



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2025] HCJAC 53
HCA/2025/000106/XC**

Lord Justice Clerk
Lord Armstrong
Lord Clark

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

PB

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: Ogg, Sol-adv; John Kilcoyne & Co, Glasgow
Respondent: Cross, Sol-Adv; the Crown Agent**

2 December 2025

Introduction

[1] The appellant was convicted after trial of three charges of rape of his then partner AA, a charge of assaulting her and a charge of raping a second complainer, BB, and committing other offences. The judge imposed a cumulative extended sentence of 12 years and 6 months with a custodial term of 9 years and 6 months. In challenging only conviction, the appellant contends first that the trial judge erred in repelling certain objections to the

evidence of one complainer whose answers to certain questions were prejudicial and, secondly, in repelling an objection to a question put by the Advocate Depute when re-examining another witness, CC, and, having done so, in declining to allow counsel an opportunity to ask further questions.

The trial

[2] The jury convicted the appellant of the following charges:

Charge 5 – the rape of AA on various occasions between 1 January 2019 and 31 January 2020 at an address in Airdrie.

Charge 7 – the rape of AA at an unknown address in Perth on 11 July 2021.

Charge 9 – the rape of AA at a second address in Airdrie on 28 August 2021.

Charge 10 – assaulting AA by holding her down and choking her at a hotel in Fife on 10 April 2022.

Charge 11 – the rape of BB, now deceased, at a third address in Airdrie on 7 September 2022.

Charge 12 – behaving in a threatening or abusive manner towards BB at the third address on 8 September 2022; section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

Charge 13 – breach of curfew bail conditions on 18 April 2024.

Charge 14 – a s 38 offence involving police officers on 18 April 2024.

Charges 7, 9 and 10 were domestically aggravated.

[3] There was a docket giving notice that the Crown would adduce certain other evidence. The appellant gave evidence and adduced his friend DD and EE, the appellant's father. The appellant does not challenge his conviction on charges 13 and 14.

[4] AA spoke to the charges on which she featured and admissible hearsay was adduced of statements made by BB, now deceased, describing the events of charges 11 and 12. The

judge directed the jury on the routes to verdict available on each charge. On all of the charges of rape the jury could find mutual corroboration between the evidence of the respective complainers. In addition, there was a body of circumstantial evidence providing free-standing corroboration on charges 9 and 11.

[5] On charge 9, sources of corroboration included evidence of AA's comments to her mother CC shortly afterwards to the effect that the appellant had raped her the previous night and CC's evidence that the appellant was silent when AA made these remarks in his presence. On charge 11, sources of corroboration included evidence of distress, evidence of comments made by the complainer shortly afterwards and evidence from the appellant albeit accompanied by his assertion of consent. For the remainder of the charges on which conviction is challenged, the Crown depended on mutual corroboration. On charge 10, assault, the source of mutual corroboration was evidence of AA's daughter speaking to hearing the appellant assaulting her mother under reference to a docket.

[6] The indictment originally contained 14 charges. On closing its case the Crown withdrew charges 1, 2 and 3 (three charges of assault from 2017, in two of which AA was the complainer and on the other DD) and the judge sustained a no case to answer submission on charge 6 (sexual exposure, causing AA to send him an image of her breasts and exposing his penis to her in a video call) and acquitted the appellant of it. The jury acquitted the appellant by a unanimous verdict of not guilty on charge 4 (threatening and abusive conduct towards AA in 2017) and, by majority, found charge 8 (a charge of rape of AA between July 2021 and October 2022 at the first address) not proven.

Note of appeal

[7] In ground 1, the appellant complains that AA spoke to conduct not libelled in the indictment specifying only that she described him as a sexual paedophile and that he was in a sexual relationship with his male friend [DD]. He maintains that timeous objection was taken to evidence that was prejudicial and that the judge erroneously repelled it.

[8] In ground 2, the appellant maintains that the judge erred in repelling an objection to the Advocate Depute referring CC to a police statement in re-examination when it had not been referred to in cross-examination. He proposes that unless the statement had been used in cross-examination it was thereafter inadmissible. The prosecutor was only entitled to use such a statement in examination-in-chief. The judge erred again in declining to allow the appellant a second cross-examination, “to explore the matters raised...in re-examination relating to the police statement.”

Evidence relevant to ground 1

[9] We have a transcription of the evidence AA gave on 13 and 14 January 2025 and of CC’s evidence on 14 January 2025. AA gave evidence by live TV link and the judge explains that AA was not always aware that counsel had stood up to state an objection and she did not always grasp that someone else was speaking as she answered the previous question.

[10] The Advocate Depute asked how things were at the start of her relationship in 2012 and 2013 and AA responded that there were good and bad moments, she had been vulnerable and wanted a relationship and put up with the appellant’s drunken misbehaviour and excused him. The transcript confirms that it was only at this point that counsel sought to object and so it came too late. He did not seek any ruling or direction.

[11] AA went on to describe a situation where the appellant had assaulted his friend DD (charge 1) and on returning home with AA he punched her in the face (charge 2 which specified only a punch on the face to injury). She ran and locked herself in the bathroom but he kicked the door in. When he saw her sitting there, he looked at her, stopped and walked out. In due course the appellant said to her about the incident that he had blanked out and could not remember what he had done. This was something he would often say. She was asked how she felt and having described that, said she did not seek medical attention because she was just married. She was asked if she reported it to the police and confirmed that she did not. She then volunteered that he had been in enough trouble with the police already and she did not want to get him into trouble. It was only at this point that counsel sought to address the judge, complaining that this was not part of the libel of the charge. The judge suggested to the Advocate Depute that he should try to control the witness and get her to focus on answering the question asked and not elaborate more widely. Counsel did not seek any ruling or direction.

[12] AA went on to describe the events of charge 4. It specified that the appellant had shouted and sworn at AA during a car journey in May 2017, pulled the handbrake of the car as she drove and then pursued her and seized hold of her. What AA said was that they were arguing heatedly in the car and at some point the appellant pulled the steering wheel. She had said this four times before counsel sought to object on the basis that the charge did not refer to the steering wheel. The judge invited the depute to control the witness. Questioning continued and on being asked how well she remembered the incident AA repeated that the appellant had grabbed the steering wheel. Counsel repeated that there was no libel but did not seek any ruling or direction. When the witness made a further reference to the steering wheel, adding that she had thought he was trying to take her off the

road, counsel repeated that there was no libel. Questioning continued and when the witness added that the appellant had pulled the handbrake so that she nearly went into a metal fence counsel made lengthy representations to the judge that this was not fair, it was a serious matter and the prosecutor should be bringing out the inconsistency if there was no earlier statement from this witness.

[13] The Advocate Depute responded that the witness had spontaneously referred to the steering wheel and he had not introduced it. Defence counsel would be able to explore such inconsistency as there was in cross-examination. The depute had himself been on the point of referring the witness to an earlier statement when counsel intervened. Counsel responded that all of this was unfair.

[14] The judge responded that he recognised the rule against eliciting criminal conduct not libelled but that it was a common experience that witnesses may give a different account to an earlier statement and this can prompt amendment of the indictment to match the evidence actually given. The judge said he intended to continue with the evidence and, if need be, he would hear submissions later. He reminded counsel that objection ought to be taken to a question, not the answer but also explained that he would not require counsel to object each time and he could not be criticised as the judge would take his position to be that he had objected to the line. He would consider any further submissions on this point at a suitable stage of the trial and would deal with matters later if need be. Counsel added that he was concerned that the Crown may seek to amend charge 4 to include attempted murder in light of the evidence. In due course the witness clarified that there had been two separate incidents and that on the occasion when he had pulled up the handbrake she had been approaching a traffic light and swerved towards railings but did not strike them.

[15] Without objection AA described the events of charge 6, explaining that the respondent had made a video call and when she answered it, instead of seeing his face, she saw him in a shower, naked, with an erection and rubbing soap all over himself. She added:

“he was just like an absolute pervert, it absolutely turned my stomach. I didn’t, I couldnae believe what I was seeing, it was just vulgar. Like I had, he had, I gave him no permission to do that.”

She put her phone down. The Advocate Depute moved the discussion on to the background to charge 7, rape, namely events during a weekend break at a self-catering cottage about 6 weeks after AA had given birth to her youngest daughter. He kept saying that he wanted to have sex with her in a large round bathtub and each morning she would awake to find him pressing his erection into her back, adding, “he’s just a sexual deviant.” Counsel stated to the judge what she had just said but he allowed questioning to continue. Later in her evidence she would describe various instances of rape.

[16] So far as DD is concerned, in evidence-in-chief AA described the appellant assaulting him (charge 1) and at page 56 of the transcript for 13 January 2025 said that the appellant would sometimes stay at DD’s flat where he would drink: “...and I’m not sure what else he does with his friend, [DD].” On 14 January, still in chief, she specified that the appellant would spend three nights each week in his friend [DD]’s flat.

[17] In cross-examination, at page 45 of the transcript for 14 January 2025, counsel suggested that the jury may hear from DD who would refute that the appellant had punched DD as AA had stated, the question ending, “what would you say to that?” The complainer added that she would say that they were more than friends and that DD would say anything to defend the appellant. When she was challenged on this, she replied that DD was terrified of AA and she thought they were more than friends. Counsel then asked her if she was implying something. She assented.

[18] Counsel later asked AA how many children the appellant had fathered, page 78. She responded that there were children popping out all over the place. This led to the following exchange:

- Q From the man you suggest is living with his boyfriend in a flat, is that right?
 A Why would a man want to spend three nights a week with another man all night.
 Q Well he's got children popping out all
 A And then come back...
 Q [over the place] you're telling ...-
 A ...with his bum bleeding. When I was actually advising him to go to the doctor because I thought it was alcohol that was causing it. That's the truth.

Submissions

Appellant

[19] Despite the very limited specification in his note of appeal, the appellant highlighted particular exchanges in transcripts of AA's evidence. On ground 1, he referred to the judge repelling an objection (singular) about repeated reference to conduct not referred to in the terms of the charges. These include:

- i) a reference to good and bad moments and the appellant's drunkenness
- ii) the appellant having damaged a door and having been in a lot of trouble
- iii) the evidence stating that the appellant had interfered with the steering wheel when AA was driving causing the car to divert off the road
- iv) the judge was wrong to state that he would treat counsel as having stated a general objection to any extraneous material which may follow and that objections need not be repeated. This could appear to the jury as acquiescence and would create a problem on appeal given the requirement for timeous objection in the Criminal Procedure (Scotland) Act 1995 section 118(8)

- v) the complainer's evidence that a precursor to a charge of rape was an argument about lottery tickets did not feature in the wording of any charge
- vi) the judge did not at any point on 13 January 2025 direct the jury to ignore extraneous comments, particularly that the appellant was a sexual deviant
- vii) on 14 January 2025 AA described the appellant drinking with his partner, counsel asked if this was another smear and AA said that she could say more but for the sake of counsel and his client she would not, and made comments about the appellant returning home with "his bum bleeding"
- viii) AA said she was not saying anything about the appellant's past but knew about it
- ix) AA said the appellant had smashed up mobile phones but there was no such charge
- x) the judge did not challenge the complainer when she said these things
- xi) the judge ought to have invited further submissions at the conclusion of AA's evidence and the judge ought to have directed the jury on the evidential status of her extraneous observations.

[20] On ground 2, the appellant highlighted certain passages in the transcript of AA's evidence on 13 January 2025 and the transcript of CC on 14 January 2025 in support of his contentions.

Respondent

[21] The Advocate Depute submitted that the matters complained of did not require notice in a charge and were not invited by the Advocate Depute who had commenced by introducing who the appellant was to AA and when their relationship began. Inevitably a

questioner must have some leeway in scene-setting. AA did not refer to previous convictions and much of the material was prompted by cross-examination and that could not found a ground of appeal: *Kepple v HM Advocate* 1936 JC 76. Other matters complained of did not go to the essence of the case: *Falconer v Brown* (1893) 1 Adam 96. Inappropriate responses that are not invited by a prosecutor's question do not breach the statutory prohibition concerning an accused person's previous convictions: *Deighan v MacLeod* 1959 JC 25. Where truly prejudicial material emerges, a trial judge has the options identified by the Lord Justice Clerk (Carloway) in *Fraser v HM Advocate* [2013] HCJAC 117, 2014 JC 115. That approach was endorsed in *Jackson v HM Advocate* [2017] HCJAC 72, 2018 JC 86.

[22] What occurred in CC's re-examination was not a new matter that had not featured in cross-examination. The question of whether the witness had specified that the rape spoken of by AA had occurred "last night" was repeatedly raised in cross-examination. In any event, the scope of permissible questioning in re-examination is essentially a discretionary matter for the presiding judge: *Gunn v Brown* 1987 SLT 94.

Decision

[23] The appellant's first ground of appeal is narrow in scope. He neither suggests that the judge ought to have deserted the trial nor that he ought to have given a corrective direction. The ground is periled on a timeous objection having been stated. Since most of the various objections stated were not taken timeously, ie to a question or before the answer was completed, this ground is liable to fail in those respects: section 118(8) of the 1995 Act.

It states:

- "(8) No conviction, sentence, judgment, order of court or other proceeding whatsoever in or for the purposes of solemn proceedings under this Act—
 - (a) shall be quashed for want of form; or

- (b) where the accused had legal assistance in his defence, shall be suspended or set aside in respect of any objections to—
- ...
- (ii) the competency or admission or rejection of evidence at the trial in the inferior court, unless such objections were timeously stated.”

If an objection comes too late to prevent a breach of the prohibition, as also if no objection is stated, it would remain open to the defence to seek desertion of the trial, *pro loco et tempore*, (allowing the trial to commence afresh) or to invite a direction from the presiding judge.

Neither of those courses feature in the grounds of appeal and it is too late to refer to them in written and oral submissions as was the case here.

[24] Nevertheless, bearing in mind the difficulty for prosecutor, defence counsel or judge stopping or diverting the witness, perhaps in part because of her giving evidence by live TV link and because a point came where the judge dissuaded counsel from stating objections to AA’s evidence, indicating he would hear submissions later, we have considered this ground on its merits. We can understand why the judge did so but, insofar as this might inhibit an appeal based on timeous objection, he should have qualified his approach to permit, explicitly, timeous objections to irrelevant evidence. In fairness to the judge, none of the objections stated before he gave that indication had been timeous. Nor does it appear from the transcripts that any of the material elicited thereafter, and complained of, was prompted by an inappropriate question to which objection could properly have been taken.

[25] Section 101(1) of the 1995 Act provides:

“101.—Previous convictions: solemn proceedings.

- (1) Previous convictions against the accused shall not, subject to subsection (2) below and section 275A(2) of this Act, be laid before the jury, nor shall reference be made to them in presence of the jury before the verdict is returned.”

This prohibition can be breached by indirect or implied references, *Cordiner v HM Advocate* 1978 JC 64, but it is not breached where a witness volunteers prohibited information in answer to a competent question. It may be different if the prosecutor's question is careless or ignores warning signs: *Deighan v MacLeod*. Generally, the introduction of prejudicial or irrelevant material prompted by cross-examination for an accused will not breach the prohibition: *Kepple*.

[26] None of the passages complained of, many of which could have featured in the note of appeal but did not, disclosed that the appellant had previous convictions. There was very little that came close to implying that he did, the highpoint for the appellant being AA stating he had been in trouble (unspecified) with the police. None of the questions posed by the Advocate Depute invited any extraneous or potentially prejudicial answer about previous convictions. He plainly did not elicit such material deliberately, nor do we consider that he did so carelessly.

[27] Where there is an implied breach of the prohibition in s 101, it remains for the trial judge to work out whether a fair trial remains possible and how to proceed. The trial judge enjoys certain advantages over the appeal court such as the ability to judge the context of unfortunate answers. The trial judge is best placed to assess the potential impact on the jury in light of all that has gone before and what may follow. A trial judge has three options as set out in *Fraser*, and has a wide discretion in deciding which is appropriate:

- “(i) to ignore the offending evidence and do nothing, lest the matter be emphasised;
- (ii) to direct the jury to ignore that evidence and, as here, to advise the jury that they should do so because it has ‘no bearing on the matter before’ them; and
- (iii) to desert the diet because of the inevitability of an unfair trial as a result.”

[28] There is a rule of evidence that, where fair notice requires it, a prosecutor is not generally permitted to lead evidence of a crime not charged on the indictment or subject to

notice in the indictment. Otherwise, the Crown may lead any evidence relevant to proof of a crime charged: *Nelson v HM Advocate* 1994 JC 94. Very few of the answers complained of in this case could constitute a crime. Same sex sexual conduct between consenting adults is not criminal. Drunkenness is not of itself criminal. Being difficult in drink is not of itself criminal. Arguing about lottery tickets is not criminal.

[29] Interfering with the steering wheel whilst the complainer was driving might be criminal. It was not invited by the Advocate Depute and emerged spontaneously. It is the kind of thing that happens in trials routinely. It might lead to a motion to amend the indictment in which case the jury could consider it. That is not what happened here, but it was a matter for the judge to determine whether, or not, to address it. Giving a direction about it would simply have drawn the jury's attention to it. Accordingly, the judge did not err in this respect. Even if he had erred, it would be immaterial. As we have noted at para [6] above, the jury unanimously acquitted the appellant of charge 4 to which this evidence could relate. There was no material prejudice to the appellant on those charges the jury convicted him of. Reference to smashing telephones was not specified in any of the charges, but the answer was given spontaneously in a trial in which the jury heard evidence relating to charges of threatening and abusive behaviour, assault and rape. We are not persuaded that this unprompted and passing reference required specific direction. It would be absurd to desert the trial because of it. We consider it entirely appropriate for the judge to proceed as he did, adopting *Fraser* option (i).

[30] Kicking a door in might be criminal, but it was a relatively minor additional detail in the witness's account of the assault libelled and would be unlikely to transgress the principle in *Nelson*. It plainly related to the incident in charge 2 of which the appellant was acquitted by the judge when the Crown withdrew it. In considering the comment that the appellant

was a sexual deviant, we bear in mind that this came shortly after AA had described the appellant, over mobile telephone and without her consent, exhibiting his erect penis in the shower whilst rubbing soap all over himself. She had also described his sexual conduct leading to the events of charge 7 (para [15] above). She would later testify about multiple instances of rape. Her expression of irrelevant opinion added nothing material to her evidence of fact. Whilst AA did make an observation, in chief, that might have suggested that the appellant was sexually involved with his male friend DD, it was a very limited comment. The majority of this material came in cross-examination. The “bum bleeding” comment followed a question about AA saying that the appellant had fathered children by different mothers, and defence counsel stating: “From the man you suggest is living with his boyfriend in a flat? Is that right?” As we have observed, consensual sexual activity between consenting adults is not criminal. Whilst infidelity may be disapproved of, any possible prejudice was squarely met by the direction the judge gave in his charge that the trial was not concerned with morals or social ethics. The jury heard evidence from both the appellant and DD that there was no such relationship or behaviour.

[31] Whilst some of AA’s evidence about the appellant was irrelevant, it was not necessary for the judge to highlight it by giving directions to ignore it. It was perfectly proper, and reasonable, to take the course of not reminding the jury of it. What he did was to focus the jury’s attention on the evidence relevant on each charge from the various sources supporting the Crown case and the evidence relevant to the defence case, notably the appellant’s denials.

[32] The judge had made it clear that he would hear any further submissions on the answers to which belated objections were stated and any further instances of such material emerging. In the appeal hearing, the Solicitor-Advocate for the appellant confirmed that no

such submissions were made. We note that at no point did defence counsel propose any particular direction, or even invite the judge to give a direction, and he did not suggest that the trial should be deserted. We note from the transcript that the Advocate Depute's questions did not invite the material complained of and nor were they careless. In response to counsel's complaints, he sought to control the witness, inviting her to listen to the questions and answer only the question asked. More than once the judge made the same points to the witness. He also made various suggestions to the Advocate Depute on how he might avoid spontaneous irrelevant answers and how he could nip them in the bud if they were started.

[33] We note that the judge had given the jury oral and written directions at the start of the trial. These included that "evidence is what a witness is able to tell you based on their direct observation" and that hearsay was generally not allowed. The jury should consider the evidence separately as it related to each charge. Verdicts must be based only on the evidence. The jury must return a true verdict according to the evidence. In his closing directions, he reminded the jury of the written directions and repeated some of them, notably that verdicts must be reached on the evidence. He directed that the court was not concerned with morals or social ethics and jury decision-making should not be swayed by emotion, revulsion or sympathy. He identified the constituent parts of each offence in detail and set out routes to verdict based on the evidence available, some of which he identified. He made no reference to any of the material complained of. As we have noted above, he reminded the jury of the appellant's denials. The effect of all this was that the judge focussed the jury's attention on the charges and the relevant evidence and warned the jury not to be distracted by irrelevant considerations such as emotional or moral reactions.

[34] Approaching matters in this way avoided reminding the jury of irrelevant material, with only moderate potential to cause prejudice, and focussed the jury's attention on the relevant evidence. He was plainly proceeding on *Fraser* option (i). It was a judgement he was entitled, and well placed, to make. He did not err in exercising his discretion in this way. In these circumstances, even if there was a ground of appeal complaining of a lack of specific direction on any of the points complained of in submissions, we would reject it.

[35] We turn to ground 2. It was a matter for counsel whether to live with the two versions of AA's comments to CC adduced in chief. If he had left matters alone, there may have been more force had the issue of just what AA was heard to say been revisited in re-examination without featuring in cross-examination. Defence counsel's exploration in cross-examination, and emphasis of the contrast between two versions of the complainant's comments, rendered legitimate the Advocate Depute confirming in re-examination what CC had told the police and her adoption of her statement. CC said in re-examination that her memory was better when she spoke to the police and adopted the fuller version of what the complainant had said to her, including the specification of the rape occurring, "last night." Accordingly, it was not a new matter that did not arise from cross-examination. Even if it had not been raised in cross-examination, it is unlikely there would be a miscarriage of justice given the discretion enjoyed by a judge: *Renton and Brown Criminal Procedure* 18-50, citing *Gunn*. The Lord Justice Clerk (Ross) explained, in *Gunn*, that this was a discretionary matter for the judge presiding and the court could only interfere if he had seriously erred in exercising his discretion. In that regard a judge must consider the interests of justice from the perspective of the accused but also the public interest in justice being done.

[36] Whilst there can be circumstances in which a trial judge may permit further questioning if a truly new and material matter is raised for the first time in re-examination

beyond the scope of cross-examination (as was permitted in *Gunn* at first instance), this was not such a case. The judge was entitled in the exercise of his discretion, and in our view correct, to conclude that there should not be a second cross-examination.

[37] Accordingly, there is no merit in the grounds of appeal and no miscarriage of justice.

The appeal is refused.