APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 66
HCA/2017/000338/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

NI

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Niven-Smith; Paterson Bell
Respondent: Goddard QC, AD; Crown Agent

6 November 2018

Background

[1] The appellant was convicted after trial at Edinburgh on 21 April 2017 of charges 1, 2, 4, 6, 7, and 9 libelled on the indictment. These were charges of indecent or sexual assault on 4 complainers, GG (charge 1) and GT (charge 7 and charge 9); and the repeated rape of both FH (charge 2) and CJI (charge 4 and charge 6).

[2] The Crown relied on the doctrine of mutual corroboration for a sufficiency of evidence, each complainer having spoken to the terms of the relevant charge or charges. In evidence CJI had asserted that her two children with the appellant, L and B (dob 15/1/16), were both the product of rape, these rapes being libelled respectively as charges 6(a) and 6(b). The latter incident was said to have taken place when the complainer had returned from a night out. The appellant had been looking after L, and when the complainer returned he raped her. L was in the bed at the time and woke up during the incident. Despite L waking up the appellant had continued to rape the complainer.

[3] In the course of her evidence the complainer admitted that she had lied to the police, falsely maintaining that the appellant had sent her threatening text messages and an email. She had in fact sent the messages herself. She had bought a second mobile and used it to send threatening texts to herself. She had created a false email address to send a message purporting to come from the appellant. She did so because she understood the appellant had been released on bail and she was afraid of him. She was also cross-examined about other untrue information she had supplied in her statement to the police. Consistent with the appellant's position in evidence, it was suggested to her that all sexual activity with him had been consensual, but this she denied.

[4] The appeal is presented on the grounds that there is fresh evidence which "would have significantly impacted upon the credibility of" the complainer. The fresh evidence is said to come from two sources. The first is a witness, KHR, who refers to a conversation in which the complainer described an instance of consensual sexual intercourse between herself and the appellant as the occasion of the conception of B. The appellant had been unaware of this conversation. KHR contacted the appellant's solicitor during the trial, at a stage where the jury had already retired, to advise of this conversation. It is submitted that

had the defence been aware of, and able to lead this evidence it would have contradicted the complainer's evidence that the sexual intercourse leading to the conception of B was rape. This contradiction from a prior inconsistent statement would have had a significant impact upon the jury's decision about the credibility of the complainer, and thus on all the charges in respect of which her evidence was crucial.

[5] The second piece of fresh evidence concerns a message left by the complainer on a Police Service of Scotland internet contact system. The message, left on 5 August 2017, was in the following terms, as agreed in a Joint Minute of Agreement:

> "My name is [CJI] and I am going to end my life tonight as I can no longer love [*sic*] with the knowledge that I helped put an innocent man in the jail for ten years for something that he didn't do as everything that I said in Court about him was lies and I can't live with myself for doing that to him."

As with the evidence of KHR, it is argued that if this evidence had been heard at the trial it would have significantly impacted upon the credibility of the complainer CJI.

Sentence

[6] The appeal against sentence was not argued.

Evidence

[7] The parties entered in to a Joint Minute which, inter alia, confirmed that the message had been left by the complainer. It was not the first that had been sent to the police by the complainer. There had been a number. The police had treated them as "attention seeking". The same had been done with this one. Following a police investigation a summary complaint was raised in respect of the offence of wasting police time. The Advocate Depute confirmed the complainer had pled guilty to it. Sentencing has been deferred.

[8] KHR, the appellant, and the complainer gave evidence at the appeal hearing, each having provided affidavit evidence.

[9] KHR spoke to her relationships with the appellant and the complainer; her recollections of the circumstances that led to the conversation with the complainer; her knowledge of the trial; and her rational and the circumstances that led to her speaking to the appellant's solicitors. She could not recall the specific date or time of the conversation, referring the likely stage of the complainer's pregnancy as a reference for it. There were a number of significant inconsistences between each of her sworn affidavits and the evidence that she gave in court on issues of pertinence. When challenged on the matter her responses were surprising.

[10] The appellant spoke briefly to his knowledge of KHR, his relationship with her, his relationship with the complainer. He had no knowledge of the conversation between KHR and the complainer. His position was that he could not reasonably have known about it or the extent to which KHR could have assisted his defence. In cross examination his position was that it would be unreasonable to suggest that he would have been required to investigate people like KHR who were within the complainer's circle of friends. He acknowledged that his solicitors had taken statements from and had led evidence from his mother and an ex-partner.

[11] The complainer gave evidence by video link. She spoke to her relationship with KHR. While she accepted that she had told KHR by phone that she was pregnant with B and that the appellant was the father, she disputed entirely that a conversation in person at her flat in the terms suggested by the KHR had taken place. She accepted that she could not recall the specific date of or the terms of the conversation. Her evidence was that she would not have advised KHR of whether the conception had occurred via consensual sex or rape.

She spoke to the message left with the police in August 2017, and her reasons for sending it. She confirmed it was untrue. She regretted sending it.

[12] We shall return to pertinent issues concerning the evidence of these witnesses later. No evidence was led from the court staff or others KHR spoke to, the appellant's legal team, or the friend from whom KHR claimed to have been informed, via Facebook, of the existence of relevant press reports concerning the appellant's trial. No press reports or Facebook content were produced.

Submissions for the appellant

KHR's evidence

[13] It was submitted that there was a reasonable explanation for this evidence not being heard at the trial. The appellant had been entirely unaware of the conversation between KHR and the complainer. There was no good reason for thinking that the appellant would have been aware of the evidence KHR could give. There were no enquires which the appellant could reasonably have been expected to initiate which would have uncovered the evidence. KHR had only contacted the appellant's solicitor during the trial and after the jury had retired to consider their verdicts.

[14] It was submitted that there had been a miscarriage of justice. The conversation with KHR was evidence which would have been capable of being used to undermine the complainer's credibility and reliability. It would have impacted significantly upon the complainer's credibility and augmented that of the appellant.

[15] The jury must have accepted the complainer's evidence that as a consequence of rape she had fallen pregnant with children L and B as being both credible and reliable in all material respects, since they unanimously convicted the appellant of charges 6(a) and 6(b) to

which this evidence related. It was not difficult to see why the jury accepted that evidence and rejected that of the appellant. The complainer's evidence was supported in general terms by other complainers, specifically that of the complainer on charge 2. KHR's evidence was therefore significant, directly pertaining to charges 6(a) and 6(b), and undermining the credibility of the evidence given by the complainer thereanent.

[16] If the jury had KHR's evidence it would have been entitled to infer that the sexual intercourse leading to the conception of B had been consensual, or at least been in reasonable doubt as to the matter, leading to acquittal on charge 6(b). KHR's evidence might also have had the effect of undermining the complainer's credibility on charge 6(a): for example if the complainer had previously been raped by the appellant, why would she subsequently have engaged voluntarily in sexual intercourse with him? This fresh evidence was particularly significant as at the trial there had otherwise been little material available to undermine the complainer on charge 6.

[17] The critical issue at the trial, in respect of the specific charges relating to the complainer and the other charges for which her evidence was relied upon as corroboration, was the credibility and reliability of the complainer. If KHR's evidence had been seen as reliable and credible the evidence would have been of a kind and quality that was likely to have had a material bearing upon the jury's consideration of that issue.

The message

[18] The message left by the complainer with the police happened after the trial. It is not therefore evidence which could have been led at the trial and there is a reasonable explanation for it not being heard.

[19] The evidence consists of a voluntarily made statement from the complainer which directly contradicts the evidence which she gave at trial. It is evidence which significantly undermines the credibility and reliability of that evidence. Whilst there had been evidence before the jury suggesting that the complainer was capable of making false allegations against the appellant, the evidence of the message left with the police is of a different character. The complainer justified the making of those accusations by reference to her fear of the appellant, about whom she had already made complaints of rape, and who had now been admitted to bail. In assessing her credibility, the jury might, have accepted this explanation. No such explanation could arise in relation to the message left with the police. The fake texts and email did not specifically relate to the allegations of rape, whereas the present message does so.

Cumulative effect of fresh evidence

[20] It was submitted on behalf of the appellant that the cumulative effect of the two additional pieces of evidence was greater than the evidence in their component parts: a single piece of evidence may not tell the jury a great deal but together they might present a very powerful picture. While each piece may have been enough to undermine the credibility of the complainer, the combined effect would have been to have left the jury with no doubt that the complainer was untruthful in respect of material parts of her evidence.

Mutual corroboration

[21] Finally it was submitted that as the Crown's case was predicated on the doctrine of mutual corroboration, with charge 2 relating to the rape of a separate complainer being reliant upon the complainer's evidence in relation to charges 4 and 6, if the fresh evidence undermined the complainer's credibility to the extent that the jury did not accept her

evidence at all then they could not convict the appellant of charge 2 in so far as it was held to concern rape.

[22] Although in the case and argument it was submitted that the fresh evidence was heightened in importance as there had been little material available to undermine the complainer on charge 6, this was not pressed significantly in argument, in light of the substantial material which was available, and used, to attack her credibility and reliability specifically in relation to the appellant and the nature of her relationship with him.

Submissions for the respondent

[23] The advocate depute submitted that in appeals of this nature the court required to answer three questions in sequence. The questions, deriving from the court's opinion in *Megrahi* v *HM Advocate* 2002 SCCR 509 and *Razzaq* v *HM Advocate* 2017 SCCR 376, were:

(1) Whether there was a reasonable explanation for the evidence not being heard at the trial?

(2) Does the appeal court accept the fresh evidence as capable of being regarded as credible and reliable?

(3) Would the fresh evidence be likely to have a material bearing on, or a material part to play in the determination by the jury of a critical issue at trial.

The assessment of whether the additional evidence would be likely to have been material to the jury's determination must be made in the context of the whole trial (*Cameron* v *HM Advocate* 1987 SCCR 608 and para 21 of *WB* v *HM Advocate* 2014 SCCR 376).

KHR

[24] In respect of question (1), it was accepted that the requirements had been met in relation to the message sent to the police as the message post-dated the trial. However, the

question arose why KHR had not been precognosced. KHR was a person who had lived with the complainer towards the end of her pregnancy with L, and had been close to her at the time the alleged rape resulting in the conception of B occurred. The appellant knew this.

[25] In relation to question (2) it was submitted that the court had heard at first hand inconsistent or fundamentally flawed evidence from KHR. An example was her evidence concerning the circumstances surrounding the alleged conversation with the complainer. In evidence she had said it occurred in a telephone call, then at the complainer's flat that day or soon after. This was different from the terms of the affidavit dated 26 July 2017. The explanation for the reason for the conversation had varied from the loan of a buggy to payment for it. There were fairly fundamental differences which made her credibility a concern. The same could be said of her knowledge of the press article, its contents and the circumstances which led her to contact the appellant's solicitors. Her evidence was inconsistent with statements given in her affidavits. The court would be aware of the likelihood that an article would contain the complainer's name - KHR had suggested it had. The inconsistencies were central to her account, not on peripheral matters.

[26] In relation to the message, the court had heard commendable and frank evidence from the complainer on the reason for sending it. If the court held that the content of the message was unreliable then it did not require to consider question 3.

[27] In relation to question (3), for both pieces of evidence the court's assessment of the evidence had to include the context of the trial as a whole. Here the jury had convicted the appellant of 6 charges involving 4 different complainers. The jury had found all 4 to be credible and reliable in relation to the conduct libelled. They had spoken to conduct of a similar nature where there was a close connection in time between some of the charges, a factual distinction from *Razzaq* v *HM Advocate*.

[28] KHR's evidence was limited to a prior inconsistent statement relating to only one episode in a charge that libelled rape on various occasions throughout a period in excess of 2 years with standout incidents being libelled (a) and (b). The contention that KHR's evidence would affect the complainer's credibility in a broad sense must be seen in the context of the evidence in the trial as a whole. The defence had considerable material with which to attack the credibility of the complainer. This included prior inconsistent police statements relating to the appellant. These inconsistent statements related to the entire conduct libelled at charge 6(b) and were of far greater evidential significance compared to the statement allegedly made to KHR. The jury had also been given further material to attack the credibility of the complainer in respect of the false texts and emails sent by the complainer, but purporting to come from the appellant.

[29] The message to the police should also be seen in the context of the whole evidence at trial including the inconsistent statements made to the police and the false allegations and behaviour associated with them. Reference was made to the joint minute. There was a history of the complainer calling the police in what was described as "attention seeking" behaviour which included statements that she intended to harm herself. It was agreed that police officers against that background did not take her claim seriously at the time.

[30] Notwithstanding the prior inconsistent statements and the false messages the jury had been unanimously satisfied that the complainer was telling the truth in relation to the central issues of the charge libelled at charge 6. It was submitted that against that background neither the alleged conversation with KHR nor the message to the police would have been likely to have had a material bearing, or part to play in the determination by the jury of a critical issue at trial.

Analysis and decision

Miscarriage of justice and 'fresh evidence'

[31] Where an appeal is made under section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995, after identifying the allegedly new or "fresh" evidence, as both parties agreed, the first task of the court is to determine whether there is a reasonable explanation for it not being adduced at the original trial. Only if an explanation exists would it then be necessary to consider the effect such evidence might have had if it had been led at first instance.

[32] Those considerations are further detailed in *Megrahi* v *HM Advocate* 2002 SCCR 509 and the opinion of the Lord Justice Clerk Gill in *Fraser* v *HM Advocate* 2008 SCCR 407 at 437-438. In summary the court must consider whether the fresh evidence would have been capable of being regarded by a reasonable jury as credible and reliable (or the Advocate Depute's question (2)). If the court is so satisfied it must then consider the cogency of the evidence. The evidence must be important and of such a kind and quality that it was likely to have been found by a reasonable jury, under proper direction, to have been of material assistance in their consideration of a critical issue that emerged at trial. It may only quash a conviction if it is satisfied that the original jury, if it had heard the new evidence would have been bound to acquit. If the court is not satisfied of acquittal it must be satisfied that the additional evidence was not merely relevant but also of such significance that it would be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice (the Advocate Depute's questions (3) and (2) respectively).

KHR's evidence

Reasonable explanation

[33] The evidence of the appellant was that he had no reason to think that KHR would have any useful evidence to give on matters relevant to the trial. He said it would not be reasonable to expect him to precognose all of the friends of the complainer, or himself, on a speculative basis. While he had instructed the legal team acting for him to undertake some lines of inquiry, which included taking statements and ultimately leading evidence from his mother and an ex-partner, he had no reason to think that KHR could assist with his defence.

[34] While this court was surprised that KHR hadn't been identified as a potential witness given her close relationship with the complainer at material times, we do have some sympathy with the general proposition put forward for the appellant on the level of investigation that should have been undertaken specifically in respect of this case. In *Campbell and Steele* v *HM Advocate* 1998 SCCR 214, Lord Justice Clerk Cullen (p 242C) stated that the underlying purpose of section 106(3)(A) was "that the court should take a broad and flexible approach in taking account of the circumstances of the particular case". We are accordingly of the view that in the particular circumstances of this case the threshold for a reasonable explanation has been met. Practitioners are however reminded that no two cases are the same. The level of consideration and investigation of witnesses must be conducted with reference to and in the context of the case's factual matrix.

Is the evidence capable of being regarded as credible and reliable?

[35] Importantly while we are not required to determine the credibility and reliability of KHR's evidence we do require to be persuaded that it is capable of being regarded as credible and reliable by a reasonable jury. If and only if we are satisfied of that we are then

required to consider whether such evidence was likely to have had a material bearing on or a material part to play in the determination of the jury of a critical issue at the trial.

[36] We had the benefit of hearing the testimony of KHR at large and specifically on the terms of her two prior affidavits in cross examination. We are not persuaded that her evidence is capable of being regarded as credible and reliable by a reasonable jury. It is likely that a jury would have come to a contrary view. The reasons for this are simple. There were a significant number of inconsistencies in her evidence concerning issues of materiality. Her evidence on the circumstances which led to her providing her recollection of the conversation with the complainer's solicitors was a notable example. In evidence she first advised she had learned about the trial as a consequence of her friend posting an article on Facebook about it. On further questioning her position was that a friend had called her and read out the terms of the article first. The article had subsequently been posted on Facebook. She stated at the hearing she had never read the article but had then contacted the appellant's solicitors. All of this evidence contradicted the terms of the affidavits she had given. The first affidavit stated that she had followed the trial in the media and was aware of the allegations the appellant faced. The second one suggested that she had been sent a Facebook message with the article. Her recollections on whether the article read to her or which she reviewed contained the details of the solicitors also changed. Her evidence was that the article had named the complainer and provided details of her children, which seems inherently unlikely. A number of these issues could have been clarified by the production of further evidence for example a copy of the article or Facebook material she referred to. Nothing had been produced. In totality her evidence on the circumstances which had led to the conversation between her and the complainer was also fluid and inconsistent. This was particularly troubling. In her first affidavit she stated that the

conversation had taken place when she met the complainer to allow the complainer to return a pram lent to her. This changed to an initial conversation over the telephone, instigated by her when she contacted the complainer about money she owed in relation to a pram. It was during the call, she stated in evidence that the complainer confirmed the pregnancy. A meeting then took place in which the pregnancy was discussed further. The specific date and time of the meeting or call could not be recalled. When challenged in cross-examination on the discrepancies in her affidavits and evidence in court KHR made attempts to try and explain away why certain things might not have been said in the affidavits, rather than explaining why her evidence may have changed. She stated that when giving her affidavits she did not think how and when the conversation had occurred mattered, the fact it happened was the important thing.

[37] On the basis that we have found KHR's evidence not capable of being regarded as credible and reliable by a reasonable jury no further consideration requires to be given. The appeal in so far as it relates to this piece of evidence fails.

The message left with Police Scotland

Reasonable explanation

[38] It was not disputed by the parties that there was a reasonable explanation as to why the evidence was not heard in the original trial proceedings. The message was sent after the trial. It was submitted that the requirement of section 106(3)(A) had been satisfied. This court agrees.

Is the evidence capable of being regarded as credible and reliable?

[39] The appellant's position was that the message was evidence of a statement inconsistent with statements made by the complainer at trial. We heard evidence from the

complainer confirming that she had written and sent the message and that the man referred to in it was the appellant. Her position was that its terms were not true. She explained the reasons for sending it. She saw it as a means of getting the help she needed with her mental health and getting her children back. At the time it was sent she wasn't coping and needed help. She was in her own words having to deal with all of the things that had happened to her. She had been suffering from mental health issues, consuming alcohol and abusing painkillers and other non-prescribed drugs. Her children had been taken away from her and placed in care. Social work had commenced their investigations when the allegations against the appellant had come out. Her view at that time was that if she hadn't given evidence against the appellant her children would not have been taken away. All she wanted was for her children to be returned to her. She thought that if she said her evidence was untrue then the appellant would be released and that would assist with getting her children back. She accepted now that her reasoning for the message was illogical and flawed and that it would not have achieved what she wanted it to. She regretted sending it.

[40] In contrast to the first ground of appeal the evidence being considered in this instance is not testimony but an actual written document. We are of the view that the message, standing on its own, would be capable of being regarded as credible and reliable by a reasonable jury. It is what it purports to be-an email sent by the complainer in terms which are inconsistent with statements made at trial. If placed before a jury, the jury would also have had the opportunity to hear the complainer's evidence on the terms of the email, its veracity and why it was sent.

Whether the evidence would have a material bearing on the jury's consideration of a critical issue

[41] At trial the jury was required to determine whether the complainer had been raped on a number of instances. As both parties submitted her credibility was an important issue for the jury in making its determination.

[42] In "fresh evidence" appeals such as this, it is always crucial to view any additional material relied upon in the context of the whole evidence laid before the jury in the original proceedings (*Al Megrahi* v *HM Advocate,* 2002 SCCR 509, para 249; see, also, *WB* v *HM Advocate supra,* Lord Justice Clerk (Carloway) at para 21). In doing so the court may take in to account the observations and assessment of the evidence by the trial judge. In this instance the trial judge advised in his report that he found it difficult to state an impression of the evidence which the complainer gave at the trial, though, importantly in our opinion, he had no note or recollection of any adverse impression on her credibility. The trial judge commented that, as the complainer was one of four at trial, he had little doubt that, the existence of the other complainers had affected the jury's assessment of the complainer's credibility and reliability.

[43] The issue for us to consider is what bearing, if any, the message would have had on the jury's determinations of material issue(s). As the court stated in *WB* v *HM Advocate* at para [21] there can be a danger in ascribing to new evidence more significance than it would have had at the actual trial. Such a danger is present here. When reviewed in isolation and without reference to the complainer's evidence on why it was sent and other matters covered at trial then it had the potential to be seen as a matter of significance. When considered within the entire context of the trial that is not the case.

[44] We are of the view that it pales in significance to other inconsistent statements made by the complainer and the other material used to attack her credibility at the trial. It is clear from the transcripts that the appellant had a considerable amount of material to attack the

complainer's credibility at trial. The material included other prior inconsistent statements given by the complainer. In particular there was a statement given to the police in December 2015. This statement had been given in the months prior to the birth of B, who it had been submitted was conceived via rape. In it the complainer had stated that in her relationship with the appellant "there was never any physical violence." That she had "never known [the appellant] to be aggressive in the slightest way and I have pushed him to the limits sometime." She had also stated that other than a report to the police to deal with the recovery of her property from the appellant she had "never had any reason to report [the appellant] to the police for any other reason." These statements related to and were in stark contrast to and inconsistent with the terms of the conduct libelled against the appellant.

[45] The jury also heard about a number of allegations that the complainer had made about the appellant prior to the trial. They included purported texts and messages sent by the appellant threating her life and general safety. Following an investigation by the police it had been discovered that the complainer had gone to the lengths of purchasing a separate phone and had sent the messages to herself. At trial and in examination in chief she had admitted that the allegations were false and that she had bought the phone and had set up a false email address. She also explained her reasons for this conduct which had included fear of the appellant.

[46] Notwithstanding the seriousness of this conduct and the extent of the prior inconsistent statements made to the police the jury held the complainer to be credible and found the appellant guilty of the charges which concerned the complainer. Charge 6 was a unanimous verdict. In our view the message accordingly pales in significance to this other significant and potentially credibility challenging material. Accordingly we are unable to conclude that the message is a piece of evidence of such significance that the verdict reached

by the jury in ignorance of it was a miscarriage of justice. The appeal in relation to this ground also fails.