APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 1
HCA/2023/624/XC

Lord Justice General
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

NOTE OF APPEAL AGAINST CONVICTION

by

JB

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Allan KC; Paterson Bell (for Keith J Tuck, Solicitors, Glasgow)
Respondent: Gilchrist AD; the Crown Agent

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9 January 2025

Introduction

[1] On 26 April 2024, the appellant was convicted after trial of two charges. These were the rape of his then wife, on various occasions between 1 January 2002 and 31 October 2003. In terms of the libel, while she was asleep, he removed her lower clothing, lay on top of her and raped her. The other charge was of sexually assaulting and raping his daughter, on various occasions between 1 July 2012 and 31 December 2013, all contrary to sections 1, 2

and 3 of the Sexual Offences (Scotland) Act 2009. It is not necessary to narrate the details of the charge involving his daughter.

[2] On 23 May 2024, the appellant was sentenced to imprisonment for 4 years on the first charge and 7 years on that involving his daughter, the sentences to run concurrently.

[3] No challenge is made to the sufficiency of evidence, or to the directions given by the trial judge. The basis of the appeal is that the Crown failed to disclose the Victim Impact Statement (VIS) of the first complainer in advance of the trial, thereby failing in their duty in terms of Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 and the Code of Practice issued by the Lord Advocate under section 164 of the Act. The argument is that there is a material inconsistency between what is contained in the VIS and the complainer's evidence. Had the defence been aware of it, the VIS only being disclosed on conviction, they could have used it to attack the complainer's credibility. Since the case relied on the application of mutual corroboration, if the jury had not accepted the evidence of this complainer, then they would have been bound to acquit on both charges. On 9 January we refused the appeal and indicated that we would give our reasons in writing, which we now do.

The evidence

[4] We do not require to narrate the evidence of the second complainer, the appellant's daughter. It is, however, necessary to go into the evidence of the appellant's former wife in a little detail. She had been unhappy in her marriage for a year or so before it ended. The parties slept in the same bed until October 2003, when she moved into another bedroom. During the last year of the marriage, she did not want to be intimate with the appellant. On a few occasions, she woke up and he would be on top of her having sex with her. She would

have been in a deep sleep, would wake up and it was happening to her. Her pyjama trousers had been removed. She thought this happened three or four times, but she did not do anything. She probably felt guilty and just let him do it because they were married. It would end with his ejaculating and then going to sleep. They did not speak about it afterwards. She had told one of her friends what had happened and was in due course asked to give a first statement in 2014, when the police were investigating the charge involving her daughter.

[5] In cross-examination, she was asked about this first statement. It was Crown Production 9, not 10 as is stated in the Note of Appeal, and was dated 26 June 2014. She confirmed that she had not made a complaint about the appellant until then and that the police were investigating her daughter's complaint. She accepted that she had been married to the appellant for 9 years and had separated just over 10 years previously. Amongst other things, the statement said the following:

> "I have been unhappy in my relationship with [the appellant] for a number of years and eventually left. There wasn't a singular or specific reason for our separation … During our relationship together [the appellant] was never physically or sexually abusive towards me."

She accepted that she was telling them the truth. However, she went on to say the following:

> "The only thing I would say is that in the last couple of years when we were together we weren't being intimate together because I was unhappy. There were occasions when [the appellant] would wake me up in the middle of the night and have sex with me. I would sometimes wake up with him lying on top of me. On some occasions I would let him have sex with me even though I didn't want to, and on other occasions I would push him away. A couple of weeks before we separated we knew we were splitting and I was sleeping in another room. [The appellant] came in and lay on top of me. He kept saying 'Come on'. I told him 'No we can't do this', and I had to push him away. Nothing happened, but I can remember being quite scared at the time."

She said that this was true. She was asked:

> "So we should understand that there were some occasions you woke up, he was lying on top of you and sometimes that progressed to him having sex with you and you allowing him to have sex, even though you didn't want to, and, on other occasions, you would push him away and that would be the end of it. Is that right?"

She answered in the affirmative.

[6] The questioning went on:

> "… and on another occasion he came into that room, the one you described, a particular occasion, he came into the room and he lay on top of you, you say, and he tried to encourage you to have sex, but you made plain (*sic*) that you didn't want sex and that was the end of it. Nothing happened."

The witness agreed with this proposition. It was put to her that at no stage did she say that she woke up and the appellant's penis was inside her, but she affirmed that she was in a deep sleep and was woken up with him having sex with her.

[7] When this point was pressed, she said that "obviously I said he was on top of me, but I didn't want to go into total detail at that point. And the police officer interviewed me again, they asked me to go into detail about it and that's why there's more." This was a reference to a second statement (Production 10) which was given in 2021 but which was not used at the trial.

[8] The appellant's former wife explained that the first statement was more about her daughter, so she did not go into great detail or elaborate on matters.

The appellant's evidence

[9] The appellant denied having any sexual interest in, or having had any sexual contact with, his daughter and denied ever having sex with his former wife while she was asleep or when she did not consent. Any sexual contact between them was consensual but it had stopped a few months before they separated.

The judge's charge

[10] Amongst other things, the attention of the jury was drawn to the criticism of the complainer that, in her statement of June 2014, she had not said in terms that she had been penetrated while asleep.

After the verdict

[11] A VIS of the complainer was given to the defence, as is standard practice. It was dated 28 June 2023 and had been with the Crown since 8 August 2023. It was provided to the appellant on the recording of the guilty verdicts; Criminal Justice (Scotland) Act 2003, section 14 (4). Amongst other things, it contained the following sentence:

> "Whilst I was married to [the appellant] I would awaken some nights in the last year of my marriage to him, on top of me trying to initiate sex."

Herein lies the point of the appeal. It is said that had the defence been aware of this, it could have been used as a prior inconsistent statement in the complainer's own words, not filtered through the police, and she could have been cross-examined as to why she had not mentioned the appellant penetrating her. It is said that this comment would materially have undermined the evidence of the complainer and materially supported the evidence of the appellant. The failure to disclose it deprived the defence of the opportunity to cross-examine the complainer about it and had led to a miscarriage of justice.

[12] The Advocate depute, on the other hand, submitted that the material added nothing to that which was already available to the defence. In any event, when the sentence was put in context and considered in light of everything said in the VIS, it could not be said to be inconsistent with the complainer's position in evidence. Even if the material were disclosable, the failure to alert the defence to its existence had not led to a miscarriage of justice.

Analysis

[13] As we shall turn to in due course, the argument which was presented to us departs in a number of material respects from the Note of Appeal and indeed from the Opinion of counsel in support of an appeal to the second sift. That having been said, we were prepared to allow the argument to be developed.

[14] The first question for us to consider is whether the material in the VIS was disclosable. The test is to be found in section 121 of the Criminal Justice and Licensing (Scotland) Act 2010. Subsections (2) and (3) of that section are in the following terms:

> "(2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must –
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> (a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
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> (b) disclose to the accused the information to which subsection (3) applies.
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> (3) This subsection applies to information if –
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> (a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
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> (b) the information would materially strengthen the accused's case, or
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> (c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused."

Section 160 deals with the means of disclosure. Subsections (4) and (5) of that section are in the following terms:

> "(4) Subsection (5) applies if the information is contained in –
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> (a) a precognition,
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> (b) a victim statement,
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> …
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> (5) In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement."

The Code of Practice states the following, at paragraph 8.1:

> "Where the accused is being prosecuted under solemn proceedings the Crown must proactively disclose witness statements (excluding Victim Impact Statements) obtained under section 14 of the Criminal Justice (Scotland) Act 2003 for all witnesses that are on either the Crown or Defence lists."

It was common ground that all this meant that the VIS itself need not be disclosed, but material information contained within such a statement ought to be. Material information is information which meets the test set out in section 121.

[15] When one reads the sentence in the VIS on its own, it might be thought to be of some significance since it makes no mention of penetration. However, it must be read in context. The first thing to say about the context is that, while it was undoubtedly in the complainer's own words, it was not a response to having been asked about what happened. It was a response to being asked whether the crime had had any lasting effects on her feelings and ability to cope. It assumed that a crime had been committed. The relevant parts of what was said are as follows:

> "This event has affected me mentally. Whilst I was married to [the appellant] I would awaken some nights in the last year of my marriage to him, on top of me trying to initiate sex. At the time I just thought this was appropriate as he was my husband. But I now realise me not saying anything to him, has probably allowed him to believe that he could do this to a woman without consent and I now feel responsible for what happened to my daughter … I should have said to him, it was not appropriate to use women for his pleasure. Since [my daughter] has come forward I have felt like it was my fault that this has happened to her, I feel like the worst mother ever. If I had told him no! then this might not have happened to her."

She went on:

> "I never thought I would be protecting her from her own father. If only I had spoke out when he did the same to me."

Finally, she said:

> "If only I realised that me not saying anything about what he did to me, might have stopped him directing his sexual desires to his daughter."

In context, it is clear that while the statement did not go into full details, she had in mind the appellant doing the same to her as he did to her daughter, namely raping her.

[16] Far from undermining the complainer's evidence, this would have backfired had the defence simply looked at the aspect of it which is the focus of the appeal. The Crown would have been entitled to examine the context, which would have supported the complainer's credibility.

[17] The defence already had available to it materials showing that the complainer had, at one point, said that the appellant was never sexually or physically abusive towards the complainer. The statement where that is to be found, Crown Production 9, does not in terms include any mention of the complainer's waking up to find the appellant having sexual intercourse with her. That was placed firmly before the jury, yet they convicted.

[18] In all these circumstances, we are satisfied that what is in the VIS did not materially undermine the Crown case or advance the defence case. It was not disclosable.

[19] Even if it had been disclosed, there is no realistic prospect of the verdict having been any different and there has been no miscarriage of justice.

[20] The appeal is refused.

Postscript

[21] In the Note of Appeal it is stated that Crown Production 10 was put to the complainer. This is plainly an error and it is perhaps not unusual for that type of error to occur. However, paragraphs 13 and 14 of the Note of Appeal are in the following terms:

> "[13] That when [the complainer's] attention was drawn to her statement (Crown Production No. 10) where she stated that the appellant was trying to initiate sex and she just went along with it and believed he would have been unaware of her not wanting to have sex, which different substantially from her evidence that he was having sex when she wakened, she said that it must be down to confusion or

> misinterpretation by the police officer taking her statement and she reiterated that the appellant was having sex, namely penetrating her vagina with his penis, when she wakened.
> [14] That the complainer wife stated that any confusion or inconsistency between her evidence on oath and her police statement was not due to her changing her position but rather to some error on the part of the police officer in noting what she had said."

[22] Crown Production 10 was never put to the witness in cross-examination. Nor was it put to her in chief. None of this is surprising, since it was consistent with her evidence. Of more import, however, is the fact that at no stage did the witness try to explain any discrepancy by suggesting that it was due to confusion or misinterpretation by the police officer noting her statement. This error found its way into the Opinion of counsel supporting an appeal to the second sift, on the basis that since the complainer used her own words in the VIS, her explanation about police confusion or misunderstanding would be undermined.

[23] We are grateful to counsel for apologising for this error, which he blamed on confusion with another case he was dealing with, but this sort of thing should not happen. The Note of Appeal in any case sets the parameters for the submissions in due course, and the goalposts should not be moved. As it happens, we were able to deal with the argument, but that will not always be true.