APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 49
HCA/2023/000645/XC

Lord Justice Clerk
Lady Wise
Lord Beckett

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL UNDER SECTION 74

by

DM

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: N Shand, Faculty Services Limited for George Mathers & Co, Aberdeen
Respondent: C McKenna, sol adv; the Crown Agent

21 March 2024

Introduction

[1] This appeal raises the question of when a complainer's previous convictions for offences of dishonesty will be admissible to impugn her credibility in a trial relating to allegations of rape or other sexual offences. The appellant has been indicted on one charge of rape and another of sexual assault of his ex-partner, EW, which are alleged to have taken place on the same evening in 2022. The appellant admits that he engaged in sexual activity

and intercourse with the complainer, but has lodged a special defence stating that the acts were consensual.

[2] Two defence applications were presented under section 275(1) of the Criminal Procedure (Scotland) Act 1995. The first narrates an account of the events around the time of the alleged offences, seeking to justify the inference that the activity in question was consensual or that the appellant had a reasonable belief in consent. The present appeal is concerned only with the second application, in which the appellant sought to lead evidence of the complainer's previous convictions, namely one conviction for theft and three for theft by shoplifting, all in the district court between the months of May and July 2005. She was admonished in respect of the first charge and fined £80, £50 and £75 on the remaining three charges. The section 275(1) application was granted at a Preliminary Hearing and the case continued to a further hearing, for the Crown to consider an application to elicit evidence about the nature of the convictions and the complainer's personal circumstances at the relevant time of the convictions. This was not opposed by the defence. At the continued hearing a different judge advised parties that she was minded to exercise the power conferred by section 275(9) to review the decision granting the defence application and continued the matter for further consideration. At the subsequent hearing she reconsidered and refused the second defence section 275 application. It is against that decision that the appeal is taken.

The defence application

[4] The issues to which the evidence is said to be relevant are:

> "The credibility of the allegations made by the complainer against the accused - i.e. whether there may be reasons to question the truthfulness of the allegations she makes against the accused on the present indictment."

[5] It was submitted that the evidence is admissible at common law, and "readily verifiable". The inferences which the appellant maintains may be drawn from the evidence are:

> "That the complainer has previously committed several offence of dishonesty. This demonstrates she is capable of criminal dishonesty and this background may, when considered in the context of the evidence as a whole, provide a reason to doubt the truthfulness of the allegations she makes against the accused.
>
> Ultimately, in conjunction with other facts and circumstances, that the complainer is not a credible and reliable witness or, in any event, there is a reasonable doubt about the truthfulness of her allegations. That accordingly, the accused should be acquitted of the charges."

[6] The Crown application need not be set out in full. It seeks to elicit evidence that at the time of the said offences the complainer was experiencing difficult circumstances, such that the convictions did not undermine her evidence in relation to the rape and sexual assault allegations. For obvious reasons, the Crown only seeks to lead this evidence in the event that the evidence of the complainer's previous convictions is admitted.

The decision under challenge

[7] In her report, the PH judge notes that there was no dispute that she had the power to review the previous decision under section 275(9), which states:

> "Where evidence is admitted or questioning allowed under this section, the court at any time may—
>
> (a) as it thinks fit; and
> (b) notwithstanding the terms of its decision under subsection (1) above or any condition under subsection (6) above,
>
> limit the extent of evidence to be admitted or questioning to be allowed."

[8] In *JW* v *HM Advocate* [2021] HCJAC 41, 2022 JC 1 the court had held that review was available where there was a prospect of the admission of clearly irrelevant or inadmissible evidence (paragraph 25).

Having reconsidered matters, the procedural hearing judge concluded that the evidence of the previous convictions on their own was irrelevant. The cases of *Murtagh* v *HMA* 2010 SC (PC) 39 and *Cairney* v *HMA* 2020 JC 110 relied on for the appellant, could be distinguished. Both concerned disclosure of previous convictions rather than admissibility. In *Cairney* there was a foundation to question the complainer's evidence in the evidence of other witnesses, and the complainer's criminal history was more serious and extended over a prolonged period.

[9] The previous convictions could shed no light on the issue of consent, and were relatively minor. It was not relevant evidence. Had it been relevant, fairness would have required that the Crown be permitted to lead the evidence set out in its application, which would have led, necessarily, to consideration of collateral matters. For both reasons the evidence was inadmissible at common law. In any event, the evidence which the defence sought to lead could not meet the tests in section 275(1).

Submissions for the appellant

[10] It was submitted, in the first instance, that the PH judge should not have exercised *ex proprio motu* her power to review under section 275(9). The test for doing so was set out in *JW*:

> "[24] … If there are sound reasons for believing that the effect of the approved application would be to admit evidence which was in reality inadmissible according to law, and in breach of the protections offered by the statutory regime, judges are obliged to review the matter under section 275(9)."

[11] The relevance of previous convictions for offences of dishonesty to impugn a complainer or witness's credibility was well-established (*Cairney*; *Murtagh; CJM* v *HM Advocate 2013 SLT 380,* opinion of the Lord Justice Clerk (Carloway) at paragraph 32). The ratio in *Cairney* was a broad one: previous convictions for dishonesty were always

admissible to challenge credibility. The court held that the convictions inferring dishonesty were relevant to credibility and would have met the test under section 275.

[12] The evidence was admissible under section 275 and had a "significant" probative value. The defence did not intend to suggest that a person with previous convictions for dishonesty must have consented to sexual intercourse, and must be lying about the alleged rape, rather that the convictions call into question her honesty and provide a reason to doubt the truthfulness of the allegations she makes against the accused.

Submissions for the Crown

[13] The power under section 275(9) had been exercised appropriately. The court had a continuing responsibility to ensure that irrelevant or collateral evidence, or evidence prohibited by section 274 was not admitted. The evidence of the complainer's previous convictions was irrelevant at common law because it did not have a direct bearing on whether the complainer consented to sex with the appellant on the date libelled. Even if there was a *prima facie* degree of relevance, admission of the evidence raised collateral issues which rendered it inadmissible on grounds of expediency.

[14] The evidence could not meet the test in section 275(1)(c), because it was so remote from the events giving rise to the indictment it could not be said to have significant probative value, and would be inconsistent with protecting the complainer's dignity and privacy.

Analysis and decision

[15] The correct test for the circumstances in which a review under section 275(9) should be conducted appears at paragraph 24 of *JW*:

> "If there are sound reasons for believing that the effect of the approved application would be to admit evidence which was in reality inadmissible according to law, and in breach of the protections offered by the statutory regime judges are obliged to review the matter under sec 275(9)."

[16] In order to determine whether there were sound reasons obliging the judge to review the decision made on an application, it is necessary to consider the nature of the evidence, in terms of its admissibility at common law and whether it meets the tests under section 275(1).

[17] The primary submission for the appellant rests on the unqualified proposition that any conviction for an offence of, or implying, dishonesty, is necessarily and always admissible as bearing on the credibility of evidence given by the person convicted, no matter the degree or antiquity of the conviction.

[18] We reject the contention that the principle can be stated so baldly. Whilst it is true that some iterations of the principle concerning the use of prior convictions appear to be stated in such absolute terms, for example, Alison ii.444 "they are admitted in evidence ... and go to affect the credibility of the witness in the estimation of the jury", other statements are less dogmatic. Dickson ii.1617 states that convictions "which indicated a disregard of truth or honesty might be proved as affecting credibility". Macdonald (5th edition page 310) notes that "when credibility only is involved, the court will stop examination as to offences not inferring depravity", giving as authority the same passage in Dickson. Examination of that source shows the statement in full to read:

> "But when the offence does not indicate either disregard of truth or general depravity of character ... the court are in the practice of stopping inquiry regarding it, as being irrelevant".

It may be that Macdonald considered the coupling of disregard of truth with depravity to imply that the former had to have a character of the latter in order to be relevant, but it matters little: the real point is that the court would interfere to prevent inquiry if it

considered the conviction, even if raising dishonesty, to be irrelevant in the circumstances of the case. On this approach a witness may be examined on a prior conviction for dishonesty, so long as the conviction may reasonably be viewed as bearing on the credibility of the evidence which the witness may give. Whether it does so will depend on the facts in issue in the case, as well as factors such as the nature, frequency and age of the convictions.

[19] This would accord with the modern approach as seen in cases such as *Cairney* and *Murtagh*, allowing for the fact that those cases were cases primarily concerned with disclosure rather than admissibility *per se*. *Cairney* is not authority for the proposition advanced on behalf of the appellant: rather it is simply an example of a case where the convictions – numerous and relatively serious in nature, including theft, and five instances of obtaining goods by deception over an extended period - were considered sufficiently material to be disclosed, and to meet the test for admissibility under the statute. As the Advocate Depute pointed out, *Cairney* was a somewhat unusual case where there was evidence from the other complainers casting doubt on the verity of the witness's account of having been a member of the boys' club where the abuse took place. At paragraph 11 the court noted (i) that it was generally only convictions for dishonesty or attempting to pervert the course of justice which are admissible; and (ii) that "even then, those of a trivial and ancient nature may fall outwith the net." The court clearly considered (paragraph 14) that the age and level of seriousness of the convictions might be a relevant factor in deciding whether they should be admitted.

[20] In addition, at paragraph 11 of *Cairney* reference was made to *Murtagh*, where Lord Hope noted, at paragraph 31,that "a generous approach should …be taken to what might be relevant", adding that "there are some limits to this approach that need to be recognised, bearing in mind the witness's right to respect for his or her private life. There is … a

threshold to be crossed." By way of example, at paragraph 32 his Lordship suggested that "a conviction for an offence many years ago which was on any view, of a trivial nature and was not repeated would fall well outside the threshold of what was relevant". The comment by the Lord Justice Clerk in paragraph 32 of *CJM* that "the dishonesty of a witness can be proved" by reference to a previous conviction for a crime of dishonesty cannot be interpreted as meaning that such a conviction will always be admissible at common law. It must be read subject to the qualification introduced at paragraph 28 of that case, that the starting point for admissibility is the general principle that evidence is only admissible if it is ''relevant'', and in light of the subsequent observations in *Cairney* at paragraph 11.

[21] It follows that the second preliminary hearing judge was right to address the question of whether the threshold of relevance had been crossed in the present case. The convictions were very minor in nature, and whilst repeated, appeared to have occurred within a short period of each other. They are 17 years old, far removed in time from the offences with which the court is currently concerned, and had not been repeated since. It is difficult to see how they could bear even indirectly, on whether the admitted acts referred to in the charges occurred without the complainer's consent. For these reasons we agree that the second preliminary hearing judge was correct to consider them irrelevant at common law. We further agree that their admission would necessarily entail inquiry into collateral matters regarding the circumstances of the complainer at the time of the offending, since the Crown would be entitled to seek to rebut the proposition that the credibility of the evidence as to what happened in 2022 might be adversely affected by convictions from 2005. The preliminary hearing judge was thus also right to consider them excluded for reasons of expediency.

[22] In any event, even if the evidence were to be considered admissible at common law, it is evidence prohibited by section 274 and could not on any view meet the test for admissibility under section 275. The probative value to be attached to it would be of such small significance that it could not outweigh any risk to the prejudice of admitting it (section 275(1)(c)), having in particular regard to the issue of proportionality (section 275(2)(b)(ii)) and the appropriate protection of the complainer's dignity and privacy (section 275(2)(b)(i)).

[23] Returning to section 275(9)(a), it is expressed in the widest terms, providing that the court may "as it thinks fit" limit the extent of evidence to be allowed notwithstanding a prior decision to allow the evidence. The case of *JW* makes it clear that the power may be exercised at any time and a judge would be obliged to do so if they considered the evidence would be inadmissible or inconsistent with proper operation of the statutory regime.

[24] For these reasons, the appeal will be refused.