had been expressed. The Advocate Depute submitted that if the passage from the bench book correctly stated matters, the appellant may require an application to lead evidence that the complainer attempted to engage in sexual activity with him and behaved in a disinhibited fashion. To that extent he departed from the written submissions.

[32] Other incidents of consensual activity had no bearing on the two central issues for the jury. In particular, his description of post incident sexual relations was not necessary to explain other incriminating evidence. In any event, the probative value of the evidence would be insufficient to outweigh the risk of prejudice to the administration of justice including the appropriate protection of the complainer's dignity and privacy.

[33] Pressed by the court to offer submissions in respect of *Oliver v HMA* and potential inconsistencies between that case and others, such as *JW*, the Advocate Depute submitted that sexual behaviour in aftermath of an alleged incident was likely to be irrelevant, but one could not say that it would never be relevant. There was no hard edged rule, since cases were fact specific. A possible example where such evidence may be relevant would be where it provided an alternative explanation for injury or scientific evidence. As to the proposition, apparently set out in *Oliver* that if a woman consents to sexual activity with the accused a day or two, or longer, after an alleged sexual assault or rape, this could affect her credibility, in that it allowed an inference that it more likely that the prior sexual encounter was also consensual, the Crown did not accept this. Consensual sexual activity following on non-consensual activity cannot allow such an inference.

### **Analysis and decision**

#### *General test of admissibility at common law*

[34] The touchstone for consideration of an application under section 275 is that the evidence sought to be elicited is admissible at common law. That question of admissibility at common law is not simply a question of the exercise of a general discretion in the interests of fairness. As the court pointed out in *CJM* (para 32) it involves applying a

“well-trying and tested rule which exists for pragmatic reasons in connection with the administration of justice generally and for the protection of witnesses, notably complainers, who cannot be expected to anticipate, and defend themselves against, personal attack. There are recognised exceptions to the rule in criminal cases in situations where the collateral fact can be demonstrated more or less instantly and cannot be challenged. Thus the dishonesty of a witness can be proved, but only by reference to established fact in the form of a previous conviction”.

[35] As the court in *CJM* explained (para 28)

“The starting-point for a decision on whether this evidence is admissible is the general principle that evidence is only admissible if it is 'relevant' ... Evidence is

relevant when it either bears directly on a fact in issue (ie the libel) or does so indirectly because it relates to a fact which makes a fact in issue more or less probable ... The determination of whether a fact is relevant depends very much upon its context and the degree of connection between what is sought to be proved, or disproved, and the facts libelled. It is a 'matter of applying logic and experience to the circumstances of the particular case' .... The question is one of degree: 'the determining factor being whether the matters are, in a reasonable sense, pertinent and relevant and whether they have a reasonably direct bearing on the subject under investigation' ...".

[36] The decision in *CJM* may be summarised thus:

- (i) evidence is only admissible if it is relevant;
- (ii) evidence is relevant if it makes a fact in issue more or less probable: the testimony must have a reasonably direct bearing on the subject matter of the prosecution; this would exclude collateral evidence;
- (iii) if evidence is inadmissible at common law it is inadmissible under the statute;
- (iv) the very nature of the statutory provisions is to restrict the admissibility of evidence permissible at common law, not to expand it;
- (v) the former common law exceptions regarding the moral character of complainers was "swept away" by the legislation;
- (vi) the conditions for an exception within section 275 are cumulative.

[37] Amongst other sources of the general rule, the court referred to *Brady v HM Advocate*, 1986 JC 68 per the Lord Justice Clerk (Ross) at pp 73:

"The general rule is that it is not admissible to lead evidence on collateral matters in a criminal trial. Various justifications have been put forward for this rule. The existence of a collateral fact does not render more probable the existence of the fact in issue; at best a collateral matter can have only an indirect bearing on the matter in issue; a jury may become confused by having to consider collateral matters and may have their attention diverted from the true matter in issue. Whatever the justification for it, the general rule is clear"

[38] The matter is put clearly in Walkers' Evidence (4<sup>th</sup> ed) at para 7.1:



“Generally speaking evidence of character and evidence regarding an issue which is collateral to the main issue is inadmissible. A “collateral issue” is one which runs parallel to a fact in issue but evidence of it is generally inadmissible on grounds of relevance, because the existence of the collateral fact does not have a reasonably direct bearing upon a fact in issue and thus does not render more or less probable the existence of that fact, and it is inexpedient to allow an inquiry to be confused and protracted by enquiries into other matters.”

### **The effect of the statutory provisions**

[39] If the evidence would not be admissible at common law, it cannot be admitted in terms of the statute. If the evidence would be admissible at common law, it is nevertheless inadmissible if it relates to the matters referred to in section 274(1), and may only be permitted if the conditions in section 275 are met.

[40] It is important to understand that the granting of an application under section 275, as with admissibility in general, is based on the operation of rules, both common law and statutory: it is not a simple matter of the exercise of a general discretion in the interests of fairness. That mistaken perception was what undermined the original rape shield laws, as explained in *CJM v HM Advocate* in 2013:

“It is not unreasonable to comment that some courts, and prosecutors, appear to have found it difficult to balance the clear intent to restrict evidence in the wider interests of justice for all, and in particular complainers, with what they consider to be fair, looking primarily to the interests of the accused.”

[41] Sections 274 and 275 together constitute a statutory scheme which provides a general rule that evidence within categories (a) – (d) of section 274 is not admissible in sexual cases. Section 274 provides that the court “shall not admit” such evidence. This constitutes a complete prohibition: unless the evidence comes within the specified exceptions, cumulatively, of section 275 the evidence remains inadmissible. The sections, to use the phrase adopted in *CJM* (para 44) provide an “elaborate code” defining the parameters within which evidence must fit if it is to be admitted in contravention of the statutory

prohibition. The statute specifies the requirements of a valid application, which must be in writing and must address each of the matters identified in section 285(3). As Lord Brodie pointed out in *HMA v MA* 2008 SCCR 84, Parliament has been careful to impose quite precise requirements. An application must, at a minimum, comply with the requirements of section 275(3), and set out the requisite detail in a comprehensible manner. Careful attention to all parts of section 275(3) is necessary in order to explain to the court why it is being invited to allow evidence which would not otherwise be admissible. In *HMA v MA* the court went on to say (para 8):

“... details of the evidence, questioning, issues, reasons, and inferences which are referred to in paragraphs (a)–(e) of the subsection are set out in the written application in a reasonably specific and comprehensible manner ... ...regard should be had to the role of the application as an advocacy document, by which I mean a means of informing the court as to why the application is being made and as an aid in persuading the court that the tests ... are met. Parties, it may be assumed, will be familiar with their respective cases. The court, on the other hand, while it may be able to gather something from the indictment, any special defence and the documentary productions, if available, cannot know precisely how it is proposed to prosecute and to defend the charge. If it is to make a decision on a section 275(1) application the court is likely to require some information, specific to the instant case, and in sufficient detail to allow it to understand why it is being invited to admit otherwise inadmissible evidence. In my opinion, that information should be contained in the written application.”

[42] In the present case, only cursory consideration appears to have been given to these matters. Experience suggests that this is not uncommon. In *LL v HM Advocate* it was remarkable that neither at the preliminary hearing nor in the appeal could counsel identify any proper inference that might be drawn, or say how the issue bore on the question of free agreement at the time of the incident. Paragraph (d) of subsection 3 was not even addressed, either in the application or in the submission. Equally, in *HMA v JG* [2019] HCJ 71, the application seems to have complied only with the more straightforward requirements of subsection (3), namely (a) and (b). So far as (c) – (e) were concerned the

application seems to have done no more than parrot the terms of the legislation. This was not sufficient to comply with the statutory requirements and the application itself was thus seriously deficient in form. Apart from the deficient terms of the application, the other notable point in that case was that there was no attempt during submissions by either side to address the conditions specified in paragraphs (a) or (c) of section 275(1), despite the fact that the section imposes a cumulative test.

[43] Paragraphs (c)-(e) of section 275(3) are of particular importance, since these are designed to explain to the court:

- (i) the issue(s) to which the evidence is said to be relevant;
- (ii) why it is said to be relevant – a mere assertion that it is will not suffice;
- (iii) what inferences the party will seek to draw from the evidence; and
- (iv) why it would be legitimate for the jury to be entitled to consider those inferences in the circumstances of the case.

It should go without saying that the application should have regard to all three of the conditions specified in section 275(1), as well as the impact on the complainer's privacy and dignity which is an essential part of condition (c). It should be appreciated that the use to which the material, if admitted, may be put is constrained by the inferences which the court considers are reasonable ones to draw from the evidence and which it would be reasonably open to the jury to draw. That is why section 275(8) makes provision for the court to place a limitation on the extent to which evidence may be used to argue specific inferences. It is also why detailed attention must be given to section 275(3) at the time of drafting the application, with a sufficient degree of specification.

[44] These matters were all identified in *RN v HMA* [2020] HCJAC 3:

“26. When representatives are preparing an application under section 275 they should keep all these matters in mind. They should understand that since the evidence is prima facie inadmissible the focus should be on providing a full explanation for the proposition that the court should nevertheless admit the evidence, concentrating strongly on the statutory tests. Proper consideration of section 275(3) is important in this regard. This was noted by Lord Brodie in *HMA v MA* 2008 SCCR 84 where he stated that an application must, at a minimum, comply with the requirements of this subsection, and set out the requisite detail in a comprehensible manner. This is material which the court requires in order to understand why it is being invited to admit otherwise inadmissible evidence. All the matters referred to therein should be included in the application and should be addressed separately in respect of each piece of evidence or proposed questioning. Paragraph (a) is self-explanatory. Paragraph (b) is designed to enable the court to understand not only what is to be put but the evidential basis for doing so. Paragraphs (c) to (e) are particularly important. Paragraph (c) requires the application to explain what the issues at trial are to which the evidence is relevant, and paragraph (d) requires an explanation of why it may be considered relevant to those issues. The paragraphs hinge together, and it is singularly unhelpful simply to say "credibility and reliability" under (c) and make a mere assertion under (d) that the evidence is relevant. Bald assertions will not be sufficient to meet the requirements of the subsection (see *JG v HMA* 2019 HCJ 71, para 35). Explanation is required. The explanation should lead naturally to being able properly to set out for the court in a clear and understandable way the inferences to which it is said the evidence reasonably gives rise. .... These are issues which should be addressed at the time of drafting the application, since the court, before granting an application, must understand what these inferences are, and be satisfied that they are legitimate ones which could reasonably be considered by a jury on the basis of the evidence in question. Deficiencies in an application may result in the court refusing to hear the application (see *JG*, paragraph 36).”

In fairness, senior counsel for the appellant frankly acknowledged that the present application was significantly deficient in detail and specification.

### **The relevance of pre or post incident consensual sexual activity**

[45] The cases of *LL v HMA* 2018 JC 182; *SJ v HMA* 2020 SCCR 227; *Oliver v HMA* [2019] HCJAC 93; and *Lee Thomson v HMA*, 13 December, [2019] HCJAC 2019 unreported, are all cases in which this point was aired.

[46] In *LL*, where the libel concerned charges of rape and sexual assault alleged to have been committed by the appellant in July 2016, with a special defence of consent, the court

considered that evidence of consensual sex between the parties in October 2015 at the same locus was not admissible at common law being collateral to the events in the charge. The court went on to say (para 14):

“We simply do not see why the fact that there was free agreement and reasonable belief as to that agreement on one occasion, makes it more or less likely, as a matter of generality, that there was free agreement and reasonable belief as to that agreement on another occasion many months later.”

[47] This accorded with the view of the PH judge that:

“Consenting to intercourse on an occasion in October 2015 shed no light on whether there was consent to intercourse or reasonable belief that there was consent to intercourse in July 2016”.

[48] In *SJ* there were libelled charges of sexual assault and rape in respect of the one complainer on the evening of 11 January 2019, into the morning of 12 January, again with a special defence of consent. In terms of a section 275 application the appellant sought to elicit (a) evidence of an instance of consensual sexual intercourse on 1 January 2019, and (b) of the complainer having sexual intercourse with B, at the locus, shortly after the alleged incident on 12 January. It was argued that evidence of the former was relevant to show the true nature of relations between the appellant and the complainer. Rejecting that argument, Lord Turnbull, with whom Lord Pentland agreed, said:

[56] In my opinion, there can be no freestanding purpose, or relevance, in establishing that the friendship between the complainer and the appellant had included prior amorous or consensual sexual behaviour of a limited kind. Such evidence can only pass the test of relevance if it bears in some meaningful way on the issue at trial.

[57] The issue at trial will be whether or not the complainer consented to the events of 11/12 January. To seek to demonstrate that the appellant and the complainer’s ‘real’ level of prior association was one which included recent amorous and sexual contact, can only have any relevance to this issue if it is contended that evidence of prior sexual contact will illuminate the question of whether or not consent was present on 11/12 January. Senior counsel for the appellant expressly rejected the suggestion that this was the purpose in leading this evidence. However,

it is fair to comment that, when pressed, counsel herself had some difficulty in articulating a proposition which identified where the relevance of the evidence lay.”

[49] At para 69 Lord Turnbull suggested that the evidence “would be an almost classic example of a collateral issue”. The second piece of evidence which was the subject of the application was “entirely irrelevant”.

[50] Lord Pentland, in his concurring opinion, stated that the evidence referred to in paragraph (a) of the application was “not capable of shedding any light on the real issues” at trial. The evidence was remote in time from the period of the libel, and related to a quite different context. The evidence was “quintessentially collateral in nature” (para 76). He added (para 78) that:

“To say that these alleged facts add colour or context or form the background to the circumstantial case against the appellant merely begs the question [of their relevance].”

[51] Lord Pentland also noted (para 79) that:

“In past practice this sort of peripheral and hence irrelevant evidence was sometimes led on the basis that the events that were the subject of the libel had to be put into a wider context. Recent authorities in this court, such as those to which Lord Turnbull refers, have brought a much sharper focus to bear on the question of whether evidence of other sexual behaviour, which I note is now the subject of a strong statutory prohibition in section 274(1)(b), is truly capable of assisting in the resolution of the real issues ... Suppose that all of the matters sought to be led were proved at the trial to be factually accurate, what could one logically draw from them for the purpose of deciding whether the appellant and the complainer engaged in non-consensual sexual activity as alleged in charges 1 and 2? In my opinion, the answer to that question is: nothing.”

[52] In *LL* the argument was similar to that noted in *SJ*, namely that, irrespective of the particular circumstances, evidence of a previous consensual sexual encounter was relevant to resolution of the issues that will arise in a trial on an indictment libelling a charge of rape, as providing the “full picture” as to the relationship between the accused and the

complainer. The argument relied on a series of older decisions, many from the 19th century.

The court rejected that argument stating (para 19) that whilst such cases might reflect a

“general late nineteenth century view (or at least a late nineteenth century judge's view) about how people might be expected to behave. We do not see it as a reliable guide as to how people might be expected to behave in the early twenty-first century. Understandings have changed.”

[53] In *Oliver v HMA* the charges libelled offences of sexual assault and assault against complainer A on 3 and 4 September 2017 and included a charge of rape and attempted murder in relation to complainer B in October 2018. In relation to the charges involving A the defence was that these incidents had simply not happened. In relation to B the appellant lodged a special defence of consent asserting a consensual course of sado-masochistic behaviour. The preliminary hearing judge refused those parts of a section 275 application in respect of A whereby the appellant sought to lead evidence (a) that the complainer chose to stay with the appellant in his flat in the period immediately following the events libelled, between 3 and 5 September 2017, and that during this time they engaged in sexual intercourse; and (c) of a similar kind but relating to a period at least 8 weeks after the alleged incident.

[54] The basis upon which both were said to be relevant was that the complainer's actions in staying with the appellant and engaging in consensual sexual intercourse with him in this period cast serious doubt on her credibility, in that it was unlikely that she would have agreed to do this in the immediate aftermath of a sexual assault by the appellant on her on 3 September, and a separate assault by him on her on 4 September.

[55] The court had no difficulty in concluding that the preliminary hearing judge had been correct to refuse part (c) as collateral, being too remote to have any bearing on events at the time of the alleged incident. In respect of part (a), noting that it would rarely be relevant

to lead evidence that a complainer has consented to sexual activity on an occasion prior to the events libelled, the court considered that the situation was different in relation “to material concerning actions by a complainer in the immediate aftermath of an alleged event” by which they meant “a period of hours, or perhaps a day or two, following an alleged event”. So long as restricted in this way to the “immediate aftermath” of the libel the matter would not be collateral, and was of sufficient probative value to render the evidence admissible. The reasons the court gave appear in para 9:

“It appears to us that there is some force in the submission for the appellant that a jury may find assistance, when assessing the credibility of a complainer, from evidence as to his/her behaviour in the immediate aftermath of events which are alleged to have occurred. They might take the view that, even in a situation where the appellant and the complainer are partners, the complainer’s decision to continue to reside in the same house with him and to engage in consensual sexual relations with him over the following day or two undermine the complainer’s credibility. Of course, they might not take this view, and there might be circumstances to explain the complainer’s behaviour. Juries are frequently asked to consider the behaviour of a complainer in the immediate aftermath of an event, for example, when considering the evidential value of distress in supporting lack of consent.”

[56] In relation to B, the application contained a paragraph, (e), seeking to lead evidence of various statements said to have been made by the complainer to the appellant in the course of a train journey on the day before the events libelled as rape, which included the libel of anal penetration. The original wording of the application included an assertion that the complainer stated that she wanted to engage in anal intercourse with the appellant outside later on that evening. The preliminary hearing judge refused most of paragraph (e) but allowed the statement to the extent of permitting the suggestion that the complainer told the applicant that she wanted to engage in sexual activity with him at his house on that date. Her reasoning was endorsed in the appeal, with the comment that the original statement might even have to be revisited once the results of an examination of phone messages was known.



[57] In *Thomson* the application related to two complainers, and in each case asserted that after the final date of the libel relating to each complainer the complainer and appellant had continued to meet regularly for consensual sexual intercourse. In refusing the appeal the court remarked:

“As the PH judge identified, the fact that a person may have consented to sexual activity on one occasion has no bearing at all on whether they consented on another occasion, either before or after the incident in question, save possibly, in particular circumstances, in the immediate aftermath. In general terms, the fact that a complainer has consented to sexual activity on previous occasions does not make it more or less likely that he/she will consent to sexual activity on a subsequent occasion. It follows, we think, that it will rarely be relevant to lead evidence that a complainer has consented to sexual activity on an occasion sometime before the events libelled.”

The phrase “save possibly, in particular circumstances, in the immediate aftermath” is clearly a reference to *Oliver* and may suggest some doubt about that decision, at least in respect of the envisaged timescale during which subsequent sexual behaviour may be said to have relevance.

[58] The apparent tension between *Thomson* and *Oliver* was recognised by Lord Turnbull in the first instance case of *JW*. Part of the application in *JW* related to alleged consensual sexual activity some hours after the alleged incident, which was said to be relevant to the question of consent at the time of the prior, libelled, incident. Rejecting that submission, Lord Turnbull stated:

“26. In my opinion, the contention that the appellant engaged in consensual sexual intercourse with the complainer at a point between 9.30am and 10.30am has no bearing at all on whether she consented to sexual activity with him in the early hours of the morning at his house at some time between 4.30am and 7.00am. In the course of the debate, Ms Green's initial submission was that evidence of a consensual act of this sort would have a direct bearing on the question of whether consent was present on the earlier occasion. This seemed to be in conflict with the concept of autonomy which underpins the Sexual Offences (Scotland) Act. I thought it would be of value to bear in mind the remarks made by Lady Hale in *R v Cooper* [2009] UKHL 42, (as quoted with approval by the Lord Justice-General (Carloway) at paragraph [31] of *GW v HM Advocate*):

'[I]t is difficult to think of an activity which is more person – and situation – specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by art. 8 of the European Convention ...'

27. When challenged on her submission Ms Green modified it to the proposition that the evidence sought to be elicited would bear on the credibility of the complainer, rather than directly on the events themselves. This, it appeared to me, would mean that it was evidence of the kind discussed in *CJM v HM Advocate* 2013 SCCR 215 at paragraph [29]. On this basis the application seeks authority to admit evidence which has no direct or indirect connection with the facts in issue, but may conceivably affect the weight to be attached to testimony which does have direct relevance to the facts, in this case the testimony of the complainer as to the absence of consent on the occasion specified in the charge.

28. The weakness in the argument advanced is however obvious from the terms of part 4 of the application. That part is headed 'The reasons why the evidence is considered to be relevant are as follows:' The explanation of the relevance of the evidence sought to be elicited in paragraph 1g), as given, is this:

'That the complainer's willingness to have sexual intercourse with the accused in his vehicle some hours after the alleged rape in his home, tends to support the position that the complainer consented to the intercourse in his home. This is particularly so given that the complainer was in possession of her car keys and was in a position to leave the accused and drive herself home.'

[59] It will be seen that the ultimate basis upon which the evidence was said to be relevant is not dissimilar to the proposition in *Oliver* that apparently consensual sexual activity shortly post-incident was capable of undermining the complainer's credibility regarding the earlier incident, on the basis that it would seem unlikely that the subsequent activity would have taken place had a non-consensual incident occurred shortly before.

[60] His Lordship however distinguished *Oliver* on the basis that the evidence of what was said to have happened in that case was not in dispute, and so was readily established,

thus it did not run the risk of diverting attention to extraneous matters. He also relied upon what was said in *Thomson*.

[61] The other element of *JW* where the decision departed from *Oliver* was in relation to the alleged intimation in advance of a desire by a complainer to indulge in sexual activity with the appellant. The application sought to lead evidence of communications between the complainer and appellant in the days before the alleged incident, in which reference was made to the complainer's preference for a particular sexual activity. Noting that *GW v HM Advocate* 2019 JC 109 requires consent is to be given, in whatever form, at the time of the sexual act and not at a point remote from it. Lord Turnbull stated (para 19) that

“If consent cannot lawfully be issued in advance, the question of consent in relation to the sexual act between the accused and the complainer specified in the charge cannot be illuminated, or determined to any extent, by prior expressions of interest in sexual conduct with the accused, or by expressions of interest in any particular type of sexual activity.”

[62] He did not consider the evidence of the communications to be relevant. In para 25, he made reference to the decision in *Oliver* (in respect of complainer B, as noted above) and indicated that insofar as his own decision conflicted with *Oliver*, he had relied upon what had been said by the court in *Thomson*.

[63] *JW* ([2020] HJC 11) is now reported as *HM Advocate v JW* 2020 SCCR 174. The report contains the following *coda*:

“[38] The Lord Justice General sitting with Lords Brodie and Pentland on 27 February 2020 considered an appeal in relation to this opinion. The court's decision was recorded as

‘having heard counsel for the appellant and the advocate depute in reply, agreeing with the terms of the report to this court by the judge at first instance, affirmed the decision of the court at first instance, refused the appeal and decerned.’”

[64] It is appreciated that the arguments advanced in this case are subtly different from those in *Oliver* since in this case there is no special defence of consent and it is not being maintained that the relevance of the evidence lies in the bearing it may have on the question of consent at the time of the charge. Furthermore, whereas in the present case the alleged sexual behaviour, and the issue of its common law relevance, is disputed, that was not the position in *Oliver*. In that case there was no dispute that the behaviour had occurred, so it could readily be established. There was in fact an explanation being offered to account for the behaviour. In addition, the Crown did not dispute that the evidence was admissible at common law, so the only issue which the court proceeded to address related to the statutory test. These were some of the factual differences which led Lord Turnbull to feel able (para 30) to distinguish *Oliver* in his decision in *JW*. As he noted, all cases of this kind are to some degree fact specific. There are in my view several difficulties with the approach adopted in *Oliver*. If evidence of conduct some weeks after an alleged incident is not capable of throwing light on the question of consent at the time of the alleged incident, (as the court in *Oliver* determined) what is the basis for saying that such evidence is capable of throwing light on the issue if it relates to something which happened within a day or so? In each case the argument is essentially the same, namely that evidence of a subsequent consensual act is capable of bearing on the question whether a prior act was consensual. I fail to see how this can be other than collateral. Moreover, any general relevance that it may have is so weak and remote that it cannot be said that it would have significant probative value or outweigh the risk to the administration of justice from its admission, specifically in respect of safeguarding the dignity and privacy of a complainer. I agree entirely in this respect with the observations of Lord Turnbull in paras 27- 29 of *JW*.

[65] The other aspect of *Oliver* which gives rise to concern is the suggestion that communications in which a willingness to engage in sexual intercourse at some time in the future was expressed may be relevant to the question whether, on an entirely different and subsequent occasion, such consent was in fact given. This seems to me to be entirely inconsistent with *GW* and I again agree with Lord Turnbull in *JW*.

[66] In both *LL* (para 14) and *SJ* (para 77) the court took care to say that it was not suggesting that a previous sexual encounter could never be relevant, and took some care to explain the circumstances which might be expected if relevance was to be established. At para 14 of *LL* the court said:

“That is not to say that there may never be cases where a previous act of intercourse might not be relevant to the issue as to whether the complainant consented on a subsequent occasion or to the issue of whether an accused reasonably believed that the complainant was consenting. However, in such a case particular circumstances would have to be averred to demonstrate what was said to be the connection between what we would see as, *prima facie*, unrelated events. Here there are no such averments.”

[67] The key lies in the basic concept of relevance as discussed in detail in *CJM* and also in para 13 of *LL*- “not every fact that has some conceivable connection, however distant, with the facts in issue is a relevant matter for enquiry”. As Lord Pentland put it in *SJ* (para 77):

“It all depends on the degree of connection in the particular circumstances of the case.”

The fact remains that the test for either post or pre charge conduct remains the same: that it will only be relevant if it has a reasonably direct bearing on a fact at issue in the trial, in the sense of making that fact more or less probable. In the course of debate the Advocate Depute gave an example of evidence which might be relevant to provide an alternative explanation for injuries or for the presence of scientific evidence, such as DNA. One can see

that these may be circumstances in which prior or subsequent sexual activity within a very short time frame may be considered relevant, but, as noted in *LL* the particular circumstances would have to be averred to demonstrate the connection between what are, *prima facie*, unrelated events.

### **The current application**

[68] The current application seeks to permit evidence that some hours prior to the alleged incident, before the appellant and complainer had gone out for the evening, the complainer consented to sexual intercourse with the appellant, and again did so the following morning. On the face of it, this is a collateral issue. The libel is one of having intercourse with the complainer whilst she was intoxicated and thereby unable to give consent. As the preliminary hearing judge noted, it does not appear relevant to that issue to show that the complainer may have consented to have sexual intercourse with the appellant, while not intoxicated, on other occasions.

[69] According to the terms of the submission, the appellant wishes to tell the jury that he did not have intercourse with the complainer when she was drunk and incapable of consenting but rather the couple had consensual intercourse on three other occasions when she was perfectly sober: twice before a night out during the 48 hours they were in each other's company and once afterwards.

[70] The appellant wishes to lead this evidence "to rebut" the complainer's allegation that he had sex with her whilst she was drunk and incapable of consenting. He seeks to do so by leading evidence that on other occasions, when she was neither drunk nor incapable of consenting, the two had consensual sex. It is said that the situation is different from cases such as *LL* and *SJ* since the issues do not relate to consent but to whether the incident

happened at all. I do not see that this advances the matter: it is still necessary to identify in what way the evidence of those other occasions is relevant to an issue in dispute at the trial, and capable of helping the jury resolve that issue. Examining the submissions with care, I cannot see that the evidence has this quality. Incidents of sober, consensual sex on other occasions would not be capable of “rebutting” the complainer’s evidence as to the charge libelled. Evidence of consensual sober sex on other occasions is *prima facie* irrelevant to the question whether non consensual sex occurred on another occasion when the complainer was drunk and incapable of giving consent. Assuming for the moment the disputed assertion that consensual sex did take place on these other occasions, this would shed no light on the question whether at the time of the libel, the appellant acted in the way alleged. It is not therefore evidence “relevant to establishing whether the accused was guilty of the offence with which he is charged”.

[71] In any event, it is not accepted that consensual sex occurred on these other occasions: this is a matter entirely in dispute. Essentially the appellant seeks to lead evidence of another matter in dispute between himself and the complainer to seek to persuade the jury that his version of a separate matter in dispute is to be preferred. Dr Johnson could not devise a better definition of a collateral matter.

[72] Even if the evidence had been admissible at common law, it would be prohibited under the statute. In this context it is worth referring to the appellant’s reasons for asserting that the evidence is relevant to an issue at trial and should be admitted. The first is his claim that he is repelled by the smell of alcohol and that he would not have intercourse with anyone smelling of alcohol. The possibility that the appellant had intercourse with the complainer when she was sober and not smelling of alcohol does not give, and is itself not capable of giving, rise to an inference that he would not have done so had she been smelling

of alcohol. It is only the evidence of the appellant that he would not have done so which would be capable of allowing that inference, and that is evidence he would be perfectly capable of giving without the current application. Equally, he would be entitled to lead evidence from others, who from intimate connection with him, know the smell of alcohol to be repulsive to him. It is not at all necessary to the placing of such evidence before the jury that the matters referred to in the application be admitted in evidence, or that the complainer be asked whether, on other occasions she had consensual intercourse with the appellant.

[73] I do not fully understand the submissions that the evidence in question was admissible as demonstrating the complainer's character. Allowing for the "invisible comma" (*HMA v MM* 2005 1 JC 102), section 275 (1) allows consideration of evidence of a specific occurrence or occurrences of sexual behaviour, or of specific facts demonstrating, *inter alia*, the complainer's character. It is the former, not the latter which arises in this case. I cannot see how the evidence in question may reflect on the complainer's character in any event, even if it may have some remote bearing on credibility. As Lord Rodger of Earlsferry pointed out in *DS v HM Advocate* 2007 SC (PC) 1 para 78,

"Plainly, the evidence is not admitted simply for its bearing on the credibility of a complainer as a witness. If that had been the legislature's intention, it would have spelled it out".

The heart of the argument in the present case is little more than the submission that the jury should be presented with the "full picture" of relations between the parties, an argument which was rejected in both *SJ* and *LL*.

[74] In relation to the incident libelled, apart from the references to consensual acts of intercourse the appellant asserts in para 1(a) of the application, *inter alia* that after a night out he and the complainer returned to his home. She was intoxicated and "came on to him



because she had been drinking and was behaving in a disinhibited manner". He refused to engage in sexual activity with her and she became annoyed and frustrated at this. On its own, the fact that a complainer was intoxicated is not something which would obviously require an application under section 275. However, the likelihood is that the jury would not simply be presented with the fact of intoxication, but would be asked to draw certain inferences from this. It may be that those inferences would be such as would require an application. In the present case the assertions are combined: not just that she was drunk but that because she had been drinking she "came on to" the appellant, and was acting in a "disinhibited", presumably sexual, manner. In the absence of specification it is not clear what this involved, but both this behaviour and her apparent disinhibition appear to be combined to suggest some sort of sexual advance to the appellant which he rejected. The issue of the complainer's intoxication cannot be separated from this allegedly sexual behaviour. If I have correctly understood the import of the proposed evidence it does in my view require an application and I reject the submission for senior counsel that these matters can be separated out from each other in some way. The Advocate Depute was wrong in my opinion to suggest that this evidence did not require an application because it was merely the appellant's account of the subject matter of the charge. The position is correctly stated in the Preliminary Hearing Bench Book that unless a particular type of sexual conduct is libelled within the charge it cannot be the subject matter of the charge. The legislation states that an application is required for any behaviour "not forming part of the subject matter of the charge". It does not say "any behaviour not occurring at the time of the charge" or any other possible wording. The wording of the statute is firmly tied to the wording of the libel. In the present case, I do not think that it would be appropriate for this court to grant the application limited to this part of it, for several reasons. First, because the material is, in the

application tied in very much with the wider aspect of evidence for which the appellant sought permission. Second, because of the lack of specification as to the alleged behaviour. Third, because the application does not properly address section 275(3) in appropriate detail in respect of this evidence. However, I would not see the decision in this case as precluding a further, properly drawn application restricted to this matter.

[75] I have had the advantage of reading the opinion of Lord Turnbull with whose observations I am in agreement, thus differing from the views expressed by Lord Glennie. In the first place, I agree with Lord Turnbull about what constitutes the *res gestae*. As his Lordship notes, in *Cinci v HMA 2004* JC 103, the Lord Justice Clerk (Gill) stated (para 9) that the *res gestae* principle is founded on the idea that the words spoken are “part of the event itself”. If the words, “though closely related to the event, are not part of the event” they cannot be treated as part of the *res gestae* (para 12).

[76] As to *R v A*, in respect of which I also agree with Lord Turnbull, there are three preliminary issues worth noting. The first is that the legislation being construed was not in the same terms as the rape shield provisions of the 1995 Act. The exclusionary provisions in England amounted to a blanket ban which on the face of it extended to evidence of a relationship of cohabitation, and to other categories of evidence as to sexual relations between the defendant and complainant which would otherwise meet the test of relevancy, unless they fell “within an extraordinarily narrow temporal restriction” (Lord Steyn, para 40). That is not the case with the Scottish legislation. In *Moir v HMA, 2005* JC 102 the Lord Justice Clerk (Gill, with whom the other judges agreed) considered that the terms of section 274 would not exclude evidence of cohabitation, even before taking into account the need to reflect section 3 of the Human Rights Act 1988. Other evidence of specific acts may be admitted if relevant to establishing whether the accused is guilty of the offence with

which he is charged, may be admitted, so long as the requirement of having sufficient probative weight are met. In my view this is entirely consistent with the way in which the House of Lords determined that the English legislation required to be interpreted.

[77] The second is that the observations in *R v A* were made in the context of the relevance which the evidence in question might have to the issue of consent, which is an issue which simply does not arise in the present case. It seems that what the appellant seeks to do would in fact be prevented by the approach adopted in *R v A*: see Lord Hope, at para 95:

“A prohibition of evidence and questions about the complainant’s sexual behaviour on other occasions whose purpose, or main purpose, is to elicit material to impugn the credibility of the complainant as a witness seems to me to strike the correct balance. If the sole purpose is to impugn credibility, the defendant has no rights in the matter at all. The complainant’s sexual behaviour on other occasions is irrelevant. No inferences can properly be drawn about her credibility from the mere fact that she has engaged in sexual behaviour on other occasions.”

[78] The third point about *R v A* is that the issues in the case were, of necessity, discussed at a high degree of generality, without specifying the applicable test for relevancy of evidence. That was no doubt partly because the terms of the application related to the bare assertion of his previous sexual relationship with the complainant, and without more detail, of the kind which I have referred to above as being necessary for the court to make a proper assessment under section 275. The appellant was given the opportunity to renew (and expand upon) his application before the trial judge, for a decision on the merits. It is difficult to see that the application as stated could be viewed as relevant. As Lord Hope noted, para 105, the mere fact that the complainant had consensual sexual intercourse with the accused on previous occasions was not relevant to the issue whether she consented to intercourse on the occasion of the alleged rape.

[79] The decision in *R v A* was simply that a prior consensual sexual relationship between a complainant and the defendant **might**, in the circumstances of an individual case, be relevant to the issue of consent, with the result that the Article 6 rights of a defendant would be breached were he denied the admission of relevant evidence where its absence would endanger the fairness of the trial under article 6 (Lord Steyn, para 46). If evidence is of such a quality, it follows that it is plainly evidence which bears directly on a central question in the case, in particular the question of consent. If it did so, it would meet the test of relevance applied to 1995 provisions. If it did not do so, it would be irrelevant, whether under the legislation in England and Wales, as interpreted in *R v A*, or whether under the 1995 Act.

[80] The observations by Lord Steyn at para 32, that “there was broad agreement that such evidence is sometimes relevant (e.g. an ongoing relationship) and sometimes irrelevant (e.g. an isolated episode in the past),” with the comment that an accused should be able to advance “truly probative material” (para 45), are again consistent with the approach taken to the 1995 provisions, which do not exclude truly probative material: all that is required of the accused is to satisfy the court that the material falls into such a category in the circumstances of the case. Material which related to an isolated incident, distant in time and circumstances, described in *R v A* as irrelevant, is equally unlikely to meet the test of relevancy applied to the provisions of the 1995 Act.

[81] In conclusion therefore, in my view the evidence relating to alleged consensual activity on other occasions is not admissible at common law as being collateral. Even if it were admissible at common law, it would be prohibited by statute and could not be brought within any of the permitted exceptions. The appeal should therefore be refused.



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 43  
HCA/2020/8/XC

Lord Justice General  
Lord Justice Clerk  
Lord Menzies  
Lord Glennie  
Lord Turnbull

OPINION OF LORD MENZIES

in

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

by

CH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: M Jackson, QC; Basten Sneddon**  
**Respondent: A Cameron, AD, Sol Adv; Crown Agent**

13 October 2020

[82] I agree with the Lord Justice Clerk that the evidence sought to be led in this case relating to alleged consensual activity on other occasions is collateral, and not admissible at common law. It follows that issues under s 275 of the 1995 Act do not arise. I agree that the appeal should therefore be refused. However, I should like to make some brief observations about the decision of the court in *Oliver v HM Advocate* [2019] HCJAC 93, and how that case may relate to the present appeal.

[83] I consider that the Advocate Depute was correct (as mentioned above at para [33]) to submit that sexual behaviour in the aftermath of an alleged incident was likely to be irrelevant, but one could not say that it would never be relevant – there is no hard-edged rule, since cases are fact specific. However, I do not accept that the court in *Oliver* set out or endorsed the proposition that if a woman consents to sexual activity with the accused a day or two, or longer, (emphasis added), after an alleged sexual assault or rape this could affect her credibility. At para [9] of the opinion in *Oliver* the court stated that “in general terms, the fact that a complainer has consented to sexual activity on previous occasions does not make it more or less likely that he/she will consent to sexual activity on a subsequent occasion. It follows, we think, that it will rarely be relevant to lead evidence that a complainer has consented to sexual activity on an occasion sometime before the events libelled. However, it appears to us that the situation may be different in relation to material concerning actions by a complainer in the immediate aftermath of an alleged event. We emphasise the words “immediate aftermath”; we have in mind a period of hours, or perhaps a day or two, following an alleged event.”

[84] First I would observe that the court deliberately used the words “the situation may be different” – not, as submitted by counsel for the appellant in the present appeal “would be relevant”. It is clear from *Oliver* that the court recognised that there was no hard-edged rule, and that cases are fact specific. *Oliver* is not authority for the proposition that any evidence of events occurring within the immediate aftermath will be relevant.

[85] Secondly, the court in *Oliver* expressly stated that it had in mind when using the term “immediate aftermath” a period of hours, or perhaps a day or two. It did not have in mind, as the Advocate Depute suggested in the present appeal, a period of a day or two “or longer”. On reflection I have come to the view that the words “perhaps a day or two” may

cause a misapprehension that a longer period might be relevant. I have reached the conclusion that these words, even prefaced as they were by “may” and “perhaps”, are neither necessary nor appropriate, and for my part I have concluded that “the immediate aftermath” should be reckoned in hours, not days.

[86] Moreover, it is important to take account of the factual circumstances in *Oliver*, and the position adopted by the Crown in that appeal. The Crown accepted in that case that the complainer continued to stay with the appellant and had consensual sexual intercourse with him in the immediate aftermath of the alleged incident. Accordingly there was little risk that the jury would be distracted by an exploration of evidence of a collateral matter which was itself a disputed issue – there was no dispute on the facts of the collateral material. Moreover, the Crown did not challenge the relevancy at common law of this material, but confined its submissions to the statutory tests in section 275. That is quite different from the situation here, where the appellant’s allegation of consensual sexual intercourse some hours after the alleged event is disputed by the complainer, and the Crown is challenging the relevancy of this material at common law. These are important distinctions.

[87] It is only necessary to consider the statutory tests in s 275 of the 1995 Act if the evidence which is sought to be led is admissible at common law. “The starting-point for a decision on whether or not this evidence is admissible is the general principle that evidence is only admissible if it is relevant.... The determination of whether a fact is relevant depends very much upon its context and the degree of connection between what is sought to be proved, or disproved, and the facts libelled” – *CJM v HM Advocate* 2013 SCCR215, per LJC (Carloway) at para [28]. “The general rule is that it is not admissible to lead evidence on collateral matters in a criminal trial” – *Brady v HM Advocate* per LJC (Ross), to which LJC Carloway referred at para [32] of *CJM*. See also Lord Menzies at paras [55] & [56] of *CJM*

"...it is a general rule of Scots law that evidence of a collateral fact in a criminal trial is inadmissible, subject to an exception relating to instantly verifiable material, which cannot be challenged".

[88] In the present case the appellant seeks to give evidence that the complainer had consensual sexual intercourse with him some hours after the event libelled. The complainer denies this. This is about as far from "instantly verifiable material which cannot be challenged" as it is possible to imagine. If allowed, it would give rise to a real risk that the jury would be distracted from the central issue, namely whether or not the appellant committed the crime libelled, and would focus on the collateral matter, namely whether or not the appellant and the complainer had consensual sexual intercourse the following morning.

[89] For these reasons I consider that this material is not admissible at common law, and it is not necessary to go on to consider the statutory tests in s 275. I would refuse this appeal.





APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 43  
HCA/2020/8/XC

Lord Justice General  
Lord Justice Clerk  
Lord Menzies  
Lord Glennie  
Lord Turnbull

OPINION OF LORD GLENNIE

in

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

by

CH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: M Jackson, QC; Basten Sneddon**  
**Respondent: A Cameron, AD, Sol Adv; Crown Agent**

13 October 2020

[90] I am grateful to your Ladyship for setting out the issues in this appeal and for summarising the evidence sought to be adduced by the accused and the basis upon which he seeks to justify its admission, as well as the statutory framework and decided case law against which this appeal falls to be decided. I regret, however, that I am unable to agree as to the result. For my part, I would hold that the evidence sought to be adduced is directly relevant to the issues raised in the libel; that it satisfies the requirements of section 275(1) of

the Criminal Procedure (Scotland) Act 1995; and that it should be admitted at trial. I shall endeavour to set out my reasons for coming to this view as briefly as possible.

[91] The first question to be decided is one of admissibility at common law, i.e. whether the evidence is relevant to the issues raised in the libel and whether, despite its relevance to the issues in the case, it falls to be excluded as collateral. This has to be decided before any question falls to be considered under sections 274 and 275 of the 1995 Act.

[92] Four general points can usefully be made at this stage. First, the question of relevancy falls to be determined at common law. There is no statutory definition of relevancy. The common law on this issue is founded, as one would expect, upon logic and experience, and broadly coincides with common sense: *CJM v HMA* 2013 SCCR 215 at para [28], *LL v HMA* 2018 JC 182 at paras [13] and [14]. Second, even at common law relevant evidence was not always admissible. It could be excluded if it was “collateral”. To label evidence as “collateral” is not to say that it is irrelevant; rather it denotes that, although it may be relevant, the evidence is excluded for reasons of expediency and practicality. Third, the test of whether evidence is relevant, and if so whether it should be excluded at common law as collateral, ought to be the same regardless of whether the charge is of a sexual offence or is of some non-sexual crime, and regardless of whether or not the particular piece of evidence under consideration is of a sexual nature. Fourth, it was the clear intention of the legislature in enacting sections 274 and 275 of the 1995 Act to exclude certain evidence – in particular some evidence of prior sexual activity with the accused (and with others) – which might otherwise be regarded as of direct relevance and therefore admissible at common law. The policy objectives underpinning the relevant legislation are well known. It should not, therefore, be regarded as surprising that as a result of the introduction of sections 274 and 275 of the 1995 Act a considerable body of evidence which

would otherwise have been admitted at common law as both relevant and not collateral is now excluded. There would have been no need for the legislative changes were it otherwise. Yet the approach now adopted appears to proceed upon the assumption that all or almost all such evidence is now to be excluded on the basis that it is irrelevant or collateral. This approach, if correct, raises the question why there was any need for the legislature to intervene in the first place: see per Lord Malcolm in *SJ v HM Advocate* 2020 SCCR 227 at para [20].

[93] Before dealing with the particular circumstances of the present case, it is instructive to consider the question of relevancy in the context of a typical case, where the issue is about consent and the accused wishes to adduce or elicit evidence of prior consensual sexual relations with the complainer. The approach of the courts in recent cases has been that, as a general rule, such evidence is irrelevant. The point has been expressed in the most forthright terms in *Oliver v HMA* [2019] HCJAC 93 and in *Lee Thomson v HMA* (unreported, 13 December 2019, HCA/2019/000517/XC). Thus, in delivering the opinion of the court in *Oliver*, Lord Menzies said this (at para [9]):

“In general terms, the fact that a complainer has consented to sexual activity on previous occasions does not make it more or less likely that he/she will consent to sexual activity on a subsequent occasion.”

And in *Lee Thomson*, the Lord Justice Clerk, delivering the opinion of the court, said that:

“... the fact that a person may have consented to sexual activity on one occasion has no bearing at all on whether they consented on another occasion, either before or after the incident in question, save possibly, in particular circumstances, in the immediate aftermath.” (emphasis added)

As Your Ladyship points out, under reference to cases such as *LL* (at para [14]), the court has sometimes been at pains to point out that it was not suggesting that a previous sexual encounter could never be relevant to the question of consent. But instances where that

evidence might be relevant are clearly to be regarded as exceptional; particular circumstances would have to be averred to demonstrate a link between “*prima facie* unrelated events” (*LL* at para [14]).

[94] Dealing with the matter solely on the issue of relevancy – and putting to one side for the moment (i) the question of whether such evidence would be regarded as collateral and (ii) the statutory barriers to the admission of such evidence – such an approach is, to my mind, contrary to logic, experience and common sense. Evidence of a prior sexual relationship between the complainant and the accused may well be relevant to the issue of consent, quite apart from it being relevant to the related issue of reasonable belief in consent. It may inform and explain the likely conduct of one or both parties. It may throw light on the complainant’s state of mind.

[95] In his opinion in *SJ*, with which I agree, Lord Malcolm referred at paras [16] and [17] to the speeches in the House of Lords in *R v A (No.2)* [2002] 1 AC 45, and quoted a brief passage from the speech of Lord Steyn. That case sought to answer the question whether a prior sexual relationship between the accused and complainant could be relevant to the issue of consent so as to render its exclusion under certain statutory provisions a contravention of the defendant's right to a fair trial. The question of whether such evidence was potentially relevant was thus directly in point. In the course of their speeches, all members of the House accepted, to a greater or lesser extent, that evidence of such a relationship might well be relevant to the issue of consent. This view was supported both by the relevant literature on the subject at the time and by the conclusions of the 1975 Heilbron Report (Cmnd 6352). The reasoning is obvious and straightforward. Evidence of the prior relationship supplies a part of the context, sometimes an important part, in which the evidence from the complainant as to what she said or did falls to be assessed. Just as no one has ever made an acontextual

statement (*Marley v Rowlings* [2015] AC 129 at para 20, citing Lord Hoffman in *Kirin-Amgen Inc. v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, at para 64), so also no-one has done an acontextual act or given or withheld consent acontextually, as in a vacuum.

[96] I fully appreciate that *R v A (No.2)* was decided nearly 20 years ago and that the Heilbron Report which influenced the House in that case was over 40 years ago. Times change, and perceptions change with time. This is particularly true of the approach to the admissibility of otherwise admissible evidence which underpins the current legislation (sections 274 and 275 of the 1995 Act) restricting, for good reason, the admissibility of evidence of the complainer's past sexual conduct. But the legal question of what evidence is relevant and what is not relevant is a different question from that of whether a particular line of evidence, which is admittedly relevant, should be excluded. That legal question of relevancy has not changed so dramatically as to render evidence which was regarded as potentially relevant under 20 years ago now completely irrelevant. I do not suggest that evidence of prior consensual sexual conduct between the complainer and the accused will always be directly relevant to the issue of consent on the occasion narrated in the libel – obviously it will sometimes not be relevant – but I do suggest that, contrary to general assertions in cases such as *Oliver* and *Lee Thomson*, such evidence will often be relevant to that issue; and that the relevance of such evidence should be a matter of proper consideration in each case, without any predisposition to hold it to be irrelevant unless, exceptionally, the accused was able to point to particular circumstances making it of relevance in the particular case. How relevant a piece of evidence may be, whether that evidence relates to sexual activity or some other matter altogether, will, of course, always depend on the facts of the particular case. In any trial for a non-sexual offence it is commonplace for the crown to lead evidence of the surrounding circumstances leading up

to the alleged offence. It provides the background, the context, against which what happened subsequently can be understood. I have never heard any objection to that course on grounds of relevancy. So too in a trial for an alleged sexual offence evidence is commonly led by the crown, without objection, as to how the parties met and what happened thereafter. Is a different test of relevancy to be applied just because the defence wish to adduce such evidence and that evidence will include evidence of sexual intimacy during that period? A long-lasting sexual relationship in the period leading up to the alleged incident is likely to throw light on the circumstances of the incident itself. So too might a weekend of heightened sexual activity between the parties in the lead up to the alleged incident be relevant to an understanding of what really happened at the particular moment complained of in the libel. By contrast, a single sexual encounter between the complainant and the accused occurring many months or even years before the incident libelled may be considered of only marginal, if any, relevance, unless some particular link is averred. There are, no doubt, many examples lying between these extremes. In my view cases where such evidence should be excluded because it is genuinely not relevant will be relatively uncommon. The necessary gatekeeping exercise, designed to ensure the policy objective of preventing the admission of unnecessary and humiliating evidence about a complainant's private, intimate and sexual history, is better served by the proper application of the statutory tests in sections 274 and 275 of the 1995 Act than by adopting an approach to relevance which parts company with logic and common sense.

[97] I turn briefly to consider the question of whether and in what circumstances, evidence which is otherwise relevant should be excluded because it is to be regarded as "collateral". It is sufficient for this purpose to refer to the opinion of the Lord Justice Clerk in *CJM v HMA* 2013 SCCR 215 at paras [27] – [35]. The evidence under consideration in that

case had no direct connection to the events set out in the libel. The defence wanted to lead evidence that some considerable time earlier the complainer had made a false complaint of a sexual nature. Such evidence would, it was claimed, potentially undermine the complainer's evidence relating to the events in the libel by showing her to be dishonest, to have made things up in the past. The court held that that evidence had no direct or indirect connection with the facts in issue, but might conceivably affect the weight to be attached to testimony which does have direct relevance to the facts. To that extent it might be regarded as relevant; but it should be excluded as "collateral", having only an indirect bearing on the matter, and being likely (since the evidence of a previous false allegation was disputed) to lead to disproportionate and unhelpful investigation into this separate issue and running the risk of distracting the jury from the real issues in the case.

[98] I have no difficulty with the proposition that evidence which is truly collateral in the sense of being removed from and bearing only indirectly on the real issues in the case can be excluded as collateral. I have no difficulty with the decision in *CJM*. But there is a danger of taking this too far, and excluding potentially relevant evidence of events surrounding the incident forming the subject matter of the libel, and thereby disembodimenting the case before the jury. Evidence which has a reasonable and direct bearing on the subject matter of the libel should not be excluded as collateral simply because it is disputed. Except to the extent excluded by statute, the jury should have before it all the evidence directly relating to the events of the libel, and that includes all evidence showing how the complainer and the accused came to be in the situation in which the offence is said to have been committed and the events immediately following upon that alleged offence. It is arguable that such evidence forms part of the *res gestae*; but, whether or not that is formally correct, it is evidence which at least places the alleged incident in its proper context, and should not be

excluded as collateral. Were it not so, it would give licence to the Crown to set the agenda for the trial and to narrow the libel so as to exclude the possibility of the accused giving his account of what he says really happened.

[99] Returning to the facts of the typical complaint, where the issue is one of consent and the disputed evidence relates to sexual intimacy between the complainer and the accused in the lead up to the incident libelled, I fail to see how such evidence can be dismissed as irrelevant or collateral. As was said in *R v A (No. 2)*, excluding such evidence will leave the jury in the dark as to how the individuals concerned came to be in the position they were in, and unaware of factors which might have influenced the decisions they may have made. In every case, whether sexual or not, evidence of how the parties came to be where the incident occurred will be relevant at common law (and therefore admissible unless excluded by the statutory safeguards). This decontextualizing of the evidence presents a real risk of injustice, whether for the complainer or for the accused.

[100] In the same way, I fail to see how conduct alleged to have occurred in the immediate aftermath of the alleged incident can be excluded as irrelevant or collateral. It is well accepted that evidence of distress shown by a complainer soon after the alleged incident can shed light on her complaint that the sexual encounter with the accused was non-consensual. I have never heard of such evidence being excluded as collateral just because it is or may be in dispute. In my view evidence of the absence of any sign of distress must be equally relevant. There cannot, at common law, be one rule for the complainer and another for the accused. Nor should evidence of the complainer and the accused being on friendly terms shortly after the event libelled be rejected as collateral just because the only witnesses to some or all of that alleged friendliness are the complainer and the accused, with the result that the evidence may be disputed. And in terms of whether the subsequent events are



relevant, and separately whether they are collateral, it should make no difference that the subsequent friendliness which the accused says occurred included a further instance of consensual sex. The evidence is directly relevant in time, place and circumstance and should be heard.

[101] The present case is not the typical consent case. In this case the accused says that the offence libelled simply did not happen. But he admits that he and the complainer had sex, and on more than one occasion. He wants to give his account of what happened in that short time span of no more than about 12 hours when he and the complainer, who had met on Facebook, met in real life for a date. On his account they had consensual sex twice before going out with the friend (A) who had introduced them, went back afterwards to his place (where the complainer drunkenly “came on to him”), and had sex again in the morning before the complainer left. There was no sex in between times. There was no sex when the complainer was too drunk to consent. He did not tie her up in any way. He refused to have sex when she was drunk and “came on to him”. That is his account. It is all part of the *res gestae*. If he is believed in his overall account of their date, the jury may find it difficult to accept the complainer’s account. If the jury accept that they had sex in the morning soon after the alleged rape, then they might ask themselves whether this throws any light on her account that he had raped her not long before. It is too closely tied in with the circumstances surrounding the events set out in the libel to be dismissed as irrelevant or collateral. If he is required to give his account by removing all references to the two of them having had sex on these three occasions (the last occasion being after the alleged rape) there is a danger that the jury is simply not going to understand his account of what was going on. They might not understand the complainer’s account either. They might not understand what the complainer was doing there at the time of the alleged offence. They

may be tempted to speculate. Presumably the jury will be given some disembodied agreed narrative. But it is unlikely to be adequate; and it will give rise to a serious risk of injustice, one way or the other.

[102] I would hold that the proposed evidence is relevant at common law and should not be excluded as collateral.

[103] So I turn to consider the statutory test. The evidence *prima facie* excluded by the terms of section 274 of the 1995 Act. That brings into play the question of whether it should be admitted under section 275. I would hold that all three paragraphs of section 275(1) are satisfied. The evidence and questioning will relate only to specific occurrences of sexual behaviour demonstrating the complainer's character on the night in question. Those occurrences are relevant to establishing whether the accused is guilty of the offence charged. And the probative value of the proposed evidence is significant and likely to outweigh any risk of prejudice to the proper administration of justice as defined in sub-section (2). In those circumstances the evidence should be admitted.

[104] I would allow the appeal.

**APPEAL COURT, HIGH COURT OF JUSTICIARY**

[2020] HCJAC 43  
HCA/2020/8/XC

Lord Justice General  
Lord Justice Clerk  
Lord Menzies  
Lord Glennie  
Lord Turnbull

## OPINION OF LORD TURNBULL

in

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

by

CH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: M Jackson, QC; Basten Sneddon**  
**Respondent: A Cameron, AD, Sol Adv; Crown Agent**

13 October 2020

[105] I agree entirely with the analysis set out in the opinion of the Lord Justice Clerk. The evidence sought to be led in this case relating to alleged consensual activity on other occasions is irrelevant to the issues in the case. It is at best collateral and not admissible at common law. In light of some of the issues canvassed by Lord Glennie in his opinion, and the importance of the matters which they raise, I would wish to make some further observations of my own. I propose to do so under the headings of *res gestae*, the relevance of the proposed evidence and the application of section 275 of the 1995 Act.

### *Res gestae*

[106] As I understand the view arrived at by Lord Glennie, he would admit the proposed evidence as relevant, partly at least, on the view that the appellant's overall account of the events during the 12 hours when he and the complainer met for a date is all part of the *res gestae*. As I would understand the law on the admissibility of evidence as part of the *res gestae*, what matters is whether or not the evidence concerned "is part of the whole thing that happened" – see Walker and Walker *The Law of Evidence in Scotland* 4<sup>th</sup> edition at paragraph 8.5.1.

[107] In the case of *Cinci v HM Advocate* 2004 JC 103 the court held that the relevant event, or the whole thing that happened, was the act of intercourse between the complainer and the appellant. The "event" which mattered was the alleged rape. Anything said after the act of intercourse had finished could not comprise part of the *res gestae*. In the subsequent case of *O'Shea v HM Advocate* 2015 SCCR 66 at paragraph [37] the Lord Justice Clerk (Carloway) emphasised that the critical determining feature is whether the statement (in that case) is part of the event itself.

[108] The event itself in the present case is the act of intercourse said to have taken place as specified in charge 3. The *res gestae* cannot, in my opinion, include events which occurred many hours before or many hours afterwards. I do not read in Lord Glennie's opinion any explanation as to how his approach to *res gestae* sits with the law as explained in the relevant textbooks and relatively recent decisions of the court. I think it would be unfortunate if practitioners and judges were to be introduced to a parallel and uncontrolled concept of *res gestae* which sits alongside, but in competition with, the traditionally understood aspect of this part of the law of evidence.

### **The relevance of the proposed evidence**

[109] The background to the legislative restrictions on the leading of evidence to be found in sections 274 and 275 of the 1995 Act, and the history of failed attempts to secure that interest, was set out by the Lord Justice Clerk (Gill) in the case of *M(M) v HM Advocate* 2005 1 JC 102 and touched upon again by the Lord Justice Clerk (Carloway) in *CJM v HM Advocate* 2013 SCCR 215. It has been a lengthy process culminating in the current “elaborate code defining the parameters within which evidence must fit if it is to be admitted in contravention of the statutory prohibition”, to quote from the Lord Justice Clerk’s opinion in the present case. It is also fair to recognise that the past and present legislative provisions have consistently posed challenges, to both practitioners and judges alike, in determining their proper scope and application. There is however one touchstone which ought to have remained constant throughout this journey, that is the concept of relevancy. None of the statutory restrictions could ever have allowed the admission of evidence which did not pass the common law test of relevancy. However, experience has shown that significantly different views as to what constitutes relevant evidence in this field have abounded. Two examples suffice to make the point.

[110] In the case of *Kimmon v HM Advocate* 2003 SCCR 295, where the appellant was charged with attempted rape, the court allowed an application to lead evidence that within the month before the alleged offence the complainer had on one or two occasions suggested to the appellant's son that she wished to have a sexual relationship with him. Conceding the appeal, the Crown’s submission was that the evidence appeared to be relevant to the appellant's guilt, and might well have a bearing on the issues in the case. It might influence a jury to conclude that there was a genuine doubt as to the guilt of the accused. It must be

assumed then that both the Crown and the court saw a correlation of logic, experience and common sense such as would allow the evidence of what the complainant said to the son to cast light on whether there was consent during the subsequent sexual interaction between the accused and the complainant.

[111] In the case of *R v A*, referred to by Lord Glennie in his opinion, the first instance judge had granted an application to lead evidence of the fact that the complainant had engaged in sexual intercourse with the defendant's friend, with whom she was in a relationship, some hours before the attack upon her which she spoke of by the defendant. Although that decision was reversed on appeal, one would again, perhaps, assume that the first instance judge saw in that evidence a common sense connection of the sort that would illuminate the question of consent between the complainant and the defendant. There seems to have been no other suggested relevance.

[112] I venture to suggest that such views on relevancy would not find support currently in this jurisdiction. Part of the explanation for such variation of view amongst judges can I think be found in the cautionary note sounded by Justice L'Heureux-Dubé in giving her opinion in the case of *R v Seaboyer* [1991] 2 SCR 577 at page 679 where, having canvassed the various definitions of what constituted relevant evidence, she said:

“Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilisation of stereotype in the determination of relevance ....”

[113] With this warning in mind in carrying out my own analysis, it seems to me to be necessary to consider the impact of the case of *R v A*. Lord Glennie has drawn on the speeches in that case in arriving at his view that the evidence proposed in the present

application does pass the test of relevance. As as in *SJ v HM Advocate* 2020 SCCR 227, reliance has been placed on the content of that decision without it having been referred to by the parties in their submissions. For my part I recognise that my analysis will be the poorer for that absence, but the fact that experienced senior counsel decided to advance their arguments in this way may be a telling factor in its own right.

[114] In *R v A* the judges of the House of Lords were concerned to determine whether evidence of a “sexual relationship” between the defendant and the complainant could be relevant to the issue of consent, so as to render the apparent almost blanket exclusion under the statutory provision contrary to the right to a fair trial. They were assessing whether such evidence could ever be relevant as a matter of principle, not whether the evidence which the defendant wished to introduce in fact met the test of relevance.

[115] The consensus expressed by all of the judges was that evidence of prior sexual conduct between the complainant and the defendant *could* (my emphasis) be relevant to the issue of consent. I would suggest that in so doing their Lordships made a statement which, on the face of it, is consistent with the current jurisprudence in this jurisdiction. In *LL v HM Advocate* 2018 JC 182 in giving the opinion of the court at paragraph [14] Lord Brodie said:

“We simply do not see why the fact that there was free agreement and reasonable belief as to that agreement on one occasion, makes it more or less likely, as a matter of generality, that there was free agreement and reasonable belief as to that agreement on another occasion many months later. What we would suppose it would be intended to suggest to the jury is that if there was free agreement on the first occasion it might be inferred that there was free agreement on the second occasion. But why is that so? Very significantly, when counsel was asked to identify the basis for such an inference, first before the preliminary hearing judge and then before this court, counsel was unable to do so. That is not to say that there may never be cases where a previous act of intercourse might not be relevant to the issue as to whether the complainer consented on a subsequent occasion or to the issue of whether an accused reasonably believed that the complainer was consenting. However, in such a case particular circumstances would have to be averred to

demonstrate what was said to be the connection between what we would see as, prima facie, unrelated events.”

[116] As in *R v A*, the court in *LL v HM Advocate* recognised that prior sexual conduct between the complainant and the accused could be relevant to the issue of consent. One can then turn to look more closely at their Lordships’ speeches and ask whether anything which was said demonstrates that the judges of the House of Lords had in mind a different application of the principle from that which came to be set out in *LL v HM Advocate*.

[117] It may be helpful to begin by taking account of the Report of the Advisory Group On The Law of Rape 1975 (Cmnd 6352) (“the Heilbron Report”), since that report is mentioned by some of their Lordships and by Lord Glennie. That group was asked to give urgent consideration to the law of rape in England and Wales and to advise whether early changes in the law were desirable. In the introduction to its report at paragraph 3 the group noted that:

“Since we were asked to report within a short time we have had to confine ourselves to those aspects which seemed to us to require particularly urgent attention and which could be adequately dealt with in the timescale available.”

[118] At paragraph 100 of the report the group set out what their understanding of the then current law was in relation to cross examination of the complainant as to her relationship with the accused. They stated that the complainant can be asked questions as to her previous relationship with the accused on the basis that such evidence could be relevant to an issue, in that it might tend to prove consent. The group vouched that statement of the law by reference to the cases of *R v Cockcroft* and *R v Riley*, the former a first instance case from 1870 and the latter an appeal court case from 1887. In giving his opinion in *Riley*, Lord Chief Justice Coleridge stated that the trial judge had been wrong to exclude evidence



of the complainant having had episodes of sexual intercourse with the accused on prior occasions. He explained his decision as follows:

“But to reject evidence of her having had connection with the particular person charged with the offence is a wholly different matter, because such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment. This line of examination is one which leads directly to the point in issue.”

The other judges concurred with his opinion, Mathew J observing that the decision was:

“... in accordance with justice and common sense.”

[119] When the advisory group turned to set out the approach which they suggested should be adopted, they explained at paragraph 134:

“We think that questions and evidence as to the association of the complainant with the accused will, in general, be regarded as relevant to the issues involved in a trial for rape ...”

[120] In setting out this view the group did not engage in any analysis or debate. It may be that due to the time constraints which they were working under the members of the group decided to concentrate on more pressing issues. Equally, it may be that this view of general admissibility, apparently reflecting the decision of the court in *Riley*, was still consistent with societal thinking in 1975. It is certainly inconsistent with the decision some 40 years later in *LL v HM Advocate*. It also seems hard to reconcile with the view expressed by Baroness Hale, albeit in a different context, in the case of *R v C* [2009] UKHL 42 at paragraph 27:

“My Lords, it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so.”

[121] In giving their speeches in the case of *R v A* their Lordships did not adopt or approve of an approach of general admissibility, and of course Lord Glennie does not suggest that

they did. Nor, however, did their Lordships adopt the view expressed by the Court of Appeal in its decision in the case, reported at [2001] EWCA Crim 4. At paragraph 31 Rose LJ said:

“In our judgment, provisional though we emphasise it is, it is not mythical but common sense that a person, whether male or female, who has previously had consensual intercourse with another, particularly in recent weeks or months may, on the occasion in dispute have been more likely to consent to intercourse with that other than if that other were a stranger or one with whom no previous sexual familiarity had occurred. We do not accept, on the basis of the matter as we presently understand it, that such an approach stems from "sexist beliefs about women which distort the trial process". On the contrary, it seems to us to reflect human nature, regardless of sex. The trial process would be unfairly distorted if a jury were precluded from knowing, if it be the case, that the complainant and defendant had recently engaged in consensual sexual activity with each other”.

It seems to me that whilst that view might sit quite well alongside the approach to relevancy which Lord Glennie would adopt, the judges in the House of Lords approached the matter in a more restricted manner, and, in what was said by some, one can detect a straightforward rejection of this approach.

[122] At paragraph 31 Lord Steyn said that such evidence may “depending on the circumstances” be relevant to the issue of consent. In the same paragraph he said that a prior relationship between a complainant and an accused “may sometimes” be relevant to what decision was made on a particular occasion. At paragraph 45 he reiterated that “sometimes” logically relevant sexual experiences between a complainant and accused may be admitted but that there will be cases where such previous sexual experience will be irrelevant. At paragraph 78 Lord Hope identified that evidence of sexual relations between a complainant and the defendant could only be admitted on the test of whether the evidence and questions “relate to a relevant issue in the case”. At paragraph 125 Lord Clyde recognised that such evidence “may” be relevant as casting light on the question of the complainant’s consent.

[123] I would therefore suggest that despite the references to the Heilbron Report, it is obvious that their Lordships recognised that the law in this area now required to be applied in a more nuanced fashion. To that extent then, their Lordships' approach to the application of principle does not seem to me to be in conflict with the decision in *LL v HM Advocate*.

[124] Although their Lordships were not determining the relevance of the proposed evidence in *R v A*, some insight can be gleaned as to what they had in mind by the sort of evidence which might relevantly cast light on the issue of consent. At paragraph 10 Lord Slynn referred to evidence such as – two young people who lived together or regularly as part of a happy relationship and had had sexual acts together. At paragraph 32 Lord Steyn observed that good sense suggests that it may be relevant to an issue of consent whether the complainant and the accused were ongoing lovers. This was the context in which he asked whether the jury is simply to be told about what happened in the bedroom without any idea of whether the defendant was a trespasser or an invitee. This was the context in which he stated that to exclude such material creates the risk of disembodiment of the case before the jury. It was because of the concern that evidence of this sort would not be admissible in terms of the statutory provision that Lord Steyn came to suggest how to read down the provision and explained that the test of admissibility to be applied by trial judges was to be whether the evidence is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the convention. In *M(M) v HM Advocate* Lord Justice Clerk Gill suggested a similar approach to the same sort of evidential conundrum at para [27] of his opinion which has been followed ever since:

“[27] Counsel for the appellant suggested that sec 275 was not wide enough to allow the appellant to put it to the second complainer that she and the appellant had lived together before the date of the alleged rape. In my opinion, a prior course of cohabitation by the second complainer with the appellant would not constitute engaging in sexual behaviour not forming part of the subject-matter of charge (4) (cf

sec 274(1)(b)). In my view, such cohabitation is outwith the purview of sec 274(1); but if there is any doubt on the point, it should be removed if the sec is read with sec 3 of the Human Rights Act 1998 (cf R v A (No 2), Lord Steyn, paras 32, 45, 46)."

[125] Further insight can be found in the speech of Lord Hutton at paragraph 152 where he referred to circumstances of the recent close and affectionate relationship between the complainant and the defendant and explained where the relevance of such evidence would lie. It was not in the bare fact of prior consent but that it would show the complainant's specific mindset towards the defendant, namely her affection for him. He contrasted such evidence with evidence of isolated acts of intercourse, even if fairly recently, without the background of an affectionate relationship, which he identified as being probably irrelevant.

[126] These passages it seems to me point towards a particular and limited set of circumstances in which their Lordships saw the potential for evidence of prior sexual contact between the parties to reach the test of relevance. I recognise that other passages can be identified which might suggest a broader approach but I do not agree that it properly conveys the tenor of the case to say that all members of the House accepted to a greater or lesser degree that evidence of a prior sexual relationship may well be relevant to the issue of consent. In the passages to which I have drawn attention, a particular and narrow context in which such evidence might be relevant is identified. Furthermore, I suggest that in the passages to which I refer below one can detect the stark rejection of a more general approach.

[127] I do not read their Lordships speeches as providing support for the view that evidence of prior sexual contact between the accused and the complainer will "often" be relevant to the issue of consent. In so far as their Lordships identified the type of case in which such evidence might be relevant they focused on the sort of relationship as described

by Lord Hutton which would show a mindset of affection on the part of the complainant towards the defendant. It is clear from the distinction which Lord Hutton drew that, for him at least, such affection would not be evidenced simply by prior acts of intercourse.

[128] To give further context to what their Lordships said, it also seems to me to be important to bear in mind what the proposed evidence in *R v A* was. The defendant wished to lead evidence that the complainant initiated consensual sexual intercourse as part of a continuing sexual relationship covering a period of approximately three weeks prior to the allegation, and that they had sexual intercourse at his flat on various occasions in the preceding few weeks, the last being one week before the date of the allegation. As I read the decision, the only judges who expressed a view as to whether the actual proposed evidence would be relevant were Lord Hope and Lord Hutton.

[129] At paragraphs 105 and 106 Lord Hope explained that he did not consider that the evidence proposed was relevant. At paragraph 106 he said:

“All he appears to be relying upon at present is the mere fact that on various occasions during the previous three weeks she had had consensual intercourse with him in his flat. As I have said, I consider that this fact alone – and nothing else is alleged about it – is irrelevant to his defence of consent.”

[130] At paragraph 154 Lord Hutton said:

“If the evidence were confined to those bare facts I would be of opinion that it would not be relevant to the issue of consent. But it may be that the defendant will be able to give more detailed evidence of his relationship with the complainant which would make his evidence of previous consensual intercourse relevant.”

[131] These expressions of opinion on the relevance of the actual evidence proposed demonstrate two things. First, both of their Lordships expressly rejected the approach which the Court of Appeal thought of as reflecting common sense. Second, that even in this category of evidence, both of their Lordships were of the view that there would require to be

a particular circumstance to demonstrate the link between what would otherwise be prima facie unrelated events. That appears to me to be entirely consistent with the decision in *LL v HM Advocate* and I cannot detect in *R v A* any support for the proposition that the decision in *LL* identifies an approach which is contrary to logic, experience and common sense.

[132] It therefore seems to me that when explaining that evidence of prior sexual conduct between a defendant and a complainer could be relevant in circumstances such as a couple in a close and affectionate relationship, or a couple who lived together, their Lordships were describing an approach which is accommodated by Lord Gill's opinion in *M(M) v HM Advocate*. Their Lordships approach does not conflict in any way with the requirement, in different circumstances, for there to be an averred link between a prior act of intercourse and the act which is said to have been consented to. What Lords Hope and Hutton said appears to provide positive support for the need for such a link. A similar approach was taken in the decision of the Supreme Court of Canada in *R v Darroch* 2000 SSC 46, in which Gonthier J, in giving the decision of the court, stated at paragraph 58, "actual consent must be given for each instance of sexual activity". In that same paragraph the court stated that "evidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent." At paragraph 56 the court explained that if an application to lead evidence of sexual history is made the evidence must be relevant to an issue at trial and the defence must establish a connection between the complainant's sexual history and the accused's defence. I interpret the statements made by Lords Hope and Hutton, as taken along with the statements of the Supreme Court of Canada, as coinciding with the approach set out in both *Oliver v HM Advocate* and *Lee Thomson v HM Advocate*, as quoted from in Lord Glennie's opinion. In totality those statements provide powerful support for the view that evidence of prior sexual relations between the parties will in

general be treated as irrelevant and they contradict the suggestion that such evidence will often be relevant to the issue of consent.

[133] In any event, the examples given in *R v A* of circumstances in which evidence of prior sexual conduct might be relevant do not correspond to any extent with the circumstances in the present case. Nor do they seem to me to provide any support for the present appellant's contention that evidence of sexual activity on his first date with the complainer is in any way relevant to the issue of whether or not he subsequently had intercourse with her when they returned to his home after a night out. The claimed episode the following morning is in the same position.

[134] Lastly it is worth noting that, although their Lordships were dealing with the question as a matter of principle, at paragraph 94 Lord Hope drew attention to the fact that the law would fail in its purpose:

“ ... If evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case.”

[135] The same point was made by Lord Hutton at paragraph 142 where he identified that in a charge of rape the law must have a (third) objective of ensuring that the woman is treated with dignity and is given protection against cross examination and evidence which invades her privacy unnecessarily. He went on to say:

“Linked to the third objective is the further consideration that allegations relating to the sexual history of the complainant may distort the course of the trial and divert the jury from the issue which they have to determine.”

[136] These are both references to the danger inherent in collateral evidence. Their Lordships do not address the question of how contested evidence of prior sexual conduct is to be admitted or adjudicated upon. This may be because the evidence of prior sexual conduct which they were considering as being admissible was in the context of obvious or

established relationships. Again this is very far from the circumstances of the present case and I see no suggestion in Lord Glennie's opinion as to how the jury would be expected to adjudicate over the contested evidence of other sexual activity which he would admit. In this context I would observe that it does not seem to me to be correct to state, that the accused "admits" that he and the complainer had sex on other occasions. He does not admit this, he contends it, and that is where the problem arises.

### **The application of section 275**

[137] I note that in considering the application of section 275(1) of the 1995 Act Lord Glennie would hold that the evidence and questioning proposed will relate only to specific occurrences of sexual behaviour demonstrating the complainer's character on the night in question. No elaboration is given of what this means. For my part, I do not accept that evidence which demonstrates that a young woman had sexual intercourse on her first date, with a young man whom she had recently made the acquaintance of, is of itself capable of demonstrating anything of relevance or value about the character of the young woman involved, any more than it is capable of demonstrating anything about the character of the young man concerned. Far less do I understand how it can be said that an act of intercourse the following morning can demonstrate the young woman's character "on the night in question."

[138] In any event, it does not seem to me that section 275(1)(a) directs the court to an assessment of whether evidence of a specific occurrence of sexual behaviour demonstrates anything about the complainer's character. To apply section 275 in this fashion appears to me to be to ignore the "invisible comma" to which the Lord Justice Clerk drew attention in



paragraph [65] of her opinion, see also *DS v HM Advocate* 2007 SC (PC) 1, Lord Hope of Craighead at paragraph 48 and Lord Rodger of Earlsferry at paragraph 72.