



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 6
HCA/2023/67/XC

Lord Justice General
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 74(1) OF THE CRIMINAL PROCEDURE
(SCOTLAND) ACT 1995

by

NATHAN MCKENZIE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Brannigan; Faculty Appeals Unit (for The Robert Kerr Partnership, Paisley)
Respondent: J Keenan KC (sol adv) AD; the Crown Agent

11 May 2023

Introduction

[1] This appeal concerns whether it is competent to libel in a sheriff court indictment, charging an offence of abusive behaviour under section 1 of the Domestic Abuse (Scotland) Act 2018, facts which might constitute rape. There are related issues about the right to a fair trial under Article 6 of the European Convention and of oppression at common law.

Background

[2] The appellant has been charged with a breach of section 1 of the Domestic Abuse (Scotland) Act 2018. The libel refers to various occasions, between November 2021 and February 2022, during which the appellant is said to have engaged in a course of behaviour which was abusive of his partner or ex-partner. Sundry assaults and other violent behaviour are libelled. Included within the narrative is an allegation that the appellant did “penetrate her vagina with his penis without her consent”.

[3] The appellant raised three objections to the libel. The first is that the reference to penetration of the vagina without consent was effectively a charge of rape, under section 1 of the Sexual Offences (Scotland) Act 2009. This could only be tried in the High Court (Criminal Procedure (Scotland) Act 1995, s 3(6)). Libelling it in a sheriff court indictment was therefore incompetent. Secondly, the libelling of rape within a domestic abuse charge would be confusing to a jury. It breached Article 6 in failing to give fair notice to the appellant of the charge against him. Thirdly, the libel was oppressive for the same reasons. No direction to the jury could cure the prejudice arising from the confusion which would be created.

[4] The sheriff repelled the objections, primarily on the basis of the reasoning in *DF v Her Majesty's Advocate*, unreported, Lord Matthews, 10 August 2021. The appellant appealed.

Submissions

[5] The submissions of the appellant followed broadly those which had been presented to the sheriff. On competency, it was maintained that reliance on the terms of section 3(6) of

the 1995 Act was misplaced. Those drafting that section would not have anticipated the Crown bringing a charge of rape using a different *nomen criminis*. The description of the offence as a charge of anything other than rape was a misnomer. Although the 2018 Act included sexual violence in the definition of abusive behaviour, the crime libelled must be triable in the particular forum. *DF v HM Advocate* was distinguishable as it involved proceedings in the High Court.

[6] In relation to Article 6, the contention was that the inclusion of the libel of rape in the DASA charge rendered it incompetent for a trial in the sheriff court. The charge did not give the appellant fair notice of the nature and substance of the charge against him. There was a real risk that a sheriff court jury would suffer confusion on hearing the libel being read out. Although a jury would understand that the appellant had been accused of rape, they would be told that what was libelled constituted a different crime. No direction would be sufficient to cure this. The allegation of rape was an uncorroborated one. There was insufficient nexus between the various instances of abuse and the specific allegation of rape to enable the jury to consider whether there was a “course of conduct”. Oppression was also made out in that there was a risk of grave prejudice, such that no direction could remove it. This plea stood or fell with the Article 6 contention.

[7] The Crown attempted to explain why this case had been indicted in the sheriff court. This related to sporadic engagement with the complainer. Although there had been a prospect of indicting the case in the High Court, using mutual corroboration, that prospect had faded. The issue of whether it was competent to libel behaviour, which could also constitute rape, was determined in *DF v HM Advocate* (at para [28]). This had been approved in *CA v HM Advocate* 2023 JC 8. The course of behaviour was the core of the offence and that was what required to be proved by corroborated evidence. Proof of such

behaviour on at least two occasions was needed for a course of conduct. That required to be established by corroborated evidence. If that was achieved, other incidents forming part of the course of conduct could be held proved, although only spoken to by one witness. Notice of the facts which the Crown intended to prove was sufficiently specified in the averments in the libel. Notice of the evidence was given in the lists of witnesses, productions and labels, together with the disclosed statements (*HM Advocate v Loughlin* 2023 SCCR 21 at para [8]). Whether there was sufficient nexus between the different elements of the libel was a matter to be determined by the trial judge, who would give appropriate directions (*DF v HM Advocate* at para [39]). On the basis of the complainer's description of the various instances of behaviour, there was ample evidence of a continuing course of conduct which was characterised by domestic abuse causing physical and psychological harm. The plea of oppression fell on the same basis as that relating to Article 6.

Decision

[8] In *DF v HM Advocate*, unreported, 10 August 2021, Lord Matthews explained (at para [28]) that section 1 of the Domestic Abuse (Scotland) Act 2018 extended to sexual behaviour. There was nothing incompetent in libelling what could also be charged as rape within a charge under that section. There was nothing incompetent in an indictment with such a libel. That being so, there is no requirement that the case be tried in the High Court. Section 3(6) of the Criminal Procedure (Scotland) Act 1995 does not exclude the jurisdiction of the sheriff court in a case such as the present.

[9] There is no breach of Article 6 of the European Convention in terms of fair notice. The libel is entirely clear. The Crown set out a number of incidents involving what is said to be abusive behaviour, including sexual violence. Fair notice is given in terms of the

indictment itself, together with the lists of witnesses and productions and no doubt supplemented by the disclosure regime. The nature of the evidence required to prove the charge has been set out in *CA v HM Advocate* 2023 JC 8, in which it was explained, adopting the language of *DF v HM Advocate*, that the offence under section 1 was committed by engaging in a course of behaviour. It would be sufficient to prove two incidents of the course of behaviour. That would entitle the jury to convict of the remainder, albeit uncorroborated, aspects, if they were part of the same course of conduct (*CA v HM Advocate*, LJC (Dorrian) at para [13], adopting *DF v HMA* at para [31] and citing *Finlay v HM Advocate* 2020 SCCR 317 at para [14]). There is no difficulty in directing a jury accordingly. There is no reason to suppose that the jury would be confused by the terms of the indictment. Equally, for the same reason, there is no question of any oppression arising.

[10] The appeal is accordingly refused.