APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 8
HCA/2024/297/XC

Lord Justice General
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 74(1) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

PA SAMBA SAYE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Jackson KC, Deans; John Pryde & Co SSC (for Fitzpatrick & Co, Glasgow)
Respondent: CM Murray AD; the Crown Agent

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25 July 2024

[1] The appellant was indicted to a Preliminary Hearing at Glasgow High Court on 16 November 2022 on four charges. Two of those relate to cannabis and a third to attempting to pervert the course of justice. These do not feature in this appeal. The principal charge is the rape of RM, which is said to have occurred on 19 June 2021 at an address in Glasgow. The libel is that the appellant:

> "did, whilst she was under the influence of alcohol and asleep and incapable of giving or withholding consent, pull down her lower clothing, penetrate her mouth and vagina with your penis and, after she had awoken, touch her body, attempt to penetrate her mouth with your penis, penetrate her vagina with your fingers, seize hold of her arms, restrain her and penetrate her vagina with your penis and you did thus rape her to her injury: CONTRARY to section 1 of the Sexual Offences (Scotland) Act 2009".

The appellant has lodged a special defence of consent. He has also lodged a special defence of incrimination; that the rape was carried out by one or two named persons (SKOD or AS).

[2] At a Continued PH on 6 February 2023, the court granted an application under section 275(1) of the 1995 Act, in the absence of any opposition from the Crown. Paragraph (i) is uncontroversial and sets out that, prior to having sexual intercourse, the appellant and the complainer had engaged in certain consensual sexual activity. There is then a statement that:

> "(ii) shortly prior (the time period is thought to be minutes) to charge (1) taking place … the complainer and the accused engaged in consensual penile/vaginal sexual intercourse."

The picture which the appellant thinks is thus created is one of a consensual act of intercourse between him and the complainer which is different from that in the charge and then a separate non-consensual act which was committed later by one or other of the incriminees.

[3] The next paragraph (iii) is that, if the rape in charge (1) had been committed, it was not committed by the appellant but by one or other of the named persons. The remaining paragraphs (iv) to (viii) relate to the finding of the DNA of the appellant on the person or clothing of the two named persons and the DNA of the complainer on the boxer shorts of one of the named persons.

[4] At another CPH on 10 June, the Crown moved, in terms of section 275(9) of the 1995 Act, to limit the extent of the evidence by prohibiting questioning in respect of

paragraphs (iii) to (viii). This motion was granted. The PH judge noted the Crown's position that the central issue was consent to the admitted intercourse between the complainer and the appellant. The complainer had given evidence at a commission. She spoke to being raped by one person. The complainer's version was that there was no consent and that she had said to her attacker "get off" and "stop it". There is a cryptic passage in a short extract of the Crown's note of cross-examination at the commission as follows:

> "Q Did you perhaps have sexual contact with different people?
>
> A I was of the understanding that it was the same person throughout the night.
>
> Q Were you perhaps raped by [SKOD]?
>
> A Any sexual contact I had that night was non-consensual. But as I say I could not identify who it was.
>
> Q … can you give any explanation as to how your DNA ended up in the boxer shorts of [SKOD]?
>
> A I don't know. … maybe it was 2 different people. I was not aware of that until right now, so I'm not sure".

It would seem from this that the complainer may not have been able to identify her attacker. However, the appellant's DNA has been found on the internal swab of the complainer's vagina, thus indicating, as the appellant accepts, intercourse with him. The Advocate depute advised the Crown will redact this passage if the PH judge's decision under section 275(9) is sustained.

[5] The PH judge cited *CH* v *HM Advocate* 2021 JC 45 (at para [38]) whereby evidence which is collateral to the main issue is inadmissible. It was inexpedient to allow the enquiry to be confused or protracted by looking into other matters (see also *Brady* v *HM Advocate* 1986 JC 68 at 73). The PH judge recorded that the appellant contended that the incident in charge (1) was the rape of the complainer. This was different to the consensual intercourse

which occurred earlier with the appellant. That contention ignored the key point that the allegation in charge (1) is that the appellant carried out the rape. What was under consideration was intercourse involving the complainer and the appellant and not sexual intercourse between the complainer and anyone else. A special defence of consent was not something which could relate to an act prior to the subject-matter of the charge. The evidence in paragraphs (iii) to (viii) was irrelevant at common law and collateral. The fact that non-consensual sex may have occurred with another person or persons afterwards was of no relevance to whether or not there was consent between the appellant and the complainer. Even if the evidence were relevant and admissible, it did not meet the test in section 275(1)(c). Its probative value was not significant. It could not have any effect on the central question of consent. It did not meet the test of providing appropriate protection for the complainer's dignity and privacy.

[6] The appellant submitted that the case had become confused because the appellant had lodged special defences of both consent and incrimination. His position was that he had had consensual sex earlier in the evening and that the rape libelled was committed by another person. The Crown could not convert an admission of consensual sex earlier in the day into an admission regarding the conduct in the libel. The Crown responded by submitting that the matter at issue was not whether the sexual acts between the complainer and the appellant took place, but whether the complainer consented to them. The basis of paragraph (iii) of the section 275 application presented an entirely different line of defence. It was inconsistent with that, which had been set out earlier, of consensual conduct relative to charge (1). Whether or not either or both of the named persons had any sexual contact with the complainer could not assist on whether the complainer consented to sexual acts with the appellant. Evidence that the complainer may have been subjected to non-

consensual sex by others on a later occasion had no bearing on whether she consented to sex with the appellant on an earlier occasion.

[7] The appellant accepts that he had intercourse with the complainer. The charge is one of rape of the complainer by the appellant. This refers to the episode of intercourse which admittedly took place between them. Consent on that occasion is the only issue for trial. The defence of incrimination is, in that context, irrelevant since it cannot be said that the admitted intercourse which is libelled in the charge was carried out by a third party. There is no suggestion of mistaken identity in relation to that episode. The evidence concerning the activities of others is therefore inadmissible at common law.

[8] If evidence of an episode of intercourse with the named persons were admissible, it would be struck at by section 274(1)(b) as it relates to sexual behaviour which does not form part of the subject-matter of the charge. It could not be rendered admissible under section 275(1), even if it were regarded as relevant, since its probative value would not outweigh the risk of prejudice to the proper administration of justice. Its admission would tend to deflect the jury's attention from the only question which they will require to answer.

[9] The appeal is refused.