APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 13
HCA/2024/000280/XC

Lord Matthews
Lord Armstrong
Lord Beckett

OPINION OF THE COURT

delivered by LORD BECKETT

in

APPEAL AGAINST CONVICTION

by

PETER MCGUINESS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Loosemore; John Pryde & Co (for Aamer Anwar & Co, Glasgow)
Respondent: Harvey AD; the Crown Agent

21 February 2025

Introduction

[1] This is an appeal against conviction where the principal issue is whether a witness speaking to observing a complainer's distress some years after the sexual offence

complained of was capable of corroborating the complainer's evidence that the appellant committed the crime.

[2] On 1 May 2024 at Glasgow Sheriff Court, the jury found the appellant guilty of indecent assault committed on various occasions between July 1992 and July 1995, charge 2; together with a single charge of (non-sexual) breach of the peace at common law, charge 3. The sheriff admonished the appellant on charge 3 but on charge 2 imposed imprisonment for 3 years.

[3] In challenging his conviction on charge 2, on three grounds the appellant contends:

(1) the complainer's disclosure of the offending to DN was not a *de recenti* statement and was, thus, inadmissible hearsay;

(2) distress was exhibited after so long that it was not open to the jury to attribute it to the commission of the crime and the sheriff should have sustained a no case to answer submission; and

(3) if evidence of distress was capable of providing corroboration, the sheriff's directions on it were inadequate and a misdirection.

The evidence

The circumstances of charge 2

[4] The complainer was 45 when he gave evidence at trial. He was around 10 when he met the appellant and their association developed over several years. The complainer thought that the appellant ran a youth group his older brother attended. In what appears as the start of a course of grooming, the complainer became part of the activities the appellant organised, including playing team sports, visiting swimming pools and trips with other boys to a local holiday resort where they would stay in a caravan. The appellant would buy

them alcohol. The complainer began to have individual contact with him. He liked the appellant, enjoyed his company and the complainer's parents had a positive view of him.

[5] By the time he was 13, the complainer was visiting the appellant's family home. The appellant would treat the complainer with takeaways and alcohol. The complainer would stay there overnight, especially if he had been drinking, ostensibly to prevent the complainer's parents finding out he was drunk. The appellant felt like a big brother. Over time, the appellant began to touch him. He would try to cuddle the complainer in bed and would put his leg across his body. The appellant would try to touch the complainer's genitals despite his pretending to be asleep when this happened. It intensified over time. He would go to bed drunk and the appellant would soon follow. Up to several times each month he would wake up and find the appellant touching the complainer's penis and trying to masturbate him. The appellant began to isolate the complainer from his other friends and his family. It undermined the complainer's mental health to the extent that, towards the end of the dates specified, he felt depressed and suicidal. He had no one to talk to about it.

Disclosure of the offending and evidence of distress

[6] The complainer met DN in or around 1998/1999 through work. They commenced a relationship which continued over the next 10 years. In 2004, they went on holiday to Gran Canaria where they were involved in a coach crash. DN's evidence was that some time after the crash, the complainer disclosed the abuse he suffered at the hands of the appellant. This could have been at any time after their return home from Gran Canaria in 2004 until she started college in 2008. She described the complainer as very upset, sobbing and hard to understand. It was a traumatic conversation but he had spoken of someone he knew, through his older brother, who seemed to be a youth worker. He described sexual abuse

involving the guy touching the complainer's genitals on more than one occasion. He said he had been in the guy's house where he lived with his mother and brother. The guy provided alcohol and cigarettes and knew his family. The complainer gave her the appellant's name. The complainer gave her the impression it had gone on for years.

[7] DN explained that she had realised that the complainer was depressed when they met. She initially attributed this to grief caused by his father's death. What he told her about abuse now made sense of his depression. He told her she had saved his life.

Trial procedure

[8] In advance of the prosecutor eliciting evidence from DN about what the complainer had told her, and his accompanying distress, the appellant's solicitor objected. The disclosure was not *de recenti*, was too remote in time from the offending and was inadmissible hearsay. The sheriff repelled the objection, considering it a matter for the jury to decide what weight to give the evidence. He reasoned it would be inconsistent with the decision in *Lord Advocate's Reference No 1 of 2023* 2024 JC 140 if the jury were to hear evidence of the complainer's distress but not what had caused it.

[9] At the close of the Crown case, the appellant's solicitor made a no case to answer submission contending that distress could only have corroborative effect if accompanied by a statement capable of being *de recenti*. Since the disclosure accompanying the distress was not made *de recenti*, the distress was unable to corroborate the complainer's evidence. The sheriff repelled the submission. Whilst he acknowledged that the disclosure was not made *de recenti*, it was properly for the jury to determine: (i) whether or not DN'S evidence of the complainer's distress was credible; (ii) whether the distress was genuine or not; and (iii) whether distress was due in whole or in part to the abuse he had described.

[10] In charging the jury, the sheriff addressed distress and corroboration. He directed that if the jury accepted DN's evidence about the complainer's distress, it could corroborate his account of indecent assault. The jury would need to be satisfied that distress was genuine, arose at least in part from the nature of the incident and was not wholly caused by something else. If the jury found that distress was at least in part due to the nature of the incident, then DN's evidence could corroborate the complainer's account.

[11] The sheriff directed that there could be a good reason why a person against whom a sexual offence is committed may not tell anyone about it or may delay in doing so. Some people may tell someone about it straight away, but others may not feel able to do so. A delayed disclosure did not necessarily make it untrue.

Submissions

The appellant

[12] Counsel conceded that a witness testifying to a complainer's *de recenti* distress was capable of corroborating a complainer's evidence of rape: *Lord Advocate's Reference No 1 of 2023* at para 240. A judge should direct that a complainer's evidence on a charge may be corroborated by distress exhibited shortly afterwards but only where the jury are satisfied that the distress arose spontaneously due to the nature of the incident and that the distress was genuine: *Lord Advocate's Reference No 1 of 2023* at para 239. Although the interval between the event and the observed distress might be a factor, the important point is whether the distress was caused by the offence. Intervening occasions on which the complainer might have exhibited distress may be of some significance, but there is no fixed interval after which distress cannot constitute corroboration: *Wilson* v *HM Advocate*

2017 JC 135 at para 30; *Lord Advocate's Reference Nos 2 and 3 of 2023*, reported as *HM Advocate* v *PG and JM* 2024 SLT 1207.

[13] A statement made by a complainer after the relevant incident is normally hearsay and cannot be used as proof of fact. An exception to that rule arises where the statement is made *de recenti*: *Lord Advocate's Reference Nos 2 and 3 of 2023* at para 110. Greater latitude in terms of time and circumstance is allowed with *de recenti* statements of complainers in sexual offence cases and with cases involving children: *ibid* at para 54. A *de recenti* statement meant a recent statement or a statement provided at the first reasonable opportunity to speak to a natural confidante: *ibid* at paras 104 and 110.

[14] The court made it clear that for a statement and/or distress to hold corroborative value, the complainer must still be under the uninterrupted emotional influence of the offence.

[15] On the sheriff's approach, emotional distress and *de recenti* statements would be treated differently. This would be contrary to the intention of the court in the References of 2023. The approach of the sheriff was illogical. He found that the statement made by the complainer and spoken to by DN was not *de recenti* and so not corroborative but then found that the distress exhibited 9 years post-event was corroborative of his account.

[16] The temporal latitude afforded to *de recenti* distress and/or statements in sexual offence cases could not be extended to distress or statements made many years after the offence: *CA* v *HM Advocate* 2024 HCJAC 29; *CJN* v *HM Advocate* 2013 SCCR 124 at para 7. Disclosure of an offence together with accompanying distress made after such time could not be corroborative because it did not represent the "natural outpourings of feelings aroused by the recent injury, and still unsubsided": Dickson, 3rd Edition, para 258. There had been no cases where this court had determined distress exhibited more than a matter of

days after the offence was corroborative. The sheriff erred in repelling the objection and the submission of no case to answer.

[17] In any event, the sheriff's directions on how the jury should treat DN's evidence of the disclosure and accompanying distress were inadequate. He gave no directions on the implications of the passage of time in their determination whether they could find corroboration. He only told the jury to "look carefully at the evidence of distress and decide what was responsible for it." He failed to direct the jury on how they should assess whether that evidence was corroborative or not.

[18] The sheriff gave no direction about the proper use of the evidence of DN about the complainer telling her about indecent assault. The sheriff determined that that disclosure was not a *de recenti* statement. Accordingly, he ought to have directed that the statement had no corroborative value and could only be used to assist them in understanding the cause of the distress, not for the truth of its contents.

The Crown

[19] The evidence of the complainer's disclosure to DN was primary hearsay and thus admissible; the sheriff was correct to repel the objection. Where the objective of leading evidence of a prior consistent statement made by a complainer was relevant to an issue in the case, the evidence of someone who heard it being said becomes admissible as primary hearsay: *Whorlton* v *HM Advocate* 2020 HCJAC 36 at para 5. When taking evidence of distress, it was permissible to lead what was said by the complainer in her state of distress so that the distress could be attributed to the crime alleged: *Wilson* v *HM Advocate* 2017 JC 135 at para 35; *Hogg* v *HM Advocate* 2024 JC 54 at para 35. The disclosure need not be a

de recenti statement to be admissible as primary hearsay, but only a *de recenti* statement would have corroborative effect.

[20] Evidence of distress was corroborative: *Moore* v *HM Advocate* 1990 JC 371; *Hogg* v *HM Advocate*. There was no fixed time period in which the distress must be seen: *Moore* v *HM Advocate; Hogg* v *HM Advocate;* The Lord Advocate's References of 2023. The shorter the interval, the more likely it would be that the distress was spontaneous and independent, and thus evidence in itself of what had occurred. The longer the interval, the more important it was to examine what happened during that period: *Hogg* at para 28.

[21] There had been appropriate inquiry as to what happened in the interval between the offending and the emergence of the complainer's distress. The prosecutor properly took the complainer's account of how he came to be distressed when he did; his vulnerability and isolation as a child, the coach crash and hospitalisation in Gran Canaria and his difficulties with drug and alcohol abuse. Even considering the interval between offending and disclosure, it remained for the jury to determine whether distress was a genuinely attributable to the offending described. The sheriff was correct to repel the no case to answer submission.

[22] Whilst the appellant founded on authorities where distress was exhibited a matter of days after offending, it was wrong to say they established that distress could only be attributable to offending after such a narrow interval. No such principle exists. All that was required in cases where there was a longer interval between the alleged offending and the attributable distress was an explanation as to what had happened during that interval: *CJN* v *HM Advocate* 2013 SCCR 124. The courts should disapprove the 3-week time limit on distress apparently proposed in *CJN* in light of what was said in *Hogg, Moore* and the 2023 References.

[23] Where there is an explanation for an interval between sexual offending and exhibition of distress, it would be wrong in principle for evidence of that distress to be inadmissible. It was common in cases of historical sexual offending for there to be such an interval. Such a principle would be at odds with section 288DA of the Criminal Procedure (Scotland) Act 1995. The requisite directions reflect modern understanding that there may be good reasons why a person against whom a sexual offence is committed may not tell others about it or delay in doing so.

[24] The only essential direction on distress was that the jury could find DN's evidence of the complainer's distress corroborative of his account if they were satisfied that the distress was attributable to what he had described. Accordingly, the sheriff's directions were adequate.

[25] The sheriff made it clear that the only source of corroboration on charge 2 was DN's evidence of distress. It must be presumed that the jury followed that direction. There was no risk that they would instead have regarded the accompanying statement as corroborative and no additional direction on the statement was required. There was no misdirection and no miscarriage of justice.

Decision

Ground 2

[26] In *Yates* v *HM Advocate* 1976, reproduced as a note to the opinion of *Moore* v *HM Advocate* 1990 JC 371, the Lord Justice General (Emslie) explained that evidence of the complainer's shocked condition on her return home, minutes after she was raped, was plainly capable of corroborating her account that she had been raped. In *Lord Advocate's Reference No 1 of 2023*, in delivering the opinion of a bench of 7 judges the Lord Justice

General (Carloway) explained at para 236 that distress observed by a third party, *de recenti*, can corroborate a complainer's account that she was raped. In summarising how juries should be directed on distress as corroboration, at para 239(c), he confirmed the meaning of *de recenti* in this context. It is distress shown by a complainer to a third party shortly after an alleged incident. At para 240 the court answered the questions in the Reference: "… a witness testifying to the *de recenti* distress of a complainer is capable of corroborating direct evidence from a complainer that she has been raped." A bench of 9 judges heard Lord Advocate's References No 2 and No 3 of 2023. In delivering the leading opinion LJG Carloway, at para 52, defined *de recenti* as meaning "recent; literally of recency."

[27] An illustration of the court finding that distress observed after a significant interval was available as corroboration is seen in *Drummond* v *HM Advocate* 2015 SCCR 180 where distress was witnessed perhaps 3 days after the complainer said she was raped. The complainer had not been at liberty for much of that time. *Lord Advocate's Reference No 2 of 2023* (PG) may also be illustrative. The interval between sexual abuse by PG and parental observation of the complainer's emotional disturbance was not clearly spoken to by the complainer, aged 6 or 7 at the time of the offence but an adult at the time of the trial. The Advocate Depute in the present appellant's case explained that he had prosecuted PG at trial and understood it to be an interval of some weeks. This court is familiar with the circumstances as each of us formed part of the 9 judge bench. The impression we gained from summaries of the evidence was that the interval was at least days and perhaps weeks. Senior counsel for PG did not challenge that distress was available as corroboration when the Reference was heard and the court proceeded on the basis that it was. Another illustration is found in *Wilson* v *HM Advocate* 2017 JC 135.

[28] In *Wilson* the LJG (Carloway) stated, in delivering the opinion of the court, at para 30:

> "The question in this appeal is therefore whether the distress described by LM could support or confirm the complainer's account of lack of consent during an incident which had occurred more than 24 hours previously. Of course the jury had to be satisfied that the distress was caused by the event, and not by some extraneous element, but the sheriff gave clear directions on that matter. The interval between the alleged offence and the point at which distress is observed is a factor which a jury will wish to consider, but the important point is whether the jury are satisfied that the distress was caused by the offence. The occurrence of intervening occasions on which a complainer might have exhibited signs of distress, but did not, may be of some significance, but there is no fixed interval after which distress cannot constitute corroboration (*RWP v HM Advocate*, Lord Hamilton, p 771). Intervals of more than 24 hours have been considered relevant (*ibid* ; see also *Paterson v HM Advocate* , Lord Justice-Clerk (Cullen), p 759)."

The interval between the sexual assault and a witness observing the complainer's distress was 30 hours; para 2.

[29] We note that in *Ferguson* v *HM Advocate* 2019 JC 53 the court applied *Wilson* and expressed considerable doubt on what was decided in *Moore* and *McCrann* v *HM Advocate* 2003 SCCR 722. In *Moore* and particularly *McCrann*, the court appeared to proceed upon expectations of how a complainer might be expected to behave following rape. In both cases the court held that the interval of 12 hours between event and the distress founded on was too long for such evidence to be corroborative. In that context, in delivering the opinion of the court, LJG (Carloway) explained that great care was required before expressing views such as those offered in *Moore* and *McCrann* on what might be expected of a complainer and even greater care should be taken before excluding the occurrence of distress as corroboration where an interval of time had passed. We have no difficulty in accepting this as sound. Nevertheless, we cannot ignore the context of a delay of only 12 hours. The jury in *Ferguson*, where the interval was 33 hours, had been entitled to accept the complainer's explanation for not exhibiting distress sooner, and it was for them to decide whether distress was caused by the event and thus provided corroboration.

[30] What *Wilson* and *Ferguson* demonstrate is that in situations where distress is exhibited within a few days, and particularly where there is an explanation for delay in distress being observed by another person, it will be a question for the jury to determine if they can find corroboration under direction by the trial judge. We do not find any departure from the requirement that the event causing distress was recent to its manifestation. The passages we have noticed at para [26] above from the two reports of the Lord Advocate's References of 2023 confirm the position.

[31] Interesting and creative though the Advocate Depute's argument was, it is not open to us, as a court of 3 judges, to overturn what was confirmed by a bench of 7 judges in 2023 and another of 9 in 2024. In order to be corroborative of a complainer's evidence that she was sexually assaulted, distress must be observed relatively shortly after the incident said to give rise to it. There is no hard and fast rule determining when observed distress ceases to be available as corroboration; everything will depend on the particular circumstances of the case. It will often be a question of fact for the jury. There are numerous examples in reported cases illustrating where this court did and did not consider evidence of distress to be available as corroboration. There will be cases where the interval between an incident and observation of distress will be such that, as a matter of law, it is not open to a jury to find corroboration from distress. This is such a case. An interval of 9 years cannot be viewed as shortly afterwards/*de recenti*. Accordingly, it was not open to the jury to find corroboration in the evidence of the complainer's condition as described by DN. The sheriff erred in repelling the submission of no case to answer. Accordingly, the appeal succeeds on ground of appeal 2.

[32] We do not consider the decision of the court in *CJN* to be inconsistent with the law as explained in the Lord Advocate's References of 2023 and as we have summarised it, and its

effect in the appellant's case, at paras [26]–[31] above. The court's understanding of the law when *CJN* was decided preceded the decisions in the recent Lord Advocate's References of 2023. In *CJN* it was an accumulation of misdirections, including on mixed statements, which led to the quashing of the conviction. The court did not propose a three-week limit beyond which distress could never provide corroboration for a complainer's account of an assault or sexual offence. At para 7, their Lordships explicitly recognised that whilst the corroborative potential of distress exhibited three weeks after an event might in some circumstances have little or no effect there could be exceptional cases where it would be available as corroboration. The court could not and did not set a precise time limit for the availability of evidence of distress as corroboration.

Grounds 1 and 3

[33] Having reached the conclusion we have on ground 2 it becomes unnecessary to determine grounds of appeal 1 and 3. The effect of our decision on ground 2 is that the jury should not have been considering charge 2 at all and we say no more about ground 3.

[34] In light of certain submissions advanced, we make the following observations on ground 1. The sheriff considered that what the complainer told DN many years after the event was tied to distress. He erroneously determined that distress was available as a source of corroboration. In para 227 of its opinion in *Lord Advocate's Reference No 1 of 2023* the court observed that, in such circumstances, a belated account to a witness of what had occurred earlier might be excluded as inadmissible hearsay unless brought within certain exceptions; specifying statutory hearsay and adoption of a statement. We observe that other exceptions or refinements may arise. Such a statement may be available for the purpose of contradicting testimony; section 263(4) of the 1995 Act (prior inconsistent statement). Whilst

one witness speaking to another's statement would not generally be admissible as a prior consistent statement, *Coyle* v *HM Advocate* 1994 JC 239, it may become admissible as primary hearsay, as it did in *Coyle*, to rebut an attack made on the complainer's testimony based on supposed prior inconsistent statements. It was in a similar context that the court in *Whorlton* found that it was legitimate to adduce an earlier prior consistent statement as primary hearsay to rebut a criticism of the complainer's veracity based on delayed disclosure. Wisely, the Advocate Depute departed from his written submission that *Whorlton* vouched any report of a complainer's statement always being admissible as primary hearsay where it is relevant to an issue in the case. That being said, we recognise that in contemporary practice parties will frequently, and without objection, adduce some evidence of what a complainer said on first reporting a matter to the police. If the purpose is to establish the timing of that event, it may not be objectionable but it would not always be necessary to adduce the words used by the complainer as opposed to the fact of reporting the incident relating to a particular charge.

[35] In the course of the hearing, counsel for the appellant briefly sought to develop an argument not foreshadowed in her case and argument and beyond the scope of her grounds of appeal. She proposed that evidence of non-recent distress was necessarily inadmissible, albeit her enthusiasm waned somewhat when she came to realise the implications. She referred to *CA* at para 13 where the court suggested it to be unnecessary and wrong to refer to non-recent distress as available to the jury in assessing the credibility and reliability of a complainer's evidence. The essence of the court's reasoning was that the absence of consent was not an issue in the sexual offences against children libelled. Ultimately, the court found it unnecessary to discuss further any implications from the lapse of time between the events and the distress. In any event, the passage is *obiter*, the *ratio* of the case being that there was

no miscarriage of justice because the Crown case was based only on mutual corroboration, as had been made abundantly clear to the jury. Accordingly, there was no risk the jury were misled into thinking that distress was an alternative source of corroboration. The court was not referred to cases of some relevance, as set out below.

[36] We need not decide a point not raised in the note of appeal and only tentatively advanced. If it should arise for determination, we would observe that if evidence is not corroborative that does not, of itself, render it inadmissible. A witness speaking to a complainer's distress is simply a piece of circumstantial evidence. In some circumstances it can provide corroboration, in others it cannot. Juries are commonly told that they can have regard to all of the evidence in determining what to make of the evidence of a witness, particularly if their evidence is disputed, contentious or under scrutiny. They are certainly entitled to do so: *Dreghorn* v *HM Advocate* 2015 SCCR 349 at para 35; *Fox* v *HM Advocate* 1998 JC 94, Lord Coulsfield at page 117; *McDonald* v *HM Advocate* 2010 SCCR 619 at para 27 *et seq*; *PGT* v *HM Advocate* 2020 JC 205 at paras 19-22. Where evidence of a complainer's distress is unavailable as corroboration, we are not immediately convinced it follows that it can serve no other purpose in the jury's considerations.

Disposal

[37] The Advocate Depute appropriately confirmed that if we sustained ground of appeal 2, the Crown would not seek a re-trial. We shall simply quash the conviction on charge 2.