APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 38
HCA/2021/68/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

JB

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: C Mitchell KC, Livingstone Brown, Solicitors, Glasgow
Respondent: Keenan KC, AD; the Crown Agent

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28 September 2022

[1] This is an appeal against conviction which we heard and refused on 28 September 2022. We indicated that we would give our reasons in writing, which we now do.

[2] On 28 January 2022 the appellant was convicted after trial of 5 charges, as follows:

> "(1) on various occasions between 3 August 1963 and 31 December 1987 he assaulted JB to her injury and to the danger of her life;

(2) on various occasions between 3 August 1963 and 31 December 1987 he indecently assaulted JB and on one occasion when she had recently given birth and on several occasions when she was asleep he raped her;

(4) on various occasions between 15 January 1969 and 14 January 1978 he indecently assaulted NB and raped her;

(6) on various occasions between 15 January 1978 and 31 December 1999 he assaulted NB and raped her; and

(7) on various occasions between 15 January 1978 and 14 January 1997 he indecently assaulted NB."

[3] He was sentenced to a total period of imprisonment of eight years and six months. The usual certification was made under the Sexual Offences Act 2003.

[4] Attached to the indictment there was a docket containing 6 paragraphs. The first paragraph narrated an assault on JB but an objection to that was upheld at a preliminary hearing. The remaining paragraphs referred to sexual offending against NB in Spain between 1 and 31 August 1989, 1 January and 31 December 1995, 1 January 1999 and 31 December 2005, 1 January 2001 and 31 December 2004, and 15 January 1997 and 14 January 1978. For some unexplained reason the paragraphs included the *nomina iuris* of the offences constituted by the facts alleged. That should not have happened but nothing turns on it for present purposes.

[5] Other than in relation to the first paragraph, an objection to the docket was repelled at the preliminary hearing referred to above. There is no appeal against that decision but the existence of the docket was referred to in argument, as will be seen.

[6] The grounds of appeal, of which two passed the sift, are discursive but the surviving grounds (1) and (2) can be read together and distilled into the following broad propositions. These are that the Crown unreasonably delayed in indicting the appellant. That delay

meant that the evidence of the complainer JB had to be led using the provisions of section 259 of the Criminal Procedure (Scotland) Act 1995 and as a consequence of all this the appellant's trial was unfair.

Background

[7] Much of the history of the case is contained in a joint minute, in a timeline produced by the Crown and in the decision of the preliminary hearing judge, which also dealt with the issue of delay and the proposed use of section 259.

[8] The appellant and NB were both resident in Spain at the time the allegations were made by NB. She travelled to Scotland in 2016 and reported matters to the police. Shortly before this she had reported certain matters to the Spanish authorities. On 1 April 2016 a DS Burns spoke to NB and then travelled to England to meet JB. Before DS Burns went to see JB, NB went to stay with her for a few days. She denied influencing JB in any way before she discussed matters with the police. According to NB, JB's health was good when NB stayed with her. DS Burns interviewed JB on 12 July 2016 and a statement was noted. JB did not appear to be confused or to have any difficulty with her memory at that stage.

[9] The police decided to follow up the investigation and arrangements were made to take another statement from JB by telephone. This was done on 19 September 2016, again by DS Burns.

[10] There was evidence from NB that JB travelled to Spain to spend Christmas with her in 2016. At that time JB's health seemed fine. However, JB told NB that she had heard she could get a test for Alzheimer's and was going to be tested.

[11] In late January 2017 JB was diagnosed as suffering from Alzheimer's disease. This diagnosis was made by a GP with a specialism in dementia. The information recorded at the

time included material to the effect that JB was independent, eating ready meals, had no problems with medication but had a 12 months history of concentration lapses and panic attacks. She seemed to be able to get out and about although there was a note that on one occasion she had been out at 5am thinking that she was going to get her nails done. She was able to express herself verbally, was oriented as to time and place and person and could concentrate for the 40 minutes it took to get through the test. However, her score was 65 out 100; anything below 80 or 82 suggesting dementia. The history was one of slight memory issues in connection with recent events. The doctor saw JB for review in May 2017 and at that time, as previously, found her to be competent on the basis that she had been able to understand all questions she had been asked and express herself coherently. It was only short term memory which was affected.

[12] Her own GP saw her on 11 April, 8 May and 27 June 2017, when she complained of anxiety. She also had concerns about her concept of time. Later in 2017 JB reported going out on her own and finding herself in places she could not remember.

[13] According to NB there was a slow progression of the disease initially. JB continued to lead an independent life until 2019. Additional help was not needed at home until November 2017 when NB contacted social services.

[14] In the middle of 2017 DS Burns travelled to see JB again to make enquiries about the diagnosis of Alzheimer's disease. JB remembered who she was and steps were taken to contact the GP. On or about 25 July 2017 information was obtained over the phone and the Crown were notified of concerns about Alzheimer's disease. JB continued to live alone, albeit with support from carers and friends but in 2019 she seemed chaotic and needy and was admitted to residential care in the summer of that year.

[15] Alzheimer's is a type of dementia which is progressive. Its rapidity is variable. It is possible to have a slow development of the disease and then a quick progression at a later stage. A consultant neuro-psychologist, who considered the medical records and statements, gave evidence that there had been a considerable deterioration in JB's Alzheimer's in 2019 and 2020 and possibly earlier. She was likely to have been in the early stages of dementia when she gave her statements in 2016 because of the findings of the brain scan and behavioural changes noted at the beginning of 2017. At that time her dementia was mild. The preliminary hearing judge was satisfied that at the time the statements were given JB was a competent witness. No challenge is made to that finding.

[16] According to the timeline, the police submitted a report to the procurator fiscal on 16 November 2016. On the same day a report was sent to Crown counsel recommending a pre-petition investigation and an instruction to that effect was given, also the same day.

[17] Further work was instructed on 4 April 2017. The National Pre-Petition Team was formed that month and immediately it began to absorb approximately 600 cases from the North and East Federations of the Crown Office and Procurator Fiscal Service. These cases had to be prioritised. On 3 May 2017 the case preparer emailed the police instructing some additional enquiries and the need to involve the International Co-Operation Unit at Crown Office was highlighted, presumably because of the ongoing Spanish investigation. On 31 May 2017 the case preparer instructed the police to make enquiries about JB's capacity and further concerns were raised with the police by the case preparer following the receipt of information that JB was in the early stages of Alzheimer's and was suffering from a heart complaint.

[18] The case preparer sought an update from the police on 28 August 2017 and two days later there was further correspondence with the police regarding outstanding enquiries and the Spanish investigation.

[19] On 7 November 2017 there was communication between the case preparer and the International Co-Operation Unit regarding the Spanish investigation.

[20] In January 2018 the International Co-Operation Unit confirmed the outcome of the Spanish investigation and subsequent appeal. That was to the effect that the Spanish case would not be proceeding.

[21] On 4 April 2018 NB was precognosced by telephone and thereafter efforts were made to precognosce JB. It was not known then whether JB was fit to be precognosced.

[22] In August 2018 the Crown received a medical report confirming that she was not fit.

[23] On 5 December 2018 Crown counsel instructed that the accused should appear on petition. He failed to appear at an invitation hearing on 13 February 2019 and a European Arrest Warrant was issued 6 days later. Extradition was in due course effected following an appeal and the appellant appeared on petition on 1 May 2019 before being released on bail. The case was thereafter precognosced, with a number of ancillary enquiries undertaken. An indictment was served on 24 October 2019.

Preliminary issues

[24] Following service of the indictment the Crown and defence intimated various preliminary issues. The Crown sought admission of JB's statements under section 259 of the 1995 Act, contending that JB was medically unfit to give evidence in light of her Alzheimer's disease. The defence opposed the application on the bases that it could not be concluded that she was competent when the statements were made and that their admission would

render the trial unfair. The Crown objected to the admissibility of psychological reports by a defence expert witness who was intended to speak to the susceptibility of JB to influence by others in light of her Alzheimer's disease, and issues such as childhood memory and possible false memory as a result of unregulated therapy. The defence lodged an application under section 275 of the Act and also objected to the dockets, contending that these were neither relevant to nor necessary for proof of the charges on the indictment. There was also a plea in bar of trial on the ground of oppression based on the delay in bringing proceedings, with an associated compatibility minute. This also covered the alleged prejudice to the appellant should JB's hearsay evidence be admitted.

The Preliminary Judge's decision

[25] All the conditions of section 259 were met and the application was granted. There was nothing to displace the presumption that JB was competent at the time of giving her statements and the defence advanced no positive case that she was *incapax*. There was no basis for the suggestion that NB had influenced JB. The expert evidence sought to be led by the defence was not admissible. Questions of memory were within the province of the jury. As we have indicated, the objection to paragraph 1 of the docket was upheld but the objection to the remainder repelled. They were consistent with the time span of the allegations in the indictment and met the terms of section 288BA of the 1995 Act.

[26] The delay by the Crown did not prejudice the appellant to such an extent that the trial would inevitably be unfair (*HM Advocate* v *ARK* 2013 SCCR 549). The investigation was complex. There were difficulties in light of the time span of the conduct, the Spanish proceedings and JB's deteriorating mental health. The delay was reasonable. The inclusion of the dockets was not oppressive. It was in furtherance of the public interest in ensuring

crime is properly prosecuted (*Graham* v *HM Advocate* 2019 JC 26). In determining whether the admission of hearsay evidence had resulted in an unfair trial, the court would require in due course to consider the counter-balancing factors (*Al-Khawaja* v *UK* (2012) 54 EHRR 23, *Wilson* v *HM Advocate* 2021 SCCR 141).

Submissions for the appellant

[27] The proceedings were unfair and oppressive because of the Crown's delay in bringing them. The appellant could have been charged from 16 November 2016 when the police submitted a report to the Crown and likely would have been had he not been residing in Spain. The police were aware of JB's Alzheimer's diagnosis on 20 April 2017 and the Crown instructed an enquiry into her capacity on 31 May of that year. Following the police's response on 30 August 2017 there was a long period of unexplained inactivity until August 2018 when a medical report confirmed she had no capacity. Alzheimer's being a progressive condition it was obvious to the Crown that there was an urgency about the case. The evidence did not materially advance between the original report and the Crown's instruction that the appellant be placed on petition. The investigation was not complex or exceptional. The prosecution was not delayed by the Spanish proceedings. The unexplained delay meant that JB had lost her capacity by the time the appellant appeared on petition. A trial could have taken place much earlier and JB subjected to cross-examination. Alternatively a precognition or statement could have been taken from her. She was the sole witness in relation to the three charges relating to her as well as two of the matters in the docket.

[28] The admission of her statements was oppressive and unfair. It was so significant as to be determinative of the outcome of the case. The supportive evidence from NB was not

strong and had been shown to be contradictory. Had it been possible for the defence to move the court to remove the evidence from the jury's consideration, as could be done in England, that step would have been embarked upon. The trial judge's directions were incapable of curing the prejudice caused by the admission of the statements (*Nulty* v *HM Advocate* 2003 JC 140). All of this was aggravated by the absence of sufficient procedural safeguards. NB was the only direct witness who spoke to any of the matters on the indictment; the jury was in a remote location and could not properly assess NB's demeanour; the Crown was permitted to lead evidence of the allegations in the docket notwithstanding their lack or relevance or necessity; the defence was precluded from leading evidence to challenge NB's evidence about her childhood memories; and the jury was permitted to convict by simple majority. Corroboration was a neutral consideration. A majority of Judges, in the response to a Scottish Government Consultation on reforming the not proven verdict, observed that corroboration was confusing and imprecise so as to serve no real purpose. In the present case it was provided via the doctrine of mutual corroboration with the minimum number of complainers permitted. The trial judge's charge could not compensate for the prejudice suffered. The Judges also took the view in their response that where corroboration was removed, a simple majority would be insufficient to ensure a fair trial.

Submissions for the Crown

[29] It was speculative to assert that JB could have given evidence in 2017. Her behavioural and functional ability, according to the joint minute, were noted to have declined by mid to late 2017 onwards. It could not be said whether or not a Crown section 259 application would have been necessary then. The trial judge's directions had

removed any prejudice to the appellant. Directions were given to the jury on how to treat the hearsay evidence and to have regard to her age and health in assessing it. There was no balancing direction as in *Wilson* (above) so the directions given were favourable to the appellant. The inability to cross-examine JB was not necessarily prejudicial. It was speculative to suggest that her responses would have been favourable. One complainer's testimony could be corroborated by another's hearsay evidence (*AS* v *HM Advocate* 2020 SCCR 403).

[30] The Crown accepted that JB's evidence was sole or decisive in relation to the charges involving her, but that was not the case in relation to the charges involving NB. However, there were counter-balancing features and procedural safeguards. Those referred to in *Al-Khawaja* were available in Scotland. The appellant had the opportunity to lead witnesses to challenge the credibility of JB. The trial judge retained the power to stop the trial at any stage had he considered it was no longer fair (*Beurskens* v *HM Advocate* 2015 JC 91). The application of mutual corroboration was significant (*Al-Khawaja* at paras 155-158). The trial judge gave clear directions to the jury. There were protective factors in the circumstances surrounding JB's statements. They were taken by an experienced police officer, the first was signed as accurate and the second confirmed to be true and accurate over the telephone. The police officer who took the statement was cross-examined. The appellant gave evidence. The defence were able to draw the jury's attention to the dangers in JB's evidence and had the opportunity to highlight discrepancies in it and between it and the evidence of NB.

[31] In assessing the overall fairness of the trial a number of further factors should be taken into account. It was in the public interest to prosecute serious crime. Both complainers were vulnerable. The Crown case had to meet the corroboration requirement

and, had it failed to do so, the trial judge would have upheld a submission of no case to answer.

Analysis and decision

[32] It is not suggested, as we understand counsel's submissions, that there was any particular urgency about this case until the Crown became aware of JB's diagnosis of Alzheimer's. It would appear that that would have been no later than May 2017. Counsel suggested that the Crown should thereafter have moved more quickly but was understandably unable to say exactly how much more quickly or whether in fact it would have made any difference to the capacity of JB to give evidence. The joint minute tells us that by mid to late 2017 onwards JB's behaviour and functional ability were noted to have declined. This was more or less the same period when the Crown were aware of her diagnosis. At that time the Spanish proceedings were ongoing, there being no final decision until January 2018. It was not until August 2018 that the Crown received a medical report confirming that JB did not have the capacity to be precognosced but there is no way of knowing precisely when that stage was reached. For all we know she may have been unfit to give evidence even if the Crown had proceeded with the maximum expedition.

[33] In any case it is no doubt possible to construct a theoretical argument that the Crown could have proceeded more quickly. However, it is entirely speculative to suggest that any delay on their part led to the inability of JB to give evidence in the normal way. Furthermore, it cannot be said that the Crown acted unreasonably, given the existence of the Spanish proceedings which might have affected the decision as to whether to prosecute in Scotland or not. Factored into this, is the question whether the appellant would have

returned to Scotland to be placed on petition. As it is, a European Arrest Warrant had to be issued followed by an extradition process.

[34] There are too many imponderables for it to be asserted with confidence that anything done or not done by the Crown contributed to the complainer's incapacity to testify at the trial.

[35] Even had we been persuaded otherwise, that would not have been the end of the story so far as this appeal is concerned. The question ultimately is whether the trial was unfair.

[36] Whatever may be thought to have been the position following *Nulty*, it is now well established that the fact that important, even decisive evidence in a case is led using the provisions of section 259 does not of itself render a trial unfair. The Crown conceded that the evidence of JB was decisive and, assuming that concession to be correct, the issue for us is whether there were sufficient safeguards and counter-balancing factors.

[37] In this case evidence was available of JB's deteriorating faculties at the time she gave her statements. There were discrepancies between her evidence and that given by NB. The appellant gave evidence on his own behalf in which he denied all the allegations. The availability of corroborative evidence was a considerable safeguard. The statement of JB had been taken by a police officer in a relatively formal way in the first instance at least, and that police officer was available to be cross-examined. The trial judge had given robust directions on the need to exercise caution dealing with hearsay evidence and if anything these directions had been unduly favourable to the appellant. The appellant's counsel had been able to address the jury and point out the difficulties with JB's evidence as well as that of NB.

[38] It is impossible to distinguish this case in any material respect from *AS* v *HM Advocate* 2020 SCCR 403 which, from paragraph 16 onwards, considered the fairness of the trial in circumstances akin to those in this case.

[39] Counsel's submissions about the Judges' responses to the consultation paper on abolition of the not proven verdict, while imaginative, were nothing to the point. As far as corroboration is concerned, these responses were about corroboration in general. What counts in this case was the corroboration which was in fact available. The discussion of the simple majority was in the context of there being only two verdicts, which is not the case, at least at the moment.

[40] The use of remote juries was an established feature of the criminal justice system at the time of the trial and built upon the court's experience of witnesses, particularly complainers in sexual cases, giving evidence remotely. The suggestion that this impacted on the jury's ability to assess the evidence of NB is nothing more than an unvouched assertion. In any event it has no bearing on the issue in this case, which is the use of the statements of JB, whose demeanour, *ex hypothesi*, the jury were unable to assess.

[41] The fact that expert evidence about childhood memory and false memory was disallowed is of no consequence. The same is true of the evidence which was led in terms of the docket.

[42] While there is room for discussion as to whether there are features of other legal systems which might with advantage be imported into ours, that does not assist in determining whether the safeguards employed in our system are sufficient to prevent unfairness.

[43] For the reasons given above we are satisfied that, at least in this case, they were.

[44] The appeal is, accordingly, refused.