APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 20
HCA/2021/000096/XC

Lord Justice Clerk
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal against Conviction

by

GC

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson, sol adv; Paterson Bell Solicitors, Edinburgh for John Kilcoyne & Co, Glasgow
Respondent: Prentice, QC, AD, McKenzie, sol adv; Crown Agent

31 May 2022

Introduction

[1] The appellant was convicted on 16 March 2021 of the rape of two complainers, SM and LC. Shortly after his conviction, a witness, MB, provided an affidavit to the appellant's solicitors in which she spoke to having overheard conversations between the complainers to the effect that they intended to collude in fabricating accusations of sexual conduct against

the appellant. The appeal proceeds on the assertion that MB's account amounts to "fresh evidence" in terms of section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995. On 13 January, the court fixed an evidential hearing.

[2] The purpose of the hearing was for MB to give evidence restricted to issues of collusion and fabrication with a view to the court determining two matters:

1. Is the evidence admissible?
2. Is it likely to have had a material bearing on the decision of the jury?

Background and evidence at trial

[3] The appellant was convicted of the following charges, as amended, by majority:

> "(003) on various occasions between 24 May 1998 and 31 July 2001, both dates inclusive, at [appellant's home address], on car journeys between [specified locations], within a motor vehicle … you GC did assault [SM] … and insert your penis into her vagina and attempt to penetrate her anus and you thus did rape her to her injury;
>
> (005) on various occasions between 1 January 1999 and 17 April 1999, both dates inclusive, at [appellant's home address], and within a motor vehicle … you GC did assault [LC]... kiss her, touch her vagina, penetrate her vagina with your fingers and rape her by penetrating her vagina with your penis to her injury."

[4] Both SM and LC gave evidence at trial. Majority findings of not proven were reached on two remaining charges of lewd and libidinous practices, and rape, of SM between 1995 and 1998.

Evidence at trial - SM

[5] SM was the appellant's stepdaughter. During the period covered by the charge of which the appellant was convicted, SM was aged between 12 and 15. When she gave evidence she was 33. She spoke to abuse commencing at the age of 9 at a time when her mother was in hospital. Penetrative abuse occurred often, in the family home; on a family trip to a caravan; at the appellant's workplace; in his vehicle; and continued until she was

about 15. She told her mother in 2001 and the police became involved, but she was scared of the appellant and gave only a limited account of the most recent episodes. She went back to the police in 2018 and provided a fuller statement. In 2001 when she spoke to her mother it was because she feared she might be pregnant – a belly piercing she had kept popping out and school friends told her this happened during pregnancy.

[6] SM was cross examined closely and at length as to both the detail and consistency of her evidence, with respect in particular to her statements of 2001 and 2018. In fact, cross-examination by statement, at extensive, not to say inordinate length, occurred with both complainers, with, in many instances, little obvious purpose. SM was specifically asked about her awareness of allegations of sexual misconduct involving LC in 1999, and whether the two had discussed anything about their respective allegations. She acknowledged that she was loosely aware of allegations having been made by LC, but she knew nothing of the detail of the allegations and denied discussing anything to do with the case with LC, either at the time or since. They were not, and had not been, particularly friendly.

Evidence at trial - LC

[7] LC was aged between 13 and 14 years old at the period of the charge upon which the appellant was convicted, and 35 when she gave evidence. LC is the daughter of SM's mother's cousin. She came to see the appellant as a father figure. She spoke to the abuse libelled, saying that she did not resist or tell him to stop, but explained in evidence that she was a naïve tomboy at the time and did not really know what was happening. She spoke to the appellant making her feel special and giving her attention. She now considers that she had been groomed by the appellant. LC was interviewed by the police in 1999, after her mother had noticed a change in her behaviour.

[8] She too was cross-examined closely and at considerable length, again with significant focus on the statements of 1999 and 2018. When asked whether she had discussed her evidence with SM, LC denied doing so. She had not spoken to SM in a long time. She gave evidence that the police contacted her in 2018 and she reacted angrily to the fact that SM had prompted this to happen by contacting the police again at that time.

Other evidence at trial

[9] It was agreed by joint minute that forensic examination of SM in 2001 and LC in 1999 had shown respectively a healed tear of the hymen and a deeply notched hymen. One explanation for these findings was penile penetration of the vagina, but there were other explanations. Four samples of carpet from the locus showed semen staining, the source of which could not be identified, nor could it be dated.

[10] The appellant's evidence was that no sexual conduct had taken place between him and LC. He also denied the allegations of SM in their entirety.

[11] Dr Michael O'Keefe, forensic physician, commenting on SM's evidence that on each of the many occasions penile penetration had taken place it been painful, gave evidence that he was "somewhat surprised" that pain would still be experienced after such a prolonged and regular period. In cross-examination, he said that the female genital area was a sensitive part of the body, and there was the potential for pain to be experienced in circumstances where the complainer tensed her body.

Affidavits on appeal

[12] An affidavit provided by the appellant's wife, MC, stated that on 18 March 2021, she was made aware by a friend that MB had "shared" a post on Facebook regarding the appellant's conviction. MB claimed that the allegations were false, and that SM had told her

that the allegations were false and had been made for financial gain. The appellant and MC in their affidavits state that they do not know MB.

[13] MB provided an affidavit for the purpose of this appeal. She had previously been in a relationship with SM. The nub of her evidence was that during the relationship SM had told her numerous times that she was going falsely to accuse the appellant of raping her. MB's "understanding" was that statements made by SM and LC to the police in 1998 and 2001 respectively had been false. MB stated that she had been in a relationship with SM for seven years, from February 2008 until November 2015. She never met the appellant. She first met SM in 2007 when MB was living in Good Shepherd House, a children's home in Glenboig. In 2008 the two were reunited in Arbroath and began a relationship, living in SM's home. LC visited and the three regularly drank alcohol together. MB deponed that on an occasion in July 2014, SM and LC discussed the false allegations they were planning to make to the police in order to ensure their accounts were consistent. They planned to say that the appellant had individually raped them on separate occasions, and multiple times, at different places.

[14] MB stated that SM told her she wanted to take revenge against the appellant for separating from her mother. SM also had a financial motivation, in that she intended to obtain compensation from the Criminal Injuries Compensation Authority. She told MB this on numerous occasions. However, SM also told her in late 2014 that she was only going to make the allegations under pressure from her mother and LC who said they would never speak to her again unless she spoke to the police. MB said she understood from LC that she was motivated by a hatred fuelled by the appellant's romantic rejection of her.

[15] MB had become aware of the appellant's conviction in March 2021 via a page on Facebook named "STS Scotland". The appellant's photo was posted along with details of

the trial and conviction. This was the first time she became aware of the case. After seeing the post, she decided to contact the appellant's family to tell them that she believed that he had been falsely accused. This was the only contact she had with the appellant's family - she had never spoken to them or contacted them prior to March 2021.

Subsequent Police statement of MB

[16] Shortly prior to the hearing on 16 March 2022, a police statement provided by MB and dated 12 March 2022 was produced. It bears her signature. It differs from her affidavit in the following main respects.

(i) The statement in the affidavit that she had known SM since 2007 was 'a mistake': they first met in February 2015.

(ii) They did not meet when MB was staying at Good Shepherd House in Glenboig. They met in Arbroath. The Good Shepherd house where MB had resided was in Bishopton.

(iii) They were not in a relationship for seven years from 2008 to 2015: the correct period was February to November 2015. She thought that the solicitor to whom she provided her affidavit had not been listening to her properly.

(iv) The overheard discussions between the complainers took place in 2015, not 2014 as stated in her affidavit. In the statement she seems to say that the overheard discussion between the complainers was on one occasion between April and November 2015, although it goes on to say that they discussed it a lot when they were drinking, which she previously said took place regularly "either every first, second or third weekend". There were, it is said, other occasions in July 2015 when SM made further statements of false intent to her. At another point in the statement she said "SM told me straight away when I first met her that she was going to accuse [the appellant] of raping her".

(v) Only LC and SM were drinking alcohol when they met up; MB did not drink.

(vi) SM wanted to get her involved and to make a statement about it. SM wanted her to say that she knew the appellant and to say that he had "done stuff" to her.

(vii) SM contacted the appellant on Facebook and said to him that she wanted money or she would go to the police saying he had raped her.

(viii) She maintained that SM's mother had been party to discussions about making allegations against the appellant and getting him the jail.

[17] MB was cited to attend the appeal hearing on 16 March 2022. She did not attend. The court was advised that, in addition to being cited, she had been spoken to personally by police a few days previously and informed of the time and place of the hearing. A warrant for her arrest was granted, and the case continued to 30 March. That hearing was discharged since the warrant remained extant. A written update was ordered for 14 April, with a single judge procedural hearing for 21 April, later re-arranged for 28 April, with further written updates requested. Three written updates indicated in detail the attempts made to enforce the warrant, which had, by the time of a further appeal hearing on 12 May been marked for UK-wide execution. Despite all this the witness had not been traced, and it was apparent that it was unlikely that the witness could be traced within the near future. The court recognised the importance to the appellant of the issues in this appeal by allowing the case to be continued thus far; however having regard to the length of time over which the witness had evaded discovery, and the interests of the complainers who had been in a position of uncertainty over the appellant's conviction during the progress of the appeal, a further motion for continuation was refused. The appeal therefore proceeded. For these purposes the solicitor advocate for the appellant relied on MB's affidavit. The parties had also entered into a Joint Minute in which it was agreed that the appellant has not spoken to,

met or had any previous contact with MB; and that MB contacted the appellant's wife by Facebook messaging her after the appellant had been convicted of the charges upon the indictment. Agreement was also reached as to the content of certain productions relating to text or Facebook messages. A prior Joint Minute agreed that MB had been resident at the Good Shepherd Centre, Bishopton, between October 2007 and November 2008, and that the Good Shepherd organisation had never owned or operated a facility at Glenboig.

Legislation

Criminal Procedure (Scotland) Act 1995

[18] Sections 106:

> "(3) By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on—
>
> (a) subject to subsections (3A) to (3D) below, the existence and significance of evidence which was not heard at the original proceedings; and
>
> (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.
>
> (3A) Evidence such as is mentioned in subsection (3)(a) above may found an appeal only where there is a reasonable explanation of why it was not so heard (3B) Where the explanation referred to in subsection (3A) above or, as the case may be, (3C) below is that the evidence was not admissible at the time of the original proceedings, but is admissible at the time of the appeal, the court may admit that evidence if it appears to the court that it would be in the interests of justice to do so".

[19] Section 263

> "(4) In a trial, a witness may be examined as to whether he has on any specified occasion made a statement on any matter pertinent to the issue at the trial different from the evidence given by him in the trial; and evidence may be led in the trial to prove that the witness made the different statement on the occasion specified."

[20] Section 274

> "(1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer—

> (a) is not of good character (whether in relation to sexual matters or otherwise);
>
> …
> (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—
>
> …
>
> (ii) is not a credible or reliable witness."

[21] Section 275

> "(1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—
>
> (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—
>
> (i) the complainer's character; ..
>
> (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and
>
> (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited."

[22] The proper administration of justice includes appropriate protection of a complainer's dignity and privacy; and that only facts and circumstances are led which are commensurate to the importance of an issue before the jury.

Submissions on behalf of the appellant

[23] The evidence of MB amounts to significant evidence which was not heard at trial and which supports the appellant's position that SM and LC have fabricated the allegations. The evidence would be admissible at common law, as prior inconsistent oral statements,

different to the evidence given at trial. The evidence was thus admissible in terms of section 263(4) of the 1995 Act and at common law, as capable of undermining the credibility of the complainers.

[24] Aspects of the evidence would be prohibited in terms of section 274(1)(a) and (c). Had the evidence been available at trial, a section 275 application would have been made seeking to lead evidence that:

1. the complainers colluded to make false claims of rape and sexual assault to the police and in court against the appellant;
2. the complainers carried out research on rape;
3. SM suggested to MB that she should make a false accusation.

[25] The questioning would relate to the character of the complainers and the discussions taking place in Arbroath in July 2015. The discussions would be relevant to establishing the guilt of the appellant and the probative value would be significant, demonstrating collusion between the complainers. The evidence strikes at the heart of the Crown case. The evidence is admissible in the appeal hearing as it would be in the trial.

[26] In terms of section 106(3), the evidence was significant in suggesting that the complainers intended to make false claims about the appellant. The credibility of the complainers was the critical issue. The jury had accepted their evidence without hearing MB's account, which was not available to the appellant at the time of the trial. He did not know of MB or the conversations she had overheard. Those circumstances amounted to a reasonable explanation in terms of section 106(3). In the circumstances and in the absence of the evidence being heard at trial, there had been a miscarriage of justice.

Submissions on behalf of the Crown

[27] The Crown accepted that MB's evidence in relation to issues of collusion and fabrication between SM and LC would be admissible and that MB's affidavit would fall within the definition of evidence in terms of section 106(3)(a) of the 1995 Act. It was also accepted that the appellant had what amounted to a reasonable explanation as to why MB's evidence was not led at trial. However, the evidence was not of such materiality as to lead to a miscarriage of justice. For the appeal to succeed the court must accept that the new evidence would be capable of being regarded as credible and reliable by a reasonable jury. The evidence of MB could not be regarded as such because of the following inconsistencies:

- Crown production no 4 was an email from the Good Shepherd Centre confirming that it had no knowledge of any affiliated or owned organisation operating in the Glenboig area.
- Crown production no 5 was a transcript of a police interview dated 9 December 2015 which records that MB had been detained relative to a domestic incident, namely, that she had sent threatening communications to SM, her ex-partner. In the interview, she stated that she and SM had been in a relationship for around 9 months, the relationship having commenced on or around 10 February 2015. This was in contradiction of her position as stated in the affidavit that the two had been in a relationship for seven years from 2008 until 2015.
- Medical records of LC from around July 2014 (Crown productions nos 2 and 3), when she had given birth to her son, show that she would have been unable to consume alcohol around that time. It was said that this evidence undermines MB's position that LC had been consuming alcohol when she and SM had been discussing the allegations in July 2014.

- MB stated that the motivation of the complainers was financial gain via a Criminal Injuries Compensation Authority award. SM had confirmed that she had made no such application.

[28] In the event that MB's evidence was found to be credible and reliable, it would not have had a material bearing on the decision of the jury. Both SM and LC were asked at trial if they had discussed their evidence and if their evidence was untrue and denied this. Thus the evidence of MB did not raise a new issue which had not been before the jury at trial. They had already considered the point and so it could not be said to have a material bearing. Finally, the evidence was to be assessed in the entirety of that presented at trial, which included evidence of genital injuries consistent with vaginal penetration and the semen stained carpet samples.

Decision and Analysis

Fresh evidence appeals generally

[29] The test for appeals under section 106(3) is that which was stated authoritatively at paragraph 219 of *Al Megrahi* v *HM Advocate* 2002 JC 99. The following elements are of most relevance here:

> "(1) The court may allow an appeal against conviction on any ground only if it is satisfied that there has been a miscarriage of justice.
>
> (2) In an appeal based on the existence and significance of additional evidence not heard at the trial, the court will quash the conviction if is satisfied that the original jury, if it had heard the new evidence, would have been bound to acquit.
>
> (3) Where the court cannot be satisfied that the jury would have been bound to acquit, it may nevertheless be satisfied that a miscarriage of justice has occurred.
>
> (4) Since setting aside the verdict of a jury is no light matter, before the court can hold that there has been a miscarriage of justice it will require to be satisfied that the additional evidence is not merely relevant but also of such significance that it will be

reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.

(5) The decision on the issue of the significance of the additional evidence is for the appeal court, which will require to be satisfied that it is important and of such a kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in its consideration of a critical issue at the trial.

(6) The appeal court will therefore require to be persuaded that the additional evidence is (a) capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial."

[30] Further guidance was set down in *Fraser (NG)* v *HM Advocate* 2008 SCCR 407:

"[131] Sections 106(3) and 106(3A) of the 1995 Act regulate fresh evidence appeals in the context of the single ground of appeal that the 1995 Act allows, namely miscarriage of justice. Before new evidence can be considered by the court, the appellant must furnish a reasonable explanation why it was not heard at the trial. Unless there is a reasonable explanation, the appeal cannot succeed, no matter how significant the proposed new evidence may be.

[132] If the appellant provides such an explanation, the onus being on him, the court must consider whether the new evidence would have been capable of being regarded by a reasonable jury as credible and reliable. If the court is so satisfied, it must next consider the cogency of the new evidence. The new evidence must be important evidence of such a kind and quality that it was likely to have been found by a reasonable jury, under proper directions, to have been of material assistance in their consideration of a critical issue that emerged at the trial…

[133] Since there is a danger that fresh evidence may assume greater strength than it would have had if it had been led at the trial, it is essential that this court should assess it in the context of the whole evidence led at the trial."

Accordingly, it is in accordance with these principles that we must approach the present appeal.

Reasonable explanation

[31] The Crown accepted that on the material before the court there seemed to be a reasonable explanation why the evidence was not heard at the trial. We are satisfied that such a concession was properly made, having regard to *Fraser (CJ)* v *HM Advocate* 2000 SCCR 755 and *NI* v *HM Advocate* 2018 WL 05795688, and that the test is met.

Admissibility

[32] The issue of admissibility of the evidence was one which the parties did not originally seek to address in any detail in their written submissions. At the request of the court the solicitor advocate for the appellant submitted a further note setting out the basis of his arguments. The propositions were (i) that evidence of this kind was admissible at common law for the purpose of challenging the credibility of a complainer; (ii) that it was however caught by section 274(1)(a) and (c); (iii) that a section 275 application would have been made at trial; and (iv) an assertion that the evidence would have been admissible under that section. We have little difficulty with propositions (i) and (ii), and we assume that an application would have been made, per proposition (iii). However, as to (iv) it does not seem to us that parties gave sufficient attention to whether the requirements of section 275 were in fact met.

[33] It should be noted that section 274 prohibits any questioning seeking to elicit evidence of the kind struck at and such questions may only be put – whatever the source upon which they are based- if the terms of section 275 are met. For some of the evidence given by MB, even when relating only to the issues of collusion and fabrication, this presents real difficulty, standing the extreme vagueness of her evidence as to the occasions when she is said to have witnessed relevant conversations and the paucity of detail as to what was said. These issues were not addressed. We should note also, that section 263(4) does not assist the appellant, since that section itself requires a degree of specificity (see *Paterson* v *HMA* 1997 SCCR 707).

[34] However it is not necessary for us to examine the matter in great detail for present purposes since it is clear that the evidence in relation to what was referred to in MB's affidavit as having taken place in 2014 at the house of SM (albeit it seems MB now maintains

that this occurred in July 2015) constitutes a sufficiently specific occurrence, reflects an issue of character capable of undemanding credibility, is relevant to the question whether the appellant is guilty of the offences charged, and, if accepted, would have a probative value likely to outweigh any risk to the administration of justice from its admission. We proceed therefore that at least in relation to that incident a section 275 application could successfully be made.

Materiality

[35] If the view were taken that the evidence of MB was credible and reliable, or at least capable of being so regarded, then the court would require to consider whether it would have been likely to have had a material bearing on, or a material part to play in, the determination by the jury of a critical issue at the trial. As noted in *Megrahi* at para [249], in 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 (see also *WB* v *HM Advocate* 2014 (SCCR) 376 per Lord Justice Clerk (Carloway) at para. [21]). In our view, the evidence of MB is relevant as, if it were to be accepted by a jury, it could have the effect of exculpating the appellant or, at the very least, throwing doubt upon the credibility and reliability of the evidence of the two complainers, which was key to the conviction. This would meet the "material bearing" test as laid down in *Megrahi*. That leads us to the most significant issue in the appeal, whether the evidence would be capable of being considered credible and reliable by a reasonable jury.

Credibility and reliability

[36] The question whether the additional evidence is capable of being regarded as

credible and reliable by a reasonable jury is a key issue because of what was said in *Church* v *HM Advocate (No 2)*, 1996 SLT 383 at 384F :

> "Evidence of witnesses who are found not to be credible or are not reliable cannot be regarded as significant evidence."

[37] In *Church*, the court suggested that the role of the appeal court in assessing credibility and reliability was different from that of the trial court. Specifically, it noted:

> "It is the function of the trial court … to decide issues of fact. For this purpose it will be necessary for that court to decide whether a witness is credible and whether the evidence which has been given by a credible witness is reliable".

[38] This is to be compared to the role of the appellate court:

> "It may reject evidence which in its opinion no reasonable jury would regard as credible or reliable. Evidence which is of that character cannot be held to be significant evidence, the absence of which from the trial was a miscarriage of justice. But if it finds that the evidence was capable of being found by a reasonable jury, properly directed, to be both credible and reliable, that will be sufficient for the purposes of the appeal. Questions of fine detail, which might have led the trial court, after careful analysis, to reject the evidence, must be distinguished from questions of general impression about its quality."

[39] Overall, therefore, it may be said that a slightly less stringent test applies in the appellate context, a court on appeal not being required actually to determine that the witness is credible and reliable- rather, only that the evidence is capable of being found by a reasonable jury, properly directed, to be both credible and reliable.

[40] The approach to be adopted was further elaborated upon in *Kidd* v *HM Advocate* 2000 JC 509, where it was noted at para [23] that the significance of the additional evidence included considerations of relevance, materiality and importance as well as the quality of the evidence in point of credibility and reliability, but none of those factors alone was determinative because what mattered was the overall impression which was created by the additional evidence. The court in *Kidd*, again at para [23], explained the reasoning behind the distinction made in *Church*:

> "The latter is not only different in function from the former but it does not enjoy the advantages which the former has of hearing and seeing the original witnesses. Further, there are inherent limitations in an appeal court determining what the former would have made of the additional evidence when considered in the context of the original evidence."

[41] The court went on, at para [24] to emphasise that the quality of the fresh evidence was crucial:

> "The cogency of the additional evidence is of critical importance. It requires to be of such significance…'that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice'".

[42] Finally, the court must assess the new evidence taking into account those elements which were unfavourable as well as those which were favourable to the appellant (*Fraser (NG)* at para [134]).

Assessment of MB's evidence

[43] There are elements of MB's evidence as to the details of the alleged fabrications which accord with details of the evidence given at trial by SM and LC. For example at paragraph 5 of the affidavit MB states that both SM and LC planned to say that the appellant had individually raped then on separate occasions whilst in a car on a country road; and that the appellant had raped them multiple times both vaginally and anally in his house in the bedroom and in the living room. At paragraph 6, MB states that SM planned to say that the appellant had raped her at a caravan park, whilst dropping her off at football and while watching a movie "Green Mile". She also planned to accuse the appellant of raping her at the showroom that the appellant worked in at the time. Were MB to have given evidence at trial to that effect then the defence would have been entitled to ask how it was that she came by the detail of the allegations had she not been told this by SM and LC. That may bolster MB's credibility. On the other hand, it should be noted that by the time of the relationship between BM and SM, both SM and LC had already made statements to the police. The

extent to which the information referred to by MB accorded with those statements would also be a relevant issue to explore, since this might provide discernible means by which MB could have knowledge of some of the details of the allegations. Presumably also the reports of the trial, some of which at least MB referred to seeing, would have contained some detail of the evidence given.

[44] The question for us is simply whether the evidence contained in MB's affidavit, taken as a whole is capable of being regarded as credible and reliable evidence. Accordingly we now examine that evidence in context. We have been provided with details of precognitions taken from SM and LC by telephone on 20 August 2021. This material is not evidence before us, but it is of assistance in demonstrating where the areas of dispute lie. It enables us to identify the nature of the evidence which might be available from the complainers challenging the contents of the affidavit. We should also note that the contents of the police statement from MB are not the subject of any agreement, and the only actual evidence from MB placed before the court is her affidavit. However, the subsequent police statement is signed and again we consider it is legitimate to look at the contents thereof to assist us in determining what issues of credibility and reliability might arise were MB to give evidence before a jury, and to determine overall whether her evidence might be capable of credit.

[45] The following elements in particular are relevant for that purpose: SM's position is that the relationship with MB began in 2015/16 and lasted 8 or 9 months. This is in complete contrast to the contents of MB's affidavit, although it does accord with the contents of the subsequent police statement. LC had never met MB and SM had never consumed alcohol with LC. SM and LC hardly spoke in the years following their initial police statements although they have spoken more since the trial. They had "never really" discussed their

cases. SM had not claimed Criminal Injuries Compensation and maintained that she was not interested in the money, only justice.

[46] LC said she did not recognise the name MB. LC had not been that friendly with SM, although they became closer after the trial. They had never talked about what happened to them. LC still does not know the actual details of what happened to SM and vice versa. The events of July 2014 referred to in the affidavit did not occur, then or in 2015. LC never met MB and never got together with SM to discuss the matter or make up allegations or search the internet. Her son was born on 5 July 2014 (a fact agreed by joint minute). She was in hospital that day and was discharged the next. She did not drink during this period. Specifically, she did not go to Arbroath to drink with SM either before or after the birth. The medical records lodged tend to support that position. She did visit SM after she had her son but she was with the baby's father.

[47] It is plain that there are very considerable differences between the accounts which might be expected of the complainers and that of MB. In addition there are serious discrepancies between MB's sworn affidavit and the contents of her subsequent police statement, as we have already noted. As far as the essential matters are concerned, therefore MB's evidence stands alone and her position now seems to be self contradictory in many respects. The discrepancies raise serious doubts over the credibility and reliability of the affidavit and of MB as a witness. The terms of a sworn affidavit are not lightly to be dismissed as the result of multiple errors by a solicitor, who would be well aware of the importance of the document which he was preparing. We note too that MB was convicted in 2018 of attempting to pervert the course of justice by trying to persuade a prosecution witness not to speak up at court. It is plain that she is deliberately avoiding her citation, which speaks volumes.

[48] MB's position is that SM's motivations were financial, pertaining to an award from the Criminal Injuries Compensation Authority. Were that the case one would have expected her to have made the application long ago, and for evidence thereof to be available. In addition, in respect of the allegation that SM had sent threatening Facebook messages to the appellant, it is worth noting that this suggestion did not feature at the trial; it was not suggested to the witness in cross-examination, despite the robust nature of that exercise; and it was not suggested by the appellant in evidence. In fact it was put to the witness SM in cross-examination that she had no contact with the appellant since 2001; and that although she said she had thought of messaging him about the abuse she had not done so.

[49] There are also numerous illogicalities within the affidavit. For example, if the allegations were false, and the result of collusion, why were the original complaints made so far apart, in 1999 and 2001? Why would the witnesses even have to collude in 2014, given that they had made statements already? If they determined in 2014 to collude to "get" the appellant, why not contact the police again at that time? It seems that the matter was not revisited until 2018, and, moreover, that LC was annoyed with SM for having made renewed contact with the police.

[50] In summary therefore, we are satisfied that there is a reasonable explanation why the proposed new evidence was not led at the trial. It is material and, to the extent we have identified, admissible. The real issue is its credibility. For the reasons set out above we are satisfied that no reasonable jury could attach any weight to it in the context of all the other admissible evidence. It could not reasonably be viewed by a jury as either credible or

reliable. The appeal is refused.