APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 45
HCA/2024/159/XC

Lord Justice General
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

NOTE OF APPEAL AGAINST CONVICTION

by

DANIEL ALEXANDER ROBERTSON

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: MF Guarino (sol adv); John Pryde & Co SSC (for Anika Jethwa, Dundee)
Respondent: Gill KC AD; the Crown Agent

23 October 2024

Introduction

[1] On 25 January 2024, at the High Court in Edinburgh, the appellant was convicted of the rape of two complainers, namely MM and AF. He was sentenced to 7 years imprisonment.

[2] This appeal concerns whether the trial judge ought to have deserted the trial diet because of the apparent state in which the appellant was during the course of his cross-

examination. It is asserted that he could not "properly complete" his testimony or give it in an appropriate manner. As a result, the jury could have drawn adverse inferences about his credibility and reliability. The judge should have allowed the appellant adjournments in which to compose himself.

[3] There is a subsidiary question about sexual offence trials and the roles of the judge, Crown and defence in ensuring that they are conducted fairly and efficiently.

The Trial

Preliminaries and Procedure

[4] The Preliminary Hearing took place on 22 May 2023. At that, counsel for the appellant said that the defence was ready for trial. A plea of not guilty was tendered, as was a special defence of consent in relation to the complainer AF. A vulnerable witness application was made in relation to AF, for whom a commission was fixed for 26 June. The trial was scheduled for 30 June. The commission proceeded, but AF left it during examination-in-chief, saying that she could not continue. The trial diet was postponed until 12 January 2024, with a continued PH on 14 August 2023. Although a continued commission for AF was fixed for 1 December 2023, this did not take place. A VWA had meantime been made for MM, who was to give her testimony by live link.

[5] The trial called on 15 January 2024. When it did, the appellant was represented by a solicitor advocate, who said that he had only recently been instructed by agents. He planned to consult with the appellant after the ballot of the jury with a view to commencing the evidence on the following day. At this point, the Advocate depute introduced an application under section 259 of the Criminal Procedure (Scotland) Act 1995, to allow AF's evidence to include a statement to the police, as well as the commission, as she was unfit to

testify. A medical certificate to that effect was not available. Further VWA applications for various witnesses were made. The trial was scheduled for five days. In the event, it lasted nine days; the evidence took seven hours.

[6] On the day after the ballot (16 January), the solicitor advocate said that, following upon his consultation, he had concerns about the appellant's fitness for trial. He wished him to be assessed by Prof Gary MacPherson. The trial judge acceded to the appellant's motion, which was not opposed, to adjourn until the following day. The VWAs (live links) were granted, but there was still no vouching for the section 259 application. On the next day (17 January) the solicitor advocate said that, having spoken to Prof MacPherson, there was no issue about the appellant's fitness for trial but that simple language and regular breaks would be beneficial. A written report was not yet available. He then asked for another adjournment to consult with the appellant. Meantime, the Advocate depute moved the section 259 application which was supported by a medical report. This was opposed on various grounds, but granted. MM's evidence then commenced.

[7] In due course, a written report from Prof MacPherson was produced. This said that the appellant was fit for trial but that he was of low intellectual capacity. Simple language and short breaks were required. During Prof MacPherson's interview of the appellant, the appellant had twice turned his back on him to express his lack of interest and unwillingness to answer questions. Prof MacPherson could not carry out a formal assessment of the appellant's functioning because he refused to engage in testing, "became irate about 'word lists' and believed he was being treated as a child." The appellant had a history of independent living, relationships and college attendance. He managed his own finances, operated a bank account and did his own shopping and cooking. He used buses and taxis independently.

[8] The testimony of MM was first interrupted when the solicitor advocate asked her whether she and the appellant had "kept behaving as boyfriend and girlfriend" after the termination of their relationship (see *infra*). The Advocate depute objected on the basis of section 274(1)(b) of the 1995 Act. Adjournments followed to allow the solicitor advocate to locate authority for his position, which was based on him seeking to lead evidence of a prior inconsistent statement (section 263) rather than sexual activity remote from the events libelled. The objection was sustained.

[9] The next delay occurred with the Crown attempting to edit a recording of an NHS 24 call, which had been made by AF, and obtaining a disc containing a recording of the commission. Not surprisingly the trial judge expressed her concern about this occurring on the fourth day of the trial. There was then another motion from the solicitor advocate to adjourn rather than to part-hear the next witness. At this point the solicitor advocate intimated that an application under section 275 would be forthcoming. This concerned the leading of evidence of a conviction of AF for wasting police time in relation to a neighbourhood dispute. The application was received late, but refused. A further delay occurred pending the production of a transcription of the NHS call. The Crown case closed. That was followed by an unsuccessful no case to answer submission on the charge relating to MM. Additional problems which arose during the appellant's testimony are set out below.

Evidence

Charge 1

[10] The first charge libelled that the appellant had raped MM in 2019 when she was drunk and incapable of giving or withholding consent. MM was 38 at the date of the trial.

She lived with her four children, aged 13, 10, 8 and 5. The appellant was the father of the youngest child. He had ceased to live with the complainer some years before the trial, but was in the habit of visiting her at weekends in order to see the child. On 24 May 2019 he had agreed to babysit whilst the complainer went out with her friends SE and GK.

[11] Before leaving her flat, the complainer had drunk most of a bottle of wine before GK arrived with a bottle of gin. She had two large gins before going to the pub. She was wearing a dress, tights, black pants and a sanitary towel. In the pub she drank five large gins, eight tequila rose shots and four cola cube shots. That was more or less her last memory before waking up the next day. When she did so, she was lying on her bed wearing the dress but with black leggings only partially pulled up. Her sanitary towel was missing. There was menstrual blood on the bed. The appellant told her that she had returned home "blazing". She was biting a cube of cheese, trying to eat frozen chips and crawling along the floor. The appellant said: "So you don't remember us having sex?" She went back to bed. The complainer only reported the incident to the police in January 2020.

[12] One of the complainer's daughters had heard her mother stumbling about. She saw her crawling on the floor in a drunken state. She had not seen her like that before. Later she heard her mother's bed creaking and the appellant groaning, as if they were having sexual intercourse.

[13] The complainer's friend, GK, confirmed that the amount of alcohol consumed by the complainer was about 10 or 12 large gins and 10 shots. When she last saw the complainer, she was unsteady on her feet and definitely drunk. Another friend, SL, later received a message from the appellant on a dating site which said that the complainer had cheated on her boyfriend "once when she came back home totally steaming drunk she ended up sleeping with me".

Charge 2

[14] The evidence from AF came from the recording of the NHS 24 call which was made at 11.40pm on 21 December 2021, a statement to the police two days later and the commission in June 2023 which she left prematurely. She was deemed unfit to continue to give evidence.

[15] In the phone call, AF said that she was having suicidal thoughts because of being forced to meet the appellant and to do sexual things. She thought that she had been raped. She had met the appellant that evening. This was expanded upon in the police statement. AF was autistic and suffered from anxiety, depression and post-traumatic stress disorder. On 21 December, a male acquaintance, namely SS, told her that she was going to go to the appellant's house to enable him to get information on his (the appellant's) ex-partner (not MM). SS took her to the appellant's house, but he did not go in. She talked to the appellant for some time before he started kissing and cuddling her. She resisted. She asked to go upstairs to the toilet. When she came out, the appellant was standing at the top of the stairs. He grabbed her, took her into a bedroom and pushed her onto a bed. He held her down, removed her tracksuit bottoms and underwear and raped her. She went home and showered. She phoned SS and told him what had happened. The lead-up to going to the appellant's house was repeated at the commission. When it came to describing what had happened in the house, the complainer put her head in her hands, started crying and said "I can't do this". After a break and a resumption of the commission, the complainer repeated this and left the commission.

[16] SS spoke to the distressed state of the complainer when he met her on a bus later that evening and she had told him what had happened. It was agreed by joint minute that the appellant had penetrated the complainer's vagina during her visit to his house.

The appellant's testimony

[17] The appellant's evidence started at 2.52pm on Friday 19 January 2024. He spoke to the babysitting and MM coming home drunk. He had shown her to her bed. He had then gone and slept on a sofa. He denied asking the complainer whether she remembered having sex. They had not had sex. He had gone home early, between 6 and 7am. He admitted sending a message to SL about MM cheating on her boyfriend by having sex with him, but this had not been true.

[18] AF had turned up at his house. SS had forced her to do so. He knew that because that was the way that SS worked. He had not been kissing and cuddling her. She had gone upstairs to the toilet. When she came out, she told him to come upstairs and to go into his bedroom. At this point in the trial, at 3.15pm, the appellant was permitted a break. His testimony resumed about 10 minutes later. He had shown the complainer to the toilet, but had then gone downstairs. On hearing the toilet door opening, he had gone back upstairs. AF had then asked him for sex. They went into the bedroom and had sex consensually.

[19] Cross-examination started at 3.34pm. The Advocate depute took the appellant through the return of MM to the house. The appellant agreed that MM had been correct about the appellant telling her about eating cheese and frozen chips, but he again denied that he had asked her about whether she remembered having sex. There was then the following exchange at 3.38:

> "ADVOCATE DEPUTE: Right okay. So it's quite detailed information that she's able to tell the court that you told her?

MR GUARINO: Well …

JUDGE STIRLING: Approach please.

MR GUARINO: No, I'm going to make it so the jury can hear it. [AB] also spoke about chips and she's -- so to say this is just something -- the accused is wrong, it's a wrong (inaudible)."

[20] A few minutes later (at 3.39) the AD was asking the appellant about whether, when he left at 6.00 or 7.00am, he had considered whether the complainer was fit to look after his child. There was a lengthy pause. The question was repeated. The appellant said that he had been upset. This then followed (at 3.40):

"ADVOCATE DEPUTE: What were you upset about? - Just the way she had been acting, and coming in drunk and, eh, and then, eh, she wasn't taking an acknowledgment of [J] as well.

ADVOCATE DEPUTE: Well would that not be the more reason to stay, if he's your child? --

MR GUARINO: Let's have a break now?"

The judge reports that at this point the appellant had crouched down in the witness box and had started crying. There was a five minute adjournment.

[21] Moving onto the second charge, at 3.59, the following exchange took place:

"ADVOCATE DEPUTE: Right. And then the next time you see [AF], she comes to your house and you say she was forced to come to your house? - Yeah.

ADVOCATE DEPUTE: So when she came into the house, how did you feel about her being in the house, if she was forced to come to your home?

MR GUARINO: No don't answer that question. Don't answer that question. He's not to know what the basis of how she got there, my Lady.

JUDGE STIRLING: No please, Mr Guarino, just let the cross-examination continue. What was the question again?

ADVOCATE DEPUTE: Em, my Lady, I asked him how he felt about [AF] being in his house, if he was aware that she had been forced to come there.

MR GUARINO: That wasn't the question. It was put to the witness ….

JUDGE STIRLING: Mr Guarino, please …

MR GUARINO: No, my Lady, it was put to the witness that he knew she'd been forced to come there. That's not what his position is. So can't put that as a *fait accompli* (*sic*).

> Cross-examination …(continued): Right. When [AF] came to your house, why did you think she was there? - No I don't really know."

[22] At about 4.05, the following exchange took place:

> "ADVOCATE DEPUTE: Right, she told you to go into the bedroom and you've told us that she told you to take your clothes off, she had taken her clothes off, you're both in bed, how did the sex start? --
>
> JUDGE STIRLING: Mr Robertson? Mr Robertson, do you feel able to continue just now?
>
> THE ACCUSED: No."

There had been a considerable pause after the initial question was put. The appellant sat down and put his head in his hands. The judge had gently said his name and then asked him if he felt able to continue. The trial was adjourned over the weekend. The judge's view was that the appellant was "simply unable to respond to questions which were difficult in the sense that the answers he would give would implicate him in the offences charged".

[23] On Monday 22 January 2024, the judge records that, outwith the presence of the jury, she told the solicitor advocate not to interrupt cross-examination again. He replied that he would do so if he felt justified in doing so. The cross commenced at 10.51am. The appellant started by saying that he could not remember various matters; saying that he was all over the place and confused. When asked about the episode with AF, he started replying "no comment". The following exchange took place:

> "ADVOCATE DEPUTE: Why are you saying, "no comment"? - No comment.
>
> MR GUARINO: My Lady, at this particular point, I have got submissions …
>
> JUDGE STIRLING: No. No.
>
> MR GUARINO: I've got submissions to make to the court.
>
> JUDGE STIRLING: No. Let's finish this.
>
> MR GUARINO: Sorry, my Lady?
>
> JUDGE STIRLING: Let's finish this. Please sit down.
>
> MR GUARINO: I'd like it noted …

> JUDGE STIRLING: Sit down.
>
> MR GUARINO: I'd like it noted in the record I've asked for an adjournment to discuss the obvious difficulty my client's having and the court has refused that. It will now be in the record."

Shortly afterwards, the AD asked the appellant if he was not willing to answer any questions and he replied "no comment". His evidence ended at that point (10.57am). The solicitor advocate elected not to re-examine. Rather, he asked for another adjournment.

[24] On the trial resuming, the solicitor advocate complained about the way in which the trial judge had spoken to him. He complained that it had been obvious that the appellant was not understanding what was happening when he started saying "no comment". The judge ought to have intervened. The appellant might have had a psychiatric breakdown because of extreme anxiety. The solicitor advocate asked for yet another adjournment so that Prof MacPherson could examine the appellant again. He moved the judge to desert the diet because of what had happened. Prof MacPherson saw the appellant again on Tuesday 23 January. His view had not changed. No written report was produced. The solicitor advocate again moved to desert. The appellant's rights had been breached because the court had not recognised his vulnerability. The motion was refused.

[25] This was followed by another adjournment after which a second joint minute was lodged. This is an extraordinary document which appears to agree matters which occurred in open court. It agreed what Prof MacPherson's opinion may be, but it did not agree that opinion as fact. Amongst other things, the opinion was to the effect that the appellant:

> "would have benefitted from an adjournment and further advice as to his obligations whilst giving evidence… Had that taken place there was every possibility the [appellant] would have been able to continue his evidence and to answer all questions in an appropriate manner."

[26] The appellant then moved a compatibility minute which alleged that the trial was unfair because of the hearsay nature of AF's evidence and the refusal of his application under section 275 of the 1995 Act (wasting police time). The minute was refused. In due course, the solicitor advocate addressed the jury on the basis that the appellant was a very vulnerable individual who adopted "childlike strategies".

Submissions

[27] The appellant maintained that the judge erred in refusing his motions to desert. The solicitor advocate had come into the case because of a late withdrawal by previous counsel. That counsel had not thought that a fitness for trial examination was required. The solicitor advocate had been astonished at Prof MacPherson's conclusion on fitness. When it was apparent that the appellant required breaks on the Monday, these were refused. The appellant had not been able to complete his evidence or to give it in an appropriate manner. The appellant should have been allowed to compose himself. Reference was made to *Stuurman* v *HM Advocate* 1980 JC 111 at 123, *SG* v *HM Advocate* 2020 SCCR 79 at para [27], *Helow* v *Advocate General* 2009 SC (HL) 1 at para 14 and *Spence* v *HM Advocate* 2024 SCCR 160 at para [26]. The Advocates Gateway was cited as demonstrating that the appellant's reactions, in the form of long pauses and statements that he could not remember certain things, were classic responses by a vulnerable person.

[28] The Crown maintained that adjournment was a matter for the discretion of the judge depending on what was required in the interests of justice (*Scougall* v *Lees* 1995 SLT 1008). A trial of this nature should only be deserted as a last resort, where unfairness was so material that no step short of abandonment could cure it (*HM Advocate* v *RV* 2017 SCCR 7 at

para [12]). The trial judge was best placed to assess that matter (*Fraser* v *HM Advocate* 2014 JC 115 at para [58]).

Decision

[29] The manner in which this trial progressed is extremely disappointing. The Preliminary Hearing system is designed to ensure that High Court trials only take place when the parties are ready and the court has disposed of all preliminary pleas and issues (Criminal Procedure (Scotland) Act 1995 s 72(3) and (6)(b)). In particular, if an accused person seeks to enter a plea in bar of trial, because of his unfitness to stand trial, that ought to be the subject of an appropriate written notice in advance of the PH (1995 Act, ss 79(1), (2)(a)(iii)). Any Vulnerable Witness Applications ought to have been disposed of at the PH, as should any application under section 275 of the Act. Similar considerations apply to applications under section 259 of the Act (s 259(5A)). The court retains a discretion to allow late applications in certain circumstances. However, a change in the accused's counsel or solicitor advocate at or about the time of the trial diet is not a sound basis for re-setting the clock whereby the new legal representative is entitled to review matters, which should have long since been dealt with, and to lodge applications as if the PH had never taken place. Although there will be exceptions, where the interests of justice so require, any new representative must have regard to what has occurred prior to his or her involvement and to the duty which is owed to the court in assisting the progress of the trial.

[30] The desirability of trials commencing on time and proceeding in an efficient and orderly manner, without multiple adjournments, should not be underestimated. In this case, for example, although it may have remained open to the appellant to seek a report on his mental state, that ought not to have delayed the progress of the trial unless and until

evidence of unfitness became available. In that context, the trial judge was highly indulgent to the appellant in permitting an adjournment pending Prof MacPherson's views. Any application under section 275 should not be entertained just because a newly instructed representative has taken a different view from former counsel (see 1995 Act, s 275B(1)). Once more, the trial judge was over indulgent to the appellant in permitting the application to be made. The judge was also well-founded in criticising the manner in which the section 259 application, and its associated documents, was presented.

[31] When it came to the evidence of the appellant, it is important to note that at no time did the appellant seek any special measures to assist him in giving evidence (see 1995 Act, s 271F, applying 271(1) to accused persons). Had such measures been sought, the judge could have considered and ruled upon any measures requested (s 271H). It is not normally for the judge to carry out an examination of an accused's, or a witness's, vulnerability in the abstract and without an application from a party.

[32] The appellant complains about a failure to adjourn at certain points in the trial. This criticism is without foundation. The appellant's examination in chief commenced at 2.52pm on the Friday. There was a break from 3.15pm to 3.24pm. Examination-in-chief continued and lasted until 3.34pm (a period of 9 minutes) when cross-examination started. After only 4 minutes the solicitor advocate interrupted cross, refused the judge's request to make his objection outwith the jury's hearing and provided the appellant and the jury with misinformation about the evidence of MM's daughter. Contrary to what the solicitor advocate had said, AB had not mentioned cheese or chips. This was misleading. The judge, not surprisingly, regarded the intervention as improper, and designed to provide the appellant with more time to respond to the AD's incomplete question. Two minutes later,

when the appellant had started crying, the judge allowed another adjournment at the solicitor advocate's request.

[33] The cross must have resumed at about 3.45. After about 14 minutes there was another objection from the solicitor advocate when the AD asked the appellant how he felt about AF being forced to come to his house. The objection took the form of the solicitor advocate stating as fact that the appellant was "not to know what the basis of how she got there". This was another ill-founded objection containing misleading information, since the appellant had already testified that he knew that AF had been forced to go to the appellant's house because that was the way that SS worked. Two such serious errors within such a short space of time and during cross-examination of an accused is very troubling. It is not surprising that the trial judge told the solicitor advocate to let the cross-examination continue. He did not do so; stating, wrongly, that it was not the appellant's position that AF had been forced to come to his house.

[34] At about 4.05pm the AD asked the appellant a very simple question about how sex with AF had started. A long pause ensued. When the appellant said that he was unable to continue, the trial judge adjourned the trial over the weekend. Contrary to the solicitor advocate's submission about the appellant having a psychiatric breakdown and acting in accordance with what might be expected of a vulnerable person, the judge considered that his failure to answer the question was because, put shortly, he had no satisfactory answer.

[35] On the Monday, no doubt in light of the two previous ill-founded objections, the trial judge told the solicitor advocate not to interrupt cross-examination again. The solicitor advocate defied this instruction; interrupting when the appellant started responding "no comment". He did the same when specifically told to sit down. The appellant's cross ended after only 6 minutes. The solicitor advocate did not seek to re-examine by, for example,

prefacing his questions by explaining that "no comment" was not an option or asking the trial judge to direct the appellant accordingly. He did not ask permission to speak to the appellant during the currency of his testimony, but outwith the presence of the jury, in order to tender that explanation. Throughout all of this, no application was made for any special measures which might have assisted the appellant.

[36] Once more the trial judge acceded to a motion for an adjournment, ultimately to enable Prof MacPherson to see the appellant again. This delayed the trial yet again. The same result on fitness flowed from what the judge was told about Prof MacPherson's conclusions. It was said that those conclusions were that, if the appellant had had another adjournment and further advice, he might have been able to answer all the questions in an appropriate manner. However, the appellant was afforded multiple adjournments and the solicitor advocate did not seek permission to tender any advice. What might have happened, if he had tendered advice, is essentially speculation.

[37] The applicant's motion that the trial diet ought to have been deserted is entirely without foundation. Especially when the evidence in a trial has been concluded, desertion should only be contemplated in exceptional circumstances. It is an act of last resort (*HM Advocate* v *RV* 2017 SCCR 7, LJG (Carloway), delivering the opinion of the court, at para [12]). The only basis which the appellant advances for seeking desertion was the conduct of the appellant in the witness box when asked searching questions in cross-examination. These questions were not complex and the manner of questioning was not aggressive. The jury are normally entitled to see an accused's reaction to questioning. That reaction should not be clouded by unwarranted interruption. Care must be taken to ensure that the basis for any objection is soundly based, especially if a party attempts to state it in the presence of the jury. The long-standing tradition of mutual trust and courtesy between

bench and bar should be maintained at all times. As requested by Prof MacPherson, the appellant had been afforded multiple breaks in order, as the solicitor advocate put it, to compose himself. The trial judge is best placed to assess whether some form of irretrievable unfairness has occurred. There was no material upon which to conclude that this occurred in this trial.

[38] The appeal is refused.