APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 63
HCA/2016/612/XC

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

ANGUS FRANCIS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Hughes; Capital Defence Lawyers (for E Thornton & Co, Oban)
Respondent: P Kearney, AD; the Crown Agent

18 August 2017

Introduction

[1] On 5 September 2016, at the Sheriff Court at Oban, the appellant was convicted of two charges which libelled that:

> "(3) on an occasion between 1 April ... and 30 June 2012, ... at … Oban, you … did penetrate sexually with your penis the vagina of LG … a child who had ... not

attained the age of 16 years …; CONTRARY to Section 28 of the Sexual Offences (Scotland) Act 2009;

(4) on various occasions between 30 June ... and 29 June 2013, ... at … Oban you … did penetrate sexually with your penis the vagina of LG … a child who had ... not attained the age of 16 years ...; CONTRARY to Section 28 of the Sexual Offences (Scotland) Act 2009."

The appellant was acquitted of a further section 28 offence against the same complainer (charge 2), which was alleged to have taken place during the same time period as that in charge (3). Charge (1) was of unlawful sexual activity, contrary to Section 5(3) of the Criminal Law (Consolidation)(Scotland) Act 1995, involving a different complainer, in 2006 or 2007. That charge was withdrawn by the Crown.

[2] On 1 November 2016, the sheriff imposed an extended sentence of 4 ½ years, comprising a custodial element of 18 months and an extension period of 3 years.

Pre-trial proceedings

[3] The appellant had lodged a defence statement containing a general denial of guilt. In relation to charge (1), the offence was denied, and the appellant relied upon a special defence of alibi. In relation to charges (2), (3) and (4) (all instances of unlawful sexual intercourse with an older child) the appellant's stated position was that he reasonably believed that LG had attained the age of 16.

[4] In advance of the First Diet on 16 August 2016, the appellant had lodged an application under section 275 concerning LG's mental state as disclosed in her medical records. This application was continued until the morning of the trial. At the start of the trial, the application was not insisted upon.

The evidence

[5] The complainer LG was the principal witness. The line taken in cross-examination was that, although there had been a single incident of sexual behaviour involving the appellant and the complainer when she had been under 16 (which could have related to charge (3)), the conduct in charge (4), which covered almost a year of repeated sexual intercourse, was denied completely. The Procurator Fiscal Depute (PFD) considered that this was inconsistent with the defence statement, by which he had understood that intercourse was not challenged and that the only issue was the appellant's belief regarding the complainer's age. This had influenced the nature and extent of his examination-in-chief. The medical records had not been referred to in examination-in-chief. The PFD wished to use the medical records in re-examination.

[6] The appellant objected to this on the basis that the matters to be covered did not arise out of cross. If the PFD was allowed to re-examine on the medical records, the appellant would not have the opportunity to cross-examine the complainer on the entries. There were certain entries which the appellant would have liked to refer to, including one suggesting that the complainer had had several previous sexual partners. The sheriff asked how questions could be asked about these entries in the absence of a section 275 application. The appellant submitted that an application could be made orally.

[7] The sheriff determined that the PFD was entitled to re-examine under reference to the medical records. The PFD asked the complainer if her sexual relationship with the appellant had been limited to a single isolated incident when she had been 14. The complainer answered that it had been ongoing from the age of 14 until after she was 16. The complainer was asked if, between her 15th and 16th birthday (being the period covered by charge (4)) she had had a sexual relationship with anyone else. Her evidence was that she

had not. The PFD then asked about certain entries in the records. The first was 24 July 2012, and the last was 26 June 2013, which was a week before the complainer's 16th birthday. These entries related to potential problems arising from sexual intercourse. Two entries, dated 24 July and 13 December 2012, made reference to the complainer having reported having "several partners". The PFD did not ask the complainer about these.

[8] At the end of re-examination, the appellant sought leave to re-cross on the specific entries referring to other sexual partners. It was submitted that the defence would be prejudiced if the complainer was not asked whether she had previously had intercourse with other individuals and whether her visits to the GP were attributable to them.

[9] The sheriff considered that the Crown had appropriately focussed the re-examination specifically on the issues concerning the appellant and not on a more general basis. The Crown re-examination had been aimed specifically at matters which had been raised in cross. The sheriff concluded that it was not an appropriate exercise of his discretion to allow further questioning.

Submissions

[10] At the appeal hearing, the contention for the appellant was that the PFD's conduct, in not referring to the existence of entries in the medical records which referred to other sexual partners, amounted to oppression. This had given the jury a skewed picture. However, oppression was not raised in the ground of appeal for which leave to appeal was granted. That ground is that the sheriff had erred in "repelling a defence objection to ... re-examination", which was "compounded by his refusing the resultant defence extemporary (*sic*) 'section 275' application for permission to further cross-examine the complainer". As a consequence, the jury were left with the erroneous impression that the complainer had only

ever reported that she had been in a relationship with the appellant. The refusal, to allow the appellant to cross-examine the complainer further, had prevented the appellant from having his defence fully ventilated. The ground in the Note of Appeal did not appear to be pressed at the hearing. It is nevertheless the one which requires to be addressed.

Decision

[11] The Crown had adduced evidence from the complainer, not only about the single act of intercourse in charge (3), but also of a prolonged sexual relationship thereafter. The existence of the latter was challenged in cross, although on the face of the defence statement it was only the appellant's belief about the complainer's age which was to be an issue. The challenge having been made, it was open to the Crown to re-examine on the basis of a continuing sexual relationship with the appellant and to put medical entries demonstrating that to the complainer. The Crown could have done that in examination-in-chief. The question is whether, whatever the stage of examination, the appellant ought to have been allowed to cross-examine on the basis that there were entries referring to continuing sexual activity with another man or men.

[12] Such a course of action is prohibited by section 274(1)(b) of the Criminal Procedure (Scotland) Act 1995. It could only be permitted under section 275, following the grant of a written application (s 274(3)). There was never any such application covering these matters or any motion to allow a written application to be received late on special cause (s 275B(1)). Even if such a motion had been made, it would inevitably have been refused. The appellant was aware that the Crown intended to lead evidence of a continuing sexual relationship during 2012 and 2013. If the appellant had wished to cross on the basis that any such relationship was with another man or men, he would have to have lodged an application

under section 275 in advance of trial. No cause was shown for not having done so. Furthermore, any evidence from the complainer that she had had other sexual partners would have had very limited probative value and it is unlikely that any such application would have succeeded.

[13] The appeal is refused.