APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 30
HCA/2023/516/XC

Lord Justice General
Lord Boyd of Duncansby
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY the LORD JUSTICE GENERAL

in the

NOTE OF APPEAL AGAINST CONVICTION

by

CLARK THOMSON

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Barr; Paterson Bell (for McCusker McElroy & Gallanagh, Paisley)
Respondent: Gill KC AD; the Crown Agent

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27 June 2024

Introduction

[1] There are two grounds of appeal. The first is whether the trial judge failed to give appropriate directions on the appellant having an honest or reasonable belief in the complainers' consent to sexual intercourse. The second is whether the conduct of the Advocate depute deprived the appellant of a fair trial. There are wider issues to be considered. These involve the scope of questioning of complainers in rape cases and the

periods of time which are taken up examining matters which are peripheral to the principal charges which bring the case to the High Court. The requirement for an application under section 275 of the Criminal Procedure (Scotland) Act 1995 also features.

The Charges

[2] On 12 July 2023 the appellant went on trial at the High Court in Paisley on eleven charges, involving former domestic partners. In due course, the Crown withdrew the libel in charges (1), (6), (8) and (10). It remains important to understand what these charges were, in order to analyse the scope of the testimony which was adduced over a period of seven days. They were, first (1) a breach of the peace on various occasions from 2001 to 2006 involving shouting and swearing at GS, referring to her in derogatory terms, uttering threats of violence to her, destroying her property, punching her dog, forcing her out into a common area of a block of flats in her underwear, preventing her from having access to her infant son, and threatening both to kill her dog and to set fire to her flat. The second (6) was a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (statutory breach of the peace) on various occasions in 2011 involving shouting and swearing at JH, removing her car keys, refusing to allow her to leave his property, threatening to keep her dog and discarding her possessions. The third (8) was a breach of section 39 of the 2010 Act, involving similar conduct towards CG in 2015. The fourth (10) was a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 in 2020 and 2021 involving FY. This libelled similar behaviour and included showing her an illustration of the appellant being hanged by FY, insisting that she keep the bathroom door open when she was in the bath, destroying her possessions and plying her with unwanted gifts. There were

also two episodes mentioned in a docket attached to the indictment and libelling incidents which occurred in Egypt and Turkey. In short, these were a series of charges involving domestic abuse of one type or another against four different women over two decades.

[3] After the Crown case had closed, the appellant pled guilty to one charge (9) of simple assault by pushing CG onto a bed in 2015. Otherwise, he went to trial. On 21 July 2023 he was unanimously found guilty of the remaining charges as follows:

> "(2) on various occasions between … 2001 and … 2006 … at … Paisley you did assault [GS] …, and did, on some occasions whilst she was pregnant, push her onto a bed, seize her by the body and hold her out of a window, seize her by the throat and compress same thereby restricting her breathing, threaten to pour boiling water over her, throw drinks over her head and body and spit on her face, all to her injury and to the danger of her life;
> (3) on an occasion … 2002 at… Paisley you … did assault [GS] and did whilst she was holding a baby, repeatedly headbutt her causing her to fall to the ground, to her severe injury, permanent disfigurement and permanent impairment;
> (4) on an occasion between … 2001 and … 2006, … at…Paisley you … did indecently assault [GS] and did suck her breast and examine her vagina;
> (5) on various occasions between … 2001 and … 2006, at Paisley … you did assault [GS] and did penetrate her vagina with your penis and you did rape her;
> (7) on various occasions [in] 2011 …at … Paisley… you … did assault [JH] Paisley and did penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009; and
> (11) on various occasions between … 2020 and … 2021, at …Johnstone you … did assault [FY] and did penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

Only charges (5), (7) and (11) required proceedings in the High Court. On 3 October 2023 the trial judge sentenced the appellant to 7 years *in cumulo* on these charges with a further 2 years concurrent on charges (2) and (3), and an admonition on charge (9).

The Evidence

[4] One notable feature of the trial, in respect of the sexual offences, was the absence of

any application from either the Crown or the appellant under section 275 of the 1995 Act. Given the prohibition in section 274, the assumption must have been that the appellant did not intend to lead any evidence or to pose any questions which showed or tended to show that the complainers: were not of good character; had engaged in sexual behaviour which did not form part of the libel; or engaged in non-sexual behaviour, outwith the libel, as might found an inference of consent to sexual behaviour or a lack of credibility or reliability.

[5] Another feature was the existence of two (later three) special defences of consent, each of which initially referred to the appellant having a reasonable belief that the complainer was consenting. At a Preliminary Hearing on 4 October 2022, the appellant, under some prompting from the PH judge, intimated that the references to reasonable belief could be taken out. This was then done. The assumption then was that reasonable belief would not be an issue at trial.

The evidence of GS

[6] The examination of the first complainer, GS, began with a series of questions about how the relationship between GS and the appellant commenced and developed. It may well be that the Advocate depute had difficulty controlling the complainer, since her answers often strayed into unnecessary *minutiae*. Much of what was adduced was at best peripheral to the libel and at worst strayed far from it, perhaps because, at the time (pre DASA 2018), what the complainer described was reprehensible rather than criminal.

[7] Once the specific facts libelled in charge (3), notably head-butting the complainer, had been dealt with, the first mention of a sexual offence, charge (4) occurs well into the first day of GS's testimony, just before the court adjourned overnight. The next day, a video, which had been secretly recorded by the appellant some time in 2004, was played. In this,

the appellant accused the complainer, using foul language, of wanting to have intercourse with, amongst others, a housing officer. The complainer described the appellant as very controlling and referred to episodes of violence, not all of which were libelled. These included spitting on her face and pouring tea over her head.

[8] Evidence of the sexual offences resumed on the second day. The Advocate depute asked if the appellant had had intercourse with the complainer when she "didn't want that to happen". She said that this had occurred "Multiple times". She described being kicked out of bed by the appellant. It was very cold. She was crying as he would not let her back into the bed. She was lying on the floor. This episode was not followed through. The complainer was then asked about other occasions when the appellant wanted to have intercourse with her. She said that she never wanted him touching her. She:

> "played along (inaudible) because I obviously didn't want to upset his feelings, because … I'd probably get kicked out of bed. So, (inaudible) I did say no, but it still would happen. I would (inaudible) shorts on to me and pulled them aside and he'd just …do the deed… and that would be it."

[9] The infant son of the complainer and the appellant was present during these episodes. The complainer continued:

> "I would say I was tired… I was too feart to say … like properly say no, and although I said no and said I'm tired, it would still go ahead, and I would allow it to go ahead because I didn't want to be kicked out the bed or (inaudible) I would have my son in arms, so I didn't want any… fights… to arise, so I allowed it to happen."

This was expanded upon as follows:

> "He wouldn't listen. He would just go ahead".

On being asked why she had allowed this to happen, she said:

> "I was scared. … if I didn't go along with him, I knew I'd either be kicked out the bed, or there would be some sort of argument, and … my son was still there in the bed with me, or in the cot at the bottom of the bed, and I didn't want my kid to hear … me getting upset or him being angry because he raised his voice."

The complainer said that she would "go stiff" and:

> "just allow him to let it happen… There was no intimacy. There was no kissing... He'd do what he had to do, then turn round and go to sleep".

The complainer would go along with "it" because she was "absolutely petrified of him". All of this happened two or three times per month. The appellant never asked if he could have intercourse with the complainer. She would allow it to happen because she was terrified of waking the infant, or her daughter, who was in the next room. She did not do anything to encourage him to have intercourse. She would say:

> "No, I'm tired; I'm tired tonight. Please, no the night", but it would still continue. If that's what he wanted, it happened…".

The examination in chief diverted into an incident involving the appellant tearing up a dress which the complainer had bought for a wedding, to which he was not invited, and threatening to do some of the things libelled in charge (1), including killing her dog and setting fire to her flat.

[10] Cross examination began with somewhat cryptic references to an incident which the complainer said she was not allowed to talk about, after which bail conditions had been imposed on the appellant. The appellant had pled guilty to something and had been put on probation. This seems to have been an assault involving the complainer being hit with a baby bottle, sustaining a black eye. The cross appears to have been aimed at establishing that, after this incident, the appellant and complainer had "resumed" their relationship,

although the complainer said that she had not wanted this. The appellant kept coming into her house despite her protestations.

[11] It was put to the complainer that it was she who had been the jealous one; asking whether the appellant had had his hair cut by a female or a male hairdresser and then checking to see whether that were so. She was asked whether, given the deterioration of the relationship, she could have terminated her pregnancy or used the morning after pill. It was put to her that she would argue with the appellant "for any reason or none". The reverse of the complainer's account was presented; for example that it had been she who had asked him if he had had intercourse with various women and had accused him of "cheating" on her repeatedly. It was the complainer who had destroyed the appellant's shirts. She was accused of throwing a knife at the appellant. She was asked questions about: breastfeeding her infant son; being unhappy about the amount of housework that the appellant was doing; and the appellant having to obtain a court order to secure contact with their son. The cross proceeded to deal with the appellant's plea of self-defence to the head-butting. It covered an allegation that the complainer had threatened to cut off the appellant's penis

[12] So far as the sexual offences were concerned, the complainer was asked whether she had told the court about incidents during which she "allowed" the appellant to have intercourse with her although she did not want this. This was not followed through. There was no questioning designed to elicit that the appellant might have believed that the complainer was consenting to intercourse, even although she was not doing so.

The evidence of JH

[13] The evidence of JH was taken on commission before a different judge. Questions about the commencement and development of the relationship followed. The appellant's

controlling and paranoid nature was described. Much time was spent exploring where the appellant and complainer lived, their daily activities and their financial arrangements. The Egyptian docket incident, which involved the appellant retaining the complainer's passport, disconnecting a hotel room phone and seizing her around the neck, was covered in some detail.

[14] Evidence about the sexual offences started well into the complainer's testimony. She said that there were times when she did not want to have intercourse and the appellant did; in which case she:

> "would probably just do it because I thought I would just get a few days out of the way, that would be it for a few days and just take the pressure off".

The complainer referred to the appellant wanting to have intercourse with her as a form of apology, "make-up" or re-assurance after arguments. She:

> "would probably just submit and just go along with it… I would maybe like switch off for a wee bit, and just kinda let things happen".

On the other hand, there were times when the complainer would say that she did not want to have intercourse and had said "no, I don't want to" but he would say:

> "let's do it quickly, just quick. No no it's fine I don't want to… oh come on I won't be long and there was a time that he kinda just persevered and I had my underwear on and he did pull my pants to the side and just did go in and I just lay there".

The complainer explained that this was when she had said that she did not want to have intercourse. Although "no" meant that she did not want to have intercourse, that is not what it meant to the appellant. The appellant would have known that the complainer meant "no".

[15] In cross examination the complainer accepted that she had continued in a relationship with the appellant for three weeks after the Egyptian episode. There were

questions about whether the complainer asked to be a joint tenant with the appellant, about the degree of each person's interest in what the other person was doing and in the arrangements made for the appellant's son. The cross continued by examining why the appellant frequently asked the complainer to pick him up in her car. The complainer was asked about how alcohol affected her and whether she had been drunk on the occasion in Egypt. She accepted that she had not reported any of the appellant's behaviour to the police until they visited her three years before the trial.

[16] The sexual offence allegations were dealt with well into the cross. The complainer had said in her statement to the police that "I never didn't consent to sex with him". She accepted that she had gone along with having intercourse to give herself a break for a couple of days. After the first statement, she had unlocked some deep rooted memories. She had said in a second statement that, when they had had intercourse without her consent, she did not think that the appellant thought that he was doing anything wrong. This was a reference to his attitude after intercourse had taken place. He was seeking re-assurance, even although the complainer had said "no". The complainer continued:

> "There was times that I would go along with it just to get, there was times I would say no and I didn't want to".

The evidence of the appellant

[17] The examination of the appellant started with a detailed exploration of how his relationship with GS began and developed, how the complainer came to be pregnant and whether the appellant's attitude to the complainer altered after the birth. The appellant gave evidence about the complainer becoming jealous, especially in relation to the appellant's hairdresser. He was not the jealous one in the relationship. The complainer used to throw things at him and scratch him. She destroyed his clothes. The appellant accepted calling the

complainer "names and stuff". He denied assaulting the complainer other than pushing her to the ground on one occasion. That had resulted in a conviction. There was an in-depth study of the head-butting incident; the appellant admitting that he had "stuck the nut on her", but only once, because she had attacked him with her nails. He had been carrying the infant at the time and he was protecting him too. The appellant accepted, given the video evidence, that he had called the complainer "vile names".

[18] The appellant's evidence on the sexual offences involving GS is contained in about five pages of transcription. He denied that he had intercourse with the complainer even although she had said "no". He maintained that on no occasion did the complainer say "no". Any intercourse was preceded by acts of intimacy. On every occasion on which intercourse occurred, the complainer "consented". She had not just been "allowing it to happen". She was affectionate and participating. He never kicked her out of bed nor was he violent to her. He never gained the impression that the complainer was "just playing along". Every occasion was consensual. She was not rigid.

[19] The examination continued with an exploration of the commencement and development of the relationship with JH. He described this complainer as becoming broody and moving in with the appellant. The appellant described a happy relationship with occasional arguments. A great deal of time was taken up going over how the appellant had contributed positively, including financially, to the relationship. The appellant admitted throwing the complainer's clothes out into the street at one point. The Egyptian incident was covered, with the appellant denying that he had taken the complainer's passport or seized the complainer by the throat.

[20] Evidence about the sexual offences comprised about six pages of transcription. The appellant was asked whether there were times when the complainer did not want to have intercourse but would "go along with sex". He said that he had never had that impression. In answer to a leading question, he agreed that on every occasion when intercourse occurred it had been "entirely consensual". The complainer had not said "no". She had, as it was put in another leading question, "willingly and consensually" gone along with the sexual activity. He was never aware of the complainer "switching off and letting things happen". That, he said, never happened. He had never said "Let's just do it quick".

[21] In cross-examination, the Advocate depute initially tried to establish what was not in dispute. He started with the following question:

> "So, can we agree… that from what we have been told by the four complainers… at times you can be an angry person".

The appellant agreed, but he disagreed, in answer to a similar question, that he could be an aggressive person. He then accepted that he could sometimes be aggressive. He agreed that the evidence pointed to him being a jealous person, "A wee bit". It was then put to him that he was a jealous person, to which he replied "Sometimes", "No always". The trial judge then stopped this line.

[22] The appellant denied that he could, at times, be intimidating. He accepted that he could be paranoid. He accepted that he had used the words "slut", "slag" and "cow". He denied that the evidence from GS and FY supported him being an "angry, aggressive, jealous, paranoid, abusive person". He admitted pleading guilty to an assault on GS, although he could not recall the details. The head-butting incident was explored. The Advocate depute then put to the appellant that:

> "You're an angry, aggressive, jealous, paranoid, abusive man".

He replied that he had made mistakes. The video was played and the appellant admitted that it showed him as aggressive and jealous but not intimidating. He denied various assaults, and punching the dog, but accepted that he could "lose the plot".

[23] The sexual offences are examined over about nine pages of transcription. The appellant at first denied that the complainers had ever said that they were tired or "Not tonight". He then said that this did happen. Sometimes GS had said "no" but:

"…she only said 'No' … I mean she's like never said 'No' when consenting to sex".

The judge intervened to clarify the position, since the appellant had said in chief that GS had not said "No, I'm tired". The appellant explained that he was a bit confused. When GS had said that she was tired, they did not have intercourse. He accepted that he did not like it when GS said "no" but he had not carried on regardless. A not dissimilar pattern of cross related to JH, with the appellant accepting that at times she had said that she did not want to have intercourse, in which case intercourse did not occur. The Advocate depute pressed the appellant upon this but he did not waver.

Speeches and Charge

[24] In his address to the jury, the Advocate depute referred to the definition of rape in section 1 of the 2009 Act and included the requirement of a lack of belief on the part of the accused that the complainer was consenting. He continued by stating that the question of either honest (common law) or reasonable (statutory) belief did not arise as there was no evidence to put that in issue. The appellant's position had been that the complainers were all active participants. When it came to the defence speech, counsel referred to the appellant's evidence being that "he reasonably believed that [JH] was consenting" and that

was a defence to the charge. Having suggested that the evidence pointed to both GS and JH consenting, counsel continued that:

> "at the very least, and this is equally important, if not more important, at the very least [the accused] had a genuine and reasonable belief in consenting and that the crown has not proved any of the rape charges".

[25] The judge intervened. He pointed out that reasonable belief had been removed from the special defences and it was thus not thought that it would be an issue at trial. Counsel submitted that it did not matter what was contained in the special defences. The issue had arisen on the evidence of the complainers and the appellant. Even if the appellant had not said that he had a reasonable belief, one reading of the complainers' testimony was that he may have had such a belief. The Advocate depute maintained that no such issue arose. The judge agreed.

[26] The jury were directed that rape, at common law was committed by the deliberate penetration of the woman without her consent. Under section 1 of the 2009 Act, it consisted of the intentional penetration of the complainer "without the complainer's consent and without any reasonable belief on the part of the accused that the complainer consented. In this case… no issue of reasonable belief arises for consideration".

Submissions

Appellant

[27] The appellant advanced two grounds of appeal. First, in relation to the convictions for rape, the trial judge failed to give correct directions on whether the appellant may have had a reasonable belief that the complainers consented. Secondly, the conduct of the

Advocate depute, in asking questions designed to show that the appellant was of bad character, deprived him of a fair trial.

[28] GS's evidence was that, although she told the appellant that she did not want to have intercourse, she would go along with it. She did not say to the appellant directly that she was not consenting. JH's evidence was that the appellant would have intercourse to "take the pressure off" for a few days. There were times when she wanted intercourse with the appellant and times when she didn't. On the latter occasions, she would switch off and let him do what he wanted. She accepted that in a statement to the police she had stated "I never didn't consent to sex with him." Both GS and JH testified that, when they did not want sex, they told the appellant beforehand. In relation to FY, the conviction depended upon mutual corroboration from GS and JH.

[29] The appellant's position in his special defence and in evidence was that the complainers had consented. It was accepted that he had made no reference in his special defence to honest or reasonable belief. Where a lack of honest or reasonable belief was a live issue, the trial judge ought to give directions on that point. The existence of an honest or reasonable belief was an inference to be drawn from the evidence (*Maqsood* v *HM Advocate* 2019 JC 45, LJG (Carloway) at paras [16] - [17]). There was evidence from the complainers and the appellant from which the jury could have inferred an honest or reasonable belief. The complainers' evidence was such that the appellant might have been reasonably or honestly mistaken about their consent. He would have had no reason to believe that they were not consenting. His own evidence that they did consent was an expression of his belief about their state of mind.

[30] The lack of an honest or reasonable belief was an essential element of rape respectively at common law and in statute (*Briggs* v *HM Advocate* 2019 SCCR 323 at para [19]; Sexual Offences (Scotland) Act 2009, s 1(1)(a) and (b)). It was incumbent upon the Crown to prove the absence of an honest or reasonable belief where it was a live issue in evidence, regardless of whether it was stated in a special defence or spoken to by the accused. Thus, the trial judge ought to have given appropriate directions.

[31] The Advocate depute's cross-examination amounted to character assassination. He went beyond putting questions on the evidence and expressed his own opinion of the appellant's character. No application under section 266(4)(a) of the 1995 Act to admit evidence of bad character had been made. The Advocate depute invited the jury to determine guilt on character as follows:

> "You know the lens you should look through when you assess [the accused]. Or maybe you might think that the angry, possessive, violent, jealous, paranoid [accused] does respect a woman's right to say no."

[32] The Advocate depute's conduct contravened fundamental principles of fairness (*KP* v *HM Advocate* 2018 JC 33 at paras [16]-[31]). He had inappropriately stated his opinion that the appellant was guilty. He had treated the appellant in a disrespectful and bullying manner. Although no objection had been taken, this was because the Advocate depute had initially conducted his cross-examination in an unobjectionable manner, focusing on aspects of the appellant's character which were grounded in the evidence. Only later did he combine these individual aspects into wider observations. By that stage objection would have been pointless. The issue was whether the Advocate depute's conduct rendered the trial unfair, regardless of whether objection had been taken.

[33] The effect of the Advocate depute's conduct was to deprive the appellant of the chance to give his best evidence. The appellant had felt overwhelmed. He had "zoned out" and had been unable to give proper answers. During the overnight break in cross-examination, he had felt suicidal. In offering his own personal opinion on the appellant's character, the Advocate depute had created a risk that the jury would determine the case other than on the evidence (*Boucher* v *The Queen* [1955] SCR 16 at 31). The Advocate depute's conduct was so gross, so persistent, so prejudicial, and so irremediable that the court was obliged to quash the conviction as unsafe (*Randall* v *The Queen* [2002] 1 WLR 2237 at para 28).

Respondent

[34] The respondent invited the court to refuse the appeal. No defence of honest or reasonable belief had been raised on the evidence. Therefore, there was no requirement to direct the jury on it (*Blyth* v *HM Advocate* 2006 JC 64; *Maqsood* v *HM Advocate*). It was not appropriate for the judge to do so if reasonable or honest belief did not arise (*RKS* v *HM Advocate* 2020 JC 235).

[35] The complainers' position was that they had said words to the effect of "not tonight" or "no, I'm tired", but the appellant had gone ahead anyway. The appellant's position directly contracted that of the complainers. His position was he had always desisted when the complainers protested that they were tired. Every time they had intercourse, the complainers had always been active and consenting participants. The appellant did not speak to situations in which the complainers had objected, then submitted to sex leading him to confuse passivity with consent. That was inconsistent with his evidence of active

consent by every complainer on every occasion. The trial judge, in declining to direct the jury on honest or reasonable belief, did nothing more than what the law required him to do.

[36] There was no breach of section 266 of the 1995 Act and no departure from good and proper practice. Even if there had been a breach, it was waived by the appellant's failure to object. If there was a departure, it was insufficiently serious to give rise to a miscarriage of justice.

[37] There was significant evidence that the appellant had acted in an angry, aggressive, jealous, paranoid and abusive way. Some of this emanated from the appellant himself, in the form of the video in which he recorded himself berating GS and calling her a "slag". The Advocate depute's questioning was that the appellant had demonstrated the qualities which the complainers had attributed to him. He had properly put to the appellant a characterisation based on the evidence. None of this required a section 266 application. Where section 266 is breached and no objection is taken, the accused is deemed to have waived compliance (*Cordiner* v *HM Advocate* 1993 SLT 2). Section 118(8) of the 1995 Act then operated to bar the appellant from raising the issue on appeal.

[38] The appellant required to demonstrate a departure from good and proper practice which was "so gross, or so persistent, or so prejudicial, or so irremediable" as to deprive him of a fair trial (*KP* v *HM Advocate*, at para [20] citing *Randall* at para 28). He had not done so. Counsel's explanation for his lack of objection did not bear scrutiny. He could have moved to desert but, in the exercise of his professional judgement, chose not to. The trial judge reported his view was there was no impropriety in the Advocate depute's cross or his speech. The views of the trial judge were to be afforded considerable weight (*Fraser* v *HM Advocate* 2014 JC 115).

Decision

[39] The rules of evidence are designed, in part, to keep the scope of the inquiry in a criminal trial within reasonable bounds. One rule is that, as a generality, the scope is confined to facts which are relevant to proof of the guilt of the accused on the charges libelled (*CJM* v *HM Advocate* 2013 SCCR 215, LJC (Carloway) at para [28]). The primary inquiry is about what the accused did, although the acts of the complainer may be relevant to that. It has also been made abundantly clear that, even if evidence is relevant, in sexual offence cases, it must still overcome the statutory hurdles in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995.

[40] In this trial, it is of some concern that the inquiry consisted of a general exploration of the commencement and development of the relationships between the appellant and the complainers without much regard to either their relevancy to the charges or the statutory provisions. It might be argued that all that was occurring was that both parties were setting the scene prior to examining the charges which brought the case to the High Court; ie the rapes in charges (5), (7) and (11). This might have some substance, but for the sheer volume of material which was adduced from the complainers and the appellant and the comparatively small amount of testimony, certainly no more than about a tenth of the total, which concerned the serious charges. Many difficulties might have been avoided if parties had carefully considered the evidence which they intended to adduce and adopted the practice in the Preliminary Hearings Bench Book (at para 9.11.1). Any section 275 application should have been presented prior to the Preliminary Hearing. Questions of admissibility at common law and in terms of sections 274 and 275 would have been resolved

before the trial. If the court granted a section 275 application, it would have been able to control the inferences which the jury might be invited to draw from any evidence adduced under it (s 275(6) and 8)).

[41] The Advocate depute engaged in a whole scale inquiry into the relationships in general. There was no objection from the appellant, other than on a couple of occasions. The appellant, in cross and when he came to testify, not only attempted to refute the complainers' accounts of violence or other forms of abuse towards them, but also engaged in an attack on the complainers. He accused them of a variety of misbehaviours, including acts of violence, jealousy and vandalism, in the absence of any section 275 application. The result was a relative free for all, boundless examination of the relationships with only occasional, or perhaps coincidental, connection between the evidence being adduced and the libel.

[42] Although it can be difficult to anticipate the line of questioning to be adopted, trial judges should be alert to irrelevant questioning (*Macdonald* v *HM Advocate* 2020 JC 244, LJG (Carloway), delivering the Opinion of the Court, at paras [33], [37] and [47]). Where an indictment features sexual offences, section 274 places a duty on the court whereby it "shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show" the matters specified in subsections 1(a), (b), (c) and (d). The same duty applies when evidence is taken on commission (s 271I(5). If the time of the High Court is not to be taken up exploring events which, if anything, might find their way into a summary complaint, it will remain important for parties to confine themselves to the libel. They must comply with section 274 unless a section 275 application has been allowed. Ultimately, the Crown withdrew the libel on the breach of the peace and domestic abuse charges. It was presumably not contended that these charges had any substantial corroborative value

relative to the rape charges. If the purpose was to demonstrate a similarity in the circumstances in which the rapes occurred, it may have been legitimate to support the existence of such a similarity, thereby indicating that those crimes were committed in pursuit of a single course of criminal conduct systematically pursued. If it was only to explain the abusive nature of the appellant's general behaviour, that might, at least in some situations, be taken as an illegitimate attempt to prove the charges based on an accused's general character and not upon evidence of what he was charged with. That is not what occurred here.

[43] The first ground of appeal is not well founded. There was evidence from both GS and JH that, although there were occasions when they did not object to having intercourse, there were others upon which they had said that they had told the appellant that they did not want to have intercourse, but the appellant carried on regardless. That is rape, both at common law and under section 1 of the 2009 Act. The evidence of the appellant was in sharp contrast to that of the complainers. He said that on each occasion when they had intercourse, the complainers were affectionate and participating or words to that effect. In that state of evidential conflict, the jury had to decide which, if either, version of events to accept as part of the exercise of determining whether they were satisfied beyond reasonable doubt of the appellant's guilt on each charge.

[44] The matter was explained in *Maqsood* v *HM Advocate* 2019 JC 45 as follows (LJG (Carloway), delivering the Opinion of the Court, at para [17]):

> "… although a judge ought to continue to direct a jury that the definition of rape includes an absence of reasonable belief, no further direction on reasonable belief is required unless that is a live issue at trial. That issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting. That does not normally arise, for

> example, where an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding."

A reasonable person would not think that a woman who says "No", "Not tonight" and "I'm tired" was instead consenting to intercourse. On this basis, the trial judge was correct to direct the jury that no issue of honest or reasonable belief arose. Insofar as the appellant denied that instances of rape described by the complainers occurred at all, again no issue of honest or reasonable belief arose (*Briggs* v *HM Advocate* 2019 SCCR 323, Lord Glennie, delivering the Opinion of the Court, at para [19]).

[45] There is a second, procedural, basis upon which this ground would be bound to fail. The issue of honest or reasonable belief was raised at the Preliminary Hearing in the context of the contents of the then special defences of consent. Reasonable belief was removed from the defences. The only special defences which remained were of consent. Belief was out of the equation unless and until the court permitted it to be re-introduced for whatever reason. If the appellant wished to found on it in his speech, he ought to have raised the issue before the Advocate depute's speech and sought permission to amend the special defences by including reference to it. A special defence is designed to give the Crown notice of the nature of the defence. The Crown are entitled to rely on what the special defence says, or does not say, in presenting their case to the jury. In the absence of an averment of belief, the Crown are entitled to approach the case, including their address to the jury, on that basis. They cannot be expected to anticipate that honest or reasonable belief will emerge after they have concluded their address and are *functus officio*. It was not appropriate for defence counsel to introduce the concept, without notice, into the defence speech. It was not appropriate to introduce a defence for which there was no evidential base. If a complainer

says she did not consent and the accused say she did, it is not for defence counsel to invent a middle, speculative ground.

[46] The criticisms of the Advocate depute are misplaced. The context in which he addressed the jury was one in which, as already observed, not only had he adduced a considerable amount of evidence about the appellant's abusive conduct towards his partners over a period of two decades, but also the appellant had put a variety of allegations of jealous and violent conduct by the complainers towards the appellant. In that uncontrolled environment, the Advocate depute was entitled to ask questions about the appellant's general abusive conduct to his partners. That was not an attack on the appellant's general character beyond what had been libelled in the breach of the peace and domestic abuse charges. In putting the allegations to the appellant, the Advocate depute did not overstep the lines of propriety.

[47] Once again, not only is there a substantive reason for rejecting the appellant's contentions on this ground, there is a procedural one too. The appellant did not object to either the questions asked during cross-examination or to the manner in which they were asked. Where, as here, an accused has legal representation, he cannot complain on appeal about evidence given to which he has not taken timeous objection (1995 Act, s 118(8)). In reality, the appellant did not waver in his rejection of the majority of Advocate depute's suggestion, and it is difficult to see what substance the appellant's complaints might have.

[48] The appellant contends that the Advocate depute's conduct breached the prohibition on questions designed to demonstrate that the appellant was of bad character in section 266(4) of the 1995 Act. There are several problems with this. The lack of timeous objection is once again fatal to this argument (*Cordiner* v *HM Advocate* 1993 SLT 2, LJC (Ross)

at 5). Secondly, the appellant had, as already described, impugned the character of the complainers by claiming that it was them who had attacked the appellant physically, damaged his possessions and acted in a jealous and paranoid manner (see 1995 Act, s 266(4)(b)).

[49] It is of considerable note that the trial judge has reported that he did not observe any conduct on the part of the Advocate depute which strayed across the lines of propriety. Having read the cross-examination of the appellant, the court agrees. There is nothing in the Advocate depute's speech which might be taken to be an expression of a personal opinion on credibility, as distinct from a submission on the evidence. The appellant's contention that he had been overwhelmed and "zoned out" during cross is mere assertion. It is not borne out by the trial judge's observations, and there is certainly nothing that could remotely be described as oppressive conduct. The appeal on this ground is also refused.