**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2022] HCJAC 21**
**HCA/2021/178/XC**

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL
AGAINST CONVICTION AND SENTENCE

by

KEVIN GUTHRIE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: Duguid QC, I Paterson (sol adv); Paterson Bell**
**Respondent: Prentice QC (sol adv) AD; the Crown Agent**

25 May 2022

**Introduction**

[1] On 16 April 2021, at the Sheriff Court in Glasgow, the appellant was convicted of a charge which libelled that:

> "… between 30 September … and 1 October 2017 … at … Cleveden Drive, Glasgow you … did sexually assault FS … and … kiss her on the lips, insert your tongue into her mouth and kiss, suck and bite her breasts, to her injury and sexually penetrate

her vagina and anus with your fingers: CONTRARY to sections 2 and 3 of the Sexual Offences (Scotland) Act 2009".

On 14 May 2021, he was sentenced to 3 years imprisonment.

[2] The appeal against conviction is about whether the appellant's legal representation was defective. The contention is that the importance of finding the appellant's DNA on the complainer's pants ought to have been the subject of greater challenge at trial. In particular, the possibility of secondary transfer of the appellant's DNA from the complainer's outer clothing onto her underwear as a result of the packaging of all the clothing by the complainer in a single bag, and the later re-packaging of that clothing by the police, had not been investigated by the appellant's representatives nor had it been properly presented to the jury.

**Evidence**

***Complainer***

[3] On 30 September 2017 she met a friend to celebrate that friend's birthday. They drank two glasses of champagne at the friend's house. They then went to the Rum Shack. They had two glasses of rum. The complainer left her drink unattended when dancing. She felt happy, if tipsy, until she left the Shack at about 10.30pm. By that time she had arranged to meet SR and his friend, the appellant.

[4] When attempting to enter a taxi, the complainer experienced difficulty in focusing, speaking and communicating generally. During the course of the journey, she asked the driver to stop so that she could be sick. She was assisted in leaving the taxi by two unknown men. SR and the appellant arrived shortly thereafter. They helped her into their taxi and to SR's flat, where she was put to bed. The complainer was attempting to stay conscious, but

failed. She recalled being on the bed. Her ear had been pinched. She could not move and was again having difficulty speaking. SR was on his phone and the appellant was at her side.

[5] The complainer remembered the bed covers being moved down, her top being lifted up and her bra being pulled down. All of this was being done by the appellant. He was biting and licking her nipples. He unzipped her trousers and put his hand inside her black underwear. He inserted his fingers into her vagina. The complainer froze. The incident lasted for a few minutes before SR returned. When he left the room again, the appellant put his hand down the back of the complainer's trousers and inserted his fingers into her anus. He put his hand down the front of her trousers for a second time and again inserted his finger into her vagina. During the course of this, the appellant was either listening to, or watching, some form of pornography on his mobile phone.

[6] The complainer recalled SR and the appellant having a conversation about whether they should call the police. Everything was unclear thereafter. She woke up the following morning and noticed that the zip on her trousers was undone. She asked SR if he knew why that was. He was unable to say. The complainer's mother was phoned. She took the complainer to the Queen Elizabeth Hospital. They explained to the medical staff that the complainer thought that her drink might have been spiked and asked if a test for this could be carried out. The hospital did not carry out such tests. The complainer told the doctor that she had been sexually assaulted by her boyfriend's friend who had been touching her inappropriately. She was not sure if this had involved penetrative sex, but by that she had meant penile penetration. The complainer spoke to various photographs which showed marks on her breast and multiple bruises elsewhere on her body. She accepted that some of

these could have been caused when she had been getting in and out of the taxis, but the injuries to the breast had not been accidental.

***SR***

[7] SR had gone out for dinner and drinks with the appellant on 30 September. SR had been in text contact with the complainer, whom he had agreed to meet later that evening. Some time after 9.00pm, he received a phone call from a taxi driver, who told him that the complainer was in his taxi and was unwell. The driver thought that she was simply drunk. SR and the appellant took the complainer into their own taxi and went to SR's flat, where the complainer was put to bed. SR had put the complainer under the covers of the bed when she had been fully clothed. The only items of the complainer's clothing which had been removed by SR were her shoes. SR became concerned about the complainer's state. He told the appellant that he was going to phone NHS 24, which he then did.

[8] SR was on the phone for between 30 and 40 minutes. Although he had originally tried to phone from the bedroom, the reception there had not been good. He went out to the front of the building, where he could also smoke. He had asked the appellant to stay in the bedroom in order to keep an eye on the complainer. He went back to the bedroom from time to time to check that everything was alright. Because of the predicted time which an ambulance would take to attend, the police, who were nearby, were asked to assist. Two officers arrived. The complainer reacted when slapped, a test which had been advised by NHS 24. It was decided not to call an ambulance. When the officers were in the flat, the complainer was alone in the bedroom. After the police left, the complainer had settled down. SR went into the same bed as the complainer, but he asked the appellant to stay in the flat in case the complainer's condition deteriorated. The appellant did so and slept on a

couch in the livingroom. In the morning the complainer had asked SR why her trousers were undone. He had said that he did not know.

*Medical and scientific*

[9] Dr Mohammed Moughal examined the complainer on 2 October 2017. He spoke to her various injuries, all of which could be attributed to blunt force trauma. A bruise to her breast was consistent with the complainer's account, but there was no bite mark in the form of teeth indentations. There were no genital injuries, but there was a complaint of pain in the vaginal and anal areas occurring on the previous day. Some of the injuries were consistent with the complainer's clothing, including her bra, being pulled.

[10] Dr Nighean Stevenson, a forensic scientist, received DNA samples from the complainer, the appellant and SR. Along with a colleague, she analysed two pairs of pants, which had been worn by the complainer. The first was the black pair which she had been wearing at the time of the incident. The "inside front and inside back" were separately taped. A large amount of DNA was detected on both samples. The profile was a mixed one, containing DNA from a major contributor, namely the complainer, and from a trace level contributor, namely the appellant. The second pair of pants, which were white, had been worn by the complainer on the day after the incident. They were examined by taping the inside front, inside back and outside back. A relatively small amount of DNA was recovered from each sample. A mixed DNA profile was obtained from the inside front, which was of a similar nature to that already obtained from the black pants, except that there was a third trace contributor from an unknown person (not SR). No DNA attributable to the appellant was detected from the other tapings or from intimate swabs taken from the

complainer, although the latter were taken only on 2 October, some 48 hours after the incident.

[11] It was Dr Stevenson's view that the level of DNA from the appellant, which had been found within the black pants, was consistent with the appellant putting his hand down the inside of those pants. It could have been either a direct or an indirect transfer but, because of the large amount of DNA found from the appellant, it was more likely to have been direct. It was put to Dr Stevenson that the presence of the appellant's DNA might have various explanations and in particular that there could have been cross-contamination from her outer clothing. Although Dr Stevenson may have accepted this, she remained of the opinion, which was contained in her report of 4 September 2019, that the findings from the black pants were consistent with the appellant putting his hands inside the pants and digitally penetrating the vagina or anus as the complainer had reported.

[12] Dr Stevenson's report expressly stated that she did not know the appellant's version of events and that matters could be re-evaluated if that were provided. A further report dated 3 February 2020 recorded that the finding of a relatively lower level of DNA attributable to the appellant on the white pants could be explained by a transfer of that DNA directly from the complainer but that "some other indirect transfer" could be considered. Again, the absence of the appellant's version was noted.

***The appellant***

[13] The appellant testified that he had been out with SR. They had gone to the assistance of the complainer, who was in a distressed state in a taxi. They took her into their own taxi and back to SR's flat, where she was put to bed. Her speech was slurred. She was struggling to speak. The appellant and SR were concerned about her condition. SR had

gone to phone for assistance. There had been poor reception in the bedroom and SR had left while the appellant remained. The police arrived and stayed for some time. By the time they had left, SR and the appellant had been happier with the complainer's condition. They decided that they would just let her sleep it off. The appellant slept on the settee in the sitting room, having phoned his partner and told her that he was staying in SR's flat in order to assist. The appellant accepted that there had been occasions when he had been left alone in the bedroom with the complainer, when SR had been outside making calls. He had not done anything of an indecent nature. He had put the complainer into the recovery position on the bed to stop her vomiting when lying on her back. The appellant had no explanation for the DNA findings, other than that they must have been caused by some form of secondary transfer.

***Dr Zenobia Zaiwalla***

[14] The evidence of Dr Zaiwalla does not have a direct bearing on the appeal. It does, however, throw light on the primary line of defence which the appellant advanced at trial. This was that the complainer was mistaken when she thought that anything indecent had happened to her in the flat. Dr Zaiwalla was a consultant in clinical neurophysiology. She produced a report which dealt with types of dissociated states. Such a state could occur where someone was extremely sleepy as a result of intoxication, but who was continually aroused and prevented from sleep, for example, by being carried out of a taxi and up stairs, and being slapped. In this state, a person could have altered perception and experience hallucinations, including those involving sexual activity. Entry into rapid eye movement sleep, upon forced arousal, could explain a complainer describing not being able to move or

call out and at the same time being convinced that she was being assaulted. The doctor conceded that, on the other hand, the account given by the complainer could be accurate.

**Speeches**

[15] In due course the defence asked the jury to be careful about the DNA evidence. One possibility was that there had been a secondary transfer of DNA at the time when the appellant had been assisting the complainer. There were various possibilities as to how the appellant's DNA had been found on the pants.

**Grounds of appeal and procedure**

[16] Having been granted an extension of time in which to do so, on 6 September 2021 (almost five months after the verdict) the appellant lodged an extensive Note of Appeal. This contained 10 grounds (2 on sentence), although several overlapped. They focused primarily on alleged defective representation by the appellant's counsel and solicitors in not instructing an investigation into the possibility of cross-contamination of the DNA within a plastic bag which, the defence ought to have known, the complainer had used to take her clothing to the police office. On 15 October, the judge at first sift determined that none of the grounds was arguable and that therefore leave to appeal should be refused.

[17] Three extensions of time were granted to enable the appellant to appeal to the second sift (three judges). Meantime, he applied to amend his Note of Appeal by including supplementary grounds. These consisted of a complaint that neither the Crown nor the appellant's representatives had instructed an analysis of samples taken from the complainer which might have indicated that the complainer had ingested chemicals of a mind altering nature (ie as a consequence of her drink having been spiked).

[18] On 11 November 2021, leave to amend the Note of Appeal was refused on the basis that no reason for not having included the supplementary grounds in the original Note of Appeal had been proffered. In any event, trial counsel had been able to cross-examine the complainer on the basis that she had been intoxicated and/or had had her drink spiked. Whether he elected to pursue such a line had been a tactical decision. The test for a successful defective representation appeal on this ground had not been made out. The results of any analysis would not have assisted and may have inhibited the lines of cross.

[19] The application for leave to appeal on the original grounds proceeded to the second sift. The appellant's new counsel did not support grounds 3 to 5 or 7 and 8. Ground 1 was that the appellant's representatives had failed to instruct a forensic scientist "properly". The Crown had disclosed statements from two police officers (DCs MacFarlane and Roche) which referred to the complainer putting all her clothes into one plastic bag. Cross contamination as a result should have been explored with Dr Scott Bader, of the Forensic Institute, who had been instructed by the defence prior to the trial but who had not been told about the packaging of the clothing. Dr Bader had now said that the finding of the DNA on the black pants was affected by the packaging. This provided a reasonable explanation for the DNA findings, which the appellant had not been able to advance at trial.

[20] Trial counsel reported that the defence position had been that there had been extensive contact between the appellant and the complainer during the evening as she was helped to and from the taxis and from a taxi to the bedroom. There was already an arguable basis for secondary transfer. A further "somewhat fanciful", explanation, as counsel put it, involving a secondary transfer onto both pairs of pants would have looked as if the defence had been "clutching at straws". Counsel would not have adopted this line. Counsel did not state whether he was aware of the statements from the police officers and hence that the

clothes had been packaged in, and re-packaged from, a single plastic bag. He did say that he had consulted with Dr Stevenson. This had tempered some lines of cross-examination which he had been contemplating.

[21] A letter from the appellant's then agents, who are specialists in criminal cases, endorsed counsel's report that the line of secondary transfer was one which was presented.

[22] A separate point in this ground related to the appellant having eczema, which would have increased the likelihood of indirect DNA transfer, but which the appellant had not revealed to his defence team. Leave to appeal was granted on the defective representation element on ground 1, but not the part relating to eczema.

[23] Ground 2 is related to ground 1. It first complains that the trial forensic scientist had not been provided with the appellant's account of what had happened by way of contact with the complainer. That had been available to the defence pre-trial, but had not been put to the scientists. They had not been told of that part of the complainer's account which related to the injuries to her breast or about the packaging of the clothing. Leave to appeal was granted but only in relation to the packaging point.

[24] Leave was granted on ground 6, but only in relation to a contention that there was new evidence on the eczema point. This was not ultimately pressed, given that the appellant was aware of his eczema but did not mention it to his agents. Leave was also granted on sentence.

**Post-trial forensics**

[25] The appellant's new agents took over the appeal on 1 June 2021. Their focus was on the DNA evidence. They asked for access to the labels, notably the clothing, which they viewed in early July. They instructed a new report from Dr Bader dated 5 August 2021 in

light of the information on the packaging of the clothing. He concluded that, as a result of this, the finding of the appellant's DNA "cannot reliably support the allegation" because of the possibility of indirect transfer from one item to another in the plastic bag or in the re-packaging. If the appellant's DNA had been transferred to the surfaces of the complainer's outer clothing, whilst he had been assisting the complainer, there was an opportunity for transfer to the pants. No sample had been taken from the other items of clothing. Dr Bader concluded that "there was a real, although not scientifically measurable, possibility for indirect transfer of DNA between items, depending on actual circumstances".

[26] A report (undated) from Prof Allan Jamieson at the Forensic Institute, Glasgow, was obtained. He agreed that one explanation for the appellant's DNA being on the complainer's black pants was that he had digitally penetrated the complainer. The "less speculative explanation" was that he may have had contract with her underwear. The packaging of the clothing provided a means of transfer. It was not possible "to provide a scientifically reliable opinion on the route of transfer given the paucity of published data and the number of unknown factors involved". A statement from Dr Georgina Meakin, another forensic scientist, dated 16 August 2021, maintained that it was "equally likely" that the appellant's DNA was on the pants if either the complainer's or the appellant's account were true. The evidence was "neutral".

[27] A lengthy statement, which covered a wide range of matters, was obtained from James Clery, a forensic scientist based in Bristol, on 31 October 2021. This recorded that a transfer of the DNA within the bag of clothing "would not be unexpected". The same would apply to the re-packaging process. In Mr Clery's view "the observations are neutral".

[28] In an additional statement dated 23 December 2021, Dr Clery describes the DNA findings in detail. He recognised (p 18) that the finding of the appellant's DNA on the inside

of the pants "may provide support to the allegation" but a number of issues concerning the reliability of the DNA findings were present. One of these was the small quantities of DNA recovered. This equated to 15 and 20 picograms respectively on each pair; being the equivalent of 2 to 3 skin cells.

[29] In her supplementary report dated 14 April 2021, Dr Stevenson described the amount of the appellant's DNA on the inside of the black pants as "relatively large". She regarded Mr Clery's calculations as unsubstantiated. It was the amount of DNA in the entire sample and not just the analysed portion that was important. She regarded the trace level as a significant amount of DNA. Dr Stevenson considered cross-contamination. Whether the appellant's DNA was on the other clothing or the bag was unknown, but it could be ascertained. A secondary transfer was possible. Dr Stevenson remained of the view that it was more likely that the DNA was caused by direct transfer because of: the large amount of DNA being detected on the inside front of the black pants, with the mixed profile having the trace contribution from the appellant; the location of the DNA; and her experience of over 19 years.

[30] The defence instructed a further forensic scientist, namely Dr John Douse. He concluded that "further critical DNA related evidence has now been released, and which was not … in the original trial." This related to the "inadvertent mishandling" of the clothing in the bag and the possibility of cross-contamination. This had a "likelihood of altering significantly the conclusions … and could very likely have the potential to have possibly influenced the original trial outcome".

**Submissions**

[31] At the start of the hearing, the appellant moved for an adjournment on the basis (as

had been raised in Dr Stevenson's report of April 2021) that further evaluation of the complainer's clothing could be carried out. Although the appellant's legal representatives had sought access to the clothing, they had not sought an order to carry out any further examination of the clothing. The court was not satisfied that any potential findings would have a material bearing on the appeal. The motion was refused pending the conclusion of submissions.

***Appellant***

[32] The appellant recognised that the grounds of appeal were primarily directed towards defective representation arising from the possibility of cross-contamination as a result of the packaging and re-packaging of the clothing not being explored at or pre-trial. Dr Stevenson had not been asked to consider the handling of the pants prior to their receipt at the laboratory, although that handling had been mentioned in the statements by the receiving police officers. The defence team had failed to notice the packaging issue. The finding of the appellant's DNA on the white pants had been a secondary transfer. There was DNA from a third party on the white pants. The subsequent opinion of the forensic scientists highlighted the "strong possibility of cross-contamination with other items of clothing".

[33] The response from the appellant's trial counsel was at odds with expert studies whereby DNA could be transferred from one surface to another. Re-packaging involved a risk of transfer. These were not "fanciful ideas" nor would exploration of the risk have been "clutching at straws". Although secondary transfer was before the jury, an important mechanism of that transfer was not. The failure to notice the evidence of packaging and to obtain expert advice on it resulted in the appellant's defence not being "properly presented".

[34] Dr Stevenson's conclusions had been founded on the volume of DNA recovered on the black pants. The amount of the appellant's DNA had amounted to 2 skin cells on the black pants and 3 on the white pants. The appellant's DNA was not present on the intimate swabs. This was significant but had not been explored at the trial.

[35] A material part of the defence had not been before the jury "contrary to the promptings of reason and good sense" (*McIntyre* v *HM Advocate* 1998 JC 232 at 240; *Burzala* v *HM Advocate* 2008 SCCR 199 at paras [33]-[35]). A reasonable jury, which had heard the challenge to Dr Stevenson's view, would have reached a different conclusion on the complainer's credibility and reliability. The defence at the trial had not challenged the primary transfer view. The appellant was entitled to have his defence properly investigated with a view to its proper presentation (*Garrow* v *HM Advocate* 2000 SCCR 773 at para [14]; *Hemphill* v *HM Advocate* 2001 SCCR 361 at para [20]). A failure in that regard could lead to the denial of a fair trial (*AJE* v *HM Advocate* 2002 JC 215 cited in *BK* v *HM Advocate* [2017] HCJAC 68 at paras [47]-[55]). That is what had occurred in this case. There had been a complete failure to present the appellant's defence on the DNA findings.

***Respondent***

[36] A defective representation appeal could only succeed when there was a miscarriage of justice. That could only occur if the appellant had not received a fair trial (*Anderson* v *HM Advocate* 1996 JC 29 at 43-44). There had to be a complete failure to present the defence either because instructions had been disregarded or the defence had been conducted in a manner in which no competent practitioner could reasonably have conducted it (*Woodside* v *HM Advocate* 2009 SCCR 350 at para [45]). An appeal could not succeed where all that was said was that the defence could have been stronger or a better strategic judgment could have

been made (*Ditta* v *HM Advocate* 2002 SCCR 891 at 894). There had to have been a failure, in some fundamental respect, to put the defence before the jury (*Jeffrey* v *HM Advocate* 2002 SCCR 822 at para [26]).

[37] The practical effect of the defective representation had to be considered. The complainer's account had been corroborated by Dr Moughal's description of the injuries and Dr Stevenson's DNA findings. Indirect transfer had been mentioned by Dr Stevenson, and her colleague, in their pre-trial reports. Dr Bader had done the same. Secondary transfer had been discussed with Dr Stevenson by the appellant's counsel. It was explored at trial, both in the cross-examination of Dr Stevenson and in the defence speech.

[38] The appellant's post-trial scientific reports recognised that one explanation for the DNA findings was that the appellant had committed the offence. Dr Stevenson had responded to the contentions about secondary transfer. She maintained her position at trial. There had been no denial of a fair trial. Any failure to explore cross-contamination in the packaging would at best have deprived the appellant of a line in cross-examination. It was a line that counsel said he would not have adopted.

**Decision**

[39] The competency of a ground of appeal based upon the defective representation of an accused person at trial was established by the Full Bench in *Anderson* v *HM Advocate* 1996 JC 29. It is important to recognise at the outset that *Anderson* is not authority for the proposition that any defect in an accused's representation results in the quashing of a conviction. On the contrary, *Anderson* required (at 43-44) that, although an accused has a right to legal representation whereby his defence must be presented in accordance with his

instructions on what his defence is, his counsel is free to conduct that defence in such a manner as he deems appropriate. Thus:

> "as a general rule the accused is bound by the way in which the defence is conducted on his behalf."

The circumstances in which the conduct of the defence will constitute a good ground of appeal "must be defined narrowly". It must have led to a miscarriage of justice; that is to say it deprived the accused of a fair trial. That can only be said to have occurred when the conduct "was such that the accused's defence was not presented to the court". That can happen when the accused's counsel acts contrary to the accused's instruction on what his defence is (which is not the case here) or because (at the risk of repetition) he was deprived of a fair trial "because his defence was not presented to the court".

[40] For some years after *Anderson*, the court grappled with what was meant by an accused's defence not being "presented". Appeals were advanced on this ground under general contentions that the accused had not had a fair trial, even if his representatives had been afforded every opportunity to secure that right. Lines of possible enquiry were examined in some detail with a view to demonstrating that a potential source of evidence, which might have assisted the defence, had been ignored or wrongly discounted. The test laid down by *Anderson*, in short, became distorted by the addition of "properly" prior to "presented" (eg *Garrow* v *HM Advocate* 2000 SCCR 773 at para [14] followed in *Hemphill* v *HM Advocate* 2001 SCCR 361 at para [20], which also added "properly investigated") thereby endorsing a view that any substantial mistake by the accused's team might result in an ultimate acquittal on appeal. Were that to be the correct test, the number of convictions which are capable of surviving an appeal may be significantly diminished and the number

of retrials similarly multiplied. Such a test would run contrary to the statement by the Full Bench that, as a generality, an accused is bound by the way his defence is conducted.

[41] In *AJE* v *HM Advocate* 2002 JC 215, the Lord Justice Clerk (Gill) addressed the test in *Anderson* in so far as it related to the manner in which the defence should be presented at trial. He re-iterated (at para [7]) the fundamental point in *Anderson*, that an accused is bound by the way in which his defence has been presented, before proffering (at para [8]), as an example of circumstances meeting the test, a situation in which the defence was presented "with complete ineptitude or where counsel made some decision that was so absurd as to defy all good sense". In relation to pre-trial decisions, the Lord Justice Clerk referred (at para [12]) to "a failure *properly* to put forward the defence" (emphasis added) (see also Lord McCluskey at para [26]) but that was in the context of a specific instruction on the line of attack on the Crown case, which was not advanced. That context was to be of importance a few months later when the issue of pre-trial investigation and decision making was raised in *Ditta* v *HM Advocate* 2002 SCCR 891.

[42] In *Ditta* the court accepted that a failure to lodge medical records, of the contents of which the accused's agent was aware, would have provided "a further line of attack on the credibility of the complainer" (at para [15]). That was not sufficient for a successful appeal. The Lord Justice Clerk (*Gill*) explained:

> "[17] … This court will not entertain [defective representation] appeals where all that is suggested is that with the benefit of hindsight and further investigation it can be seen that the defence could have been stronger or that better judgments could have been made on strategic and tactical matters. … [A]ll that can be said … is that the defence solicitor failed to produce an adminicle of evidence that could have provided a response to a line of evidence by the complainer that could not reasonably have been foreseen. That line of evidence was on a collateral issue and there were good reasons for not producing the records."

[43] In *McBrearty* v *HM Advocate* 2004 JC 122, the Lord Justice Clerk (Gill) referred (at para [34]) to *Garrow*, *Hemphill* and *AJE* as examples of a "complete failure to put forward an important line of defence"; distinguishing those from a situation in which a judgment had been made as to the manner of presentation of that line. He described (at para [35]) the key point in *AJE* as being the:

> "failure to follow up lines of defence, that were plainly crucial to the case, despite having been urged to do so by the accused himself, and in the course of the trial had failed to pursue lines of cross-examination that were obviously necessary if the defence was to be properly put before the jury".

The Lord Justice Clerk went on to say (at para [36]) that a professional judgment could be defective representation if it flew in the face of reason. In such a case the court could hold that the defence was not "properly conducted". The underlying question remained one of whether the accused was given a fair trial.

[44] Two years later, in *Grant* v *HM Advocate* 2006 JC 205, the Lord Justice Clerk returned to *Anderson* when describing the test as being that the defence of an accused had resulted in a miscarriage of justice. This could:

> "only occur if the appellant's defence was not presented to the court, and he was therefore deprived of his right to a fair trial, because counsel either disregarded his instructions or conducted the defence in a way in which no competent counsel could reasonably have conducted it".

Leave to appeal should not be granted if:

> "all that is alleged is that the defence would have had better prospects of success if the defending counsel had pursued a certain line of evidence of argument, or pursued a different strategy".

These *dicta* were collated and repeated in *Burzala* v *HM Advocate* 2008 SLT 61 (at para [33]).

[45] If the direction of judicial travel in these cases is perceived to be a retrenchment from *Garrow* and *Hemphill* and a return to the *ratio* of *Anderson*, such a perception would be confirmed by the current *locus classicus* of *Woodside* v *HM Advocate* 2009 SCCR 350, in which

the Lord Justice Clerk (Gill) defined the scope of a defective representation appeal thus (at para 45):

> "[It] is not a performance appraisal in which the court decides whether this question or that should or should not have been put; or whether this line of evidence or that should or should not have been pursued. The appellant must demonstrate that there was a complete failure to present his defence either because his counsel or solicitor advocate disregarded his instruction or because he conducted the defence as no competent practitioner could reasonably have conducted it … That is a narrow question of precise and limited scope."

[46] The use of a phrase "complete failure to present his defence" returns the test to its origins in *Anderson*, albeit that it is expressed in a different language. In the present case, the appellant's defence was that he did not sexually assault the complainer. The presence of his DNA on the complainer's pants must have been as a result of some form of cross-contamination; for example from the complainer's outer clothing with which the appellant had been in contact. The appellant gave evidence that he did not assault the complainer. The Crown's forensic scientist was cross-examined on the basis that the DNA must have been as a result of cross-contamination from the contact between the appellant and the complainer on the way to the flat. The defence speech followed that line. In these circumstances, the test in *Anderson* and *Woodside* is simply not met. The appeal must be refused on that basis.

[47] In deference to the arguments advanced on behalf of the appellant, it may be of some utility to examine the contentions of fact in more detail. In doing so, it is important for this court to focus on the totality of the evidence at trial and not to concentrate exclusively on the impact of the DNA findings and what might be inferred from them. The question for the jury was a stark one. It was whether the complainer was credible and reliable in her account of being sexually assaulted in the flat. If she had been assaulted, the only candidate for that

assault on the evidence was the appellant. There was no issue of identification nor was there any possible lack of corroboration.

[48] In determining whether the complainer was to be accepted in her account of sexual assault, there was, first, the complainer's question to SR that her trousers were inexplicably unzipped when she woke up. Secondly, there was the medical evidence that: the complainer had a bruise on her breast which could have been caused by her account of the assault; there were marks to her chest which were consistent with her top and bra having been pulled up; and, of considerable importance, she was complaining of having pain in her vagina and anus on the day after the incident. The complainer's memories of waking with the appellant and SR in her bedroom, SR being on his phone and then leaving the appellant alone with her in the bedroom, were objectively verifiable. These would all have been important elements in assessing the complainer's testimony on the essential elements of the libel. All of this in turn is highly supportive of the complainer's version of events before any analysis of the DNA and its significance were commenced.

[49] The undisputed evidence was that the appellant's DNA was found on the inside front and inside back of the black pants which the complainer was wearing at the material time (under a pair of jeans) and on the inside front of the white pants which she had put on the following day. The proposition from some of the scientists that this is "neutral" is rejected. It may not be conclusive. On its own it would not prove either an assault or the appellant's participation in it. However, when compared with a situation in which there was a finding that the appellant's DNA had not been found on the complainer's pants, a finding that it was found makes it more probable that the complainer's account of the appellant's fingers being in contact with her vagina and anus is true. The existence of

possible cross-contamination does not affect that generality; the degree of support for the complainer's version being dependent on the likelihood of that cross-contamination.

[50] The appellant had been in contact at least with the complainer's clothing when assisting her into and from the taxi and then to SR's flat. The possibility of cross-contamination was before the jury, even if Dr Stevenson preferred, and continues to prefer, direct contact between the appellant and the pants. The appellant's counsel might have put the packaging and re-packaging before the jury as a further possible explanation for the findings, but experienced trial counsel reports that he would not have used this because the idea of cross-contamination onto both pairs of pants, and on two sites of the black pair, would have looked "fanciful" and as if the defence were "clutching at straws". Despite the appellant's criticisms of this view, which are made with the benefit of hindsight and in light of the conviction which followed, it is a legitimate one even if other counsel could have well taken a different view and decided to pursue cross contamination with more vigour.

[51] Defending those accused of a crime is not an easy task. Difficult and potentially risky decisions may often have to be taken in the context of a forthcoming or ongoing trial. The pursuit of lines of inquiry, which may take matters closer to the truth, may require very careful consideration. Lines which are casually or determinedly pursued may narrow, and potentially eliminate, the overall defence strategy. It is not without importance that, in the many months since the verdict was returned and during which several scientists have been called upon for their views, the appellant's representatives have not sought to have the clothing which was in the bag, and the bag itself, forensically examined despite Dr Stevenson's earlier suggestions. The court is not persuaded that the pursuit of the line, which the appellant now advances, would have strengthened his case. It may well have

weakened it. It cannot be said the trial counsel's conduct of the defence was such as no competent counsel could reasonably have conducted it.

[52] The appeal against conviction is refused.

**Sentence**

[53] The appellant was 29 at the material time. He continues to protest his innocence, although he appears to accept that the complainer must have been sexually assaulted at some point during the evening of 30 September 2017. He is from a stable background. He continues to have the support of his family. He has been in a steady relationship for over 15 years. He had a happy childhood and a good education. He graduated from what was then the RSAMD before embarking upon a successful acting career. His health is good and he keeps himself fit. He has no previous convictions. He poses a low risk of re-offending.

[54] Although it was recognised by the appellant that a custodial sentence was appropriate, it was submitted that the sheriff had attributed insufficient weight to the appellant's previous exemplary character, his charity work and the devastating effect which the conviction would have on his career.

[55] The court agrees with that submission. The crime committed was a serious one. It is an inexplicable one when set against the appellant's background. Most important, the appellant's conviction is likely to end, at least for the foreseeable future, the successful career which he has worked hard to achieve. In these circumstances, the court will quash the sentence of 3 years and substitute one of 2 years imprisonment.