THE COURT ORDERED that no one shall publish or reveal the name or address of the Complainers in these proceedings or publish or reveal any information which would be likely to lead to the identification of the Complainers or any member of their families in connection with these proceedings.

Michaelmas Term
[2025] UKSC 38

JUDGMENT

Daly (Appellant) *v* His Majesty's Advocate (Respondent) (Scotland); Keir (Appellant) *v* His Majesty's Advocate (Respondent) (Scotland)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Hamblen
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
12 November 2025

Heard on 21, 22 and 23 October 2024

Appellant – Daly
Aidan O'Neill KC
Wendy Culross
Edward Craven KC (of the English Bar)
(Instructed by John Pryde & Co (Edinburgh))

Appellant – Keir
Fred Mackintosh KC
Alison Gurden (of the English Bar)
Sarah Loosemore
(Instructed by Paterson Bell (Edinburgh))

Respondent
Ruth Charteris KC
Richard Goddard KC
Wojciech Jajdelski
Paul Harvey
(Instructed by Appeals Unit, Crown Office (Edinburgh))

1st Intervener – Council of the Law Society of Scotland and The Faculty of Advocates
Roddy Dunlop KC
Claire Mitchell KC
David Welsh
Stuart Munro
(Instructed by Livingstone Brown Solicitors (Glasgow City))

2nd Intervener – Rape Crisis Scotland
Richard Pugh KC
Dominic Scullion
Caragh Nimmo
(Instructed by Glasgow Open Justice (Glasgow))

LORD REED (with whom Lord Hodge, Lord Hamblen, Lady Rose and Lady Simler agree):

1. Introduction

1. These appeals are brought under section 288AA of the Criminal Procedure (Scotland) Act 1995 as amended ("the 1995 Act"), which provides a right of appeal to the Supreme Court against "a determination in criminal proceedings by a court of two or more judges of the High Court [of Justiciary]" for the purpose of determining a compatibility issue. A compatibility issue is "a question, arising in criminal proceedings, as to – (a) whether a public authority has acted (or proposes to act) – (i) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998, or … (b) whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is incompatible with any of the Convention rights": section 288ZA(2) of the 1995 Act. The term "public authority" has the same meaning in this context as in section 6 of the Human Rights Act: see section 288ZA(3)(a). It therefore includes a court such as the High Court of Justiciary, whether sitting as a court of first instance or as an appeal court, as well as any person exercising functions of a public nature, such as the Lord Advocate. Section 6(1) of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, ie with one of the rights and fundamental freedoms set out in the articles of the European Convention on Human Rights ("the Convention") listed in section 1 of that Act.

2. On an appeal under section 288AA, the powers of this court are exercisable only for the purpose of determining the compatibility issue: see section 288AA(2). Accordingly, it is not the function of this court to deal with errors of fact or law allegedly committed by the courts below unless and in so far as they may be relevant to the compatibility issue. When it has determined the compatibility issue, this court must remit the proceedings to the High Court of Justiciary: see section 288AA(3).

3. The compatibility issues in these appeals are primarily concerned with the admissibility of evidence at the appellants' trials for rape and other sexual offences. The evidence in question concerned the credibility or previous sexual behaviour of the complainers. The principal question which this court has to decide is whether, because the evidence was considered to be inadmissible, the criminal proceedings against the appellants infringed their right to a fair trial as guaranteed by article 6(1) of the Convention, read together with article 6(3)(d). As the inadmissibility of the evidence followed from the application of the relevant principles of the law of evidence, as they have recently been developed by the High Court of Justiciary in its capacity as an appeal court ("the appeal court"), the appeals also raise the broader question whether those principles are compatible with the article 6 right to a fair trial of persons who are accused of sexual offences. In view of the general public importance of that question, the court permitted interventions by the Council of the Law Society of Scotland and the Faculty of

Advocates, both of which expressed serious concerns about the current state of the law as developed by the appeal court, and by Rape Crisis Scotland, which sought to ensure that the perspective of complainers of sexual offences in Scotland was available to the court.

4. It may be best to begin by setting out the material facts of each case and the reasoning of the courts below, before considering how the relevant principles of Scots law have developed. After next considering the relevant principles of law under the Convention, it will then be possible to examine the compatibility with the Convention of the approach adopted in Scotland, both in general terms and more specifically in its application to the cases before the court.

2. The facts and the reasoning of the courts below

(1) The Daly case

5. Mr Daly was indicted on charges including two charges of the rape of a girl aged between five and seven (the first complainer), and charges involving the sexual abuse of another girl aged between six and 12 (the second complainer). By the time of the trial, the first complainer was aged 20, and the second complainer was aged 18. Proof of the charges depended on the evidence of each of the complainers being corroborated by that of the other, applying the principle that, where a person is accused of two or more offences, the evidence of witnesses implicating him in each may be regarded as mutually corroborative if the offences are "so inter-related by character, circumstances and time … as to justify an inference that they are instances of criminal conduct systematically pursued by the accused person" (*Ogg v HM Advocate* 1938 JC 152, 157). The prosecution case accordingly depended on the credibility of the evidence of each of the complainers. Mr Daly's defence was that the complainers had fabricated the allegations.

6. The evidence of the complainers at the trial took the form of recordings of interviews conducted by the police, and recordings of evidence taken on commission. The first complainer was not cross-examined. The second complainer was cross-examined, and denied suggestions put to her that her evidence was untrue. Mr Daly did not give evidence. His wife gave evidence that she had not witnessed any violent behaviour by her husband, and that neither complainer had reported sexual abuse to her. Mr Daly's counsel invited the jury to disbelieve the complainers, and particularly the first complainer, in view of her delay in reporting what had happened, and in view of aspects of her account which Mr Daly's counsel suggested were unlikely to be true. As the judge observed in his directions to the jury, the credibility of the complainers was the principal battleground between the prosecution and the defence. He directed the jury that they could only convict Mr Daly of the sexual charges against him if they accepted the evidence of both complainers as being credible. Mr Daly was convicted and sentenced to an extended

sentence of nine years, comprising a custodial part of seven years and an extended part of two years.

7. Mr Daly appealed against his conviction. His grounds of appeal stated that the first complainer had said, in a statement made to the police on 28 April 2020, two years after disclosing the matters which were the subject of the charges, that she had also been raped by him when she was 13 years old. According to her statement, she had become pregnant as a result of the rape and had given birth at her grandmother's house. She was told that the baby had been given away and she did not know where it was. After giving the statement, the first complainer (by this time 17 years old) was examined by a doctor, who concluded that it was highly unlikely that she had given birth to a full term baby, but that there was no way of confirming whether she had been pregnant and had had a miscarriage. Defence counsel's note for the purposes of the appeal records his understanding that the first complainer did not accept that the allegation was false.

8. The grounds of appeal went on to state that, because the Crown did not charge Mr Daly with what was said to be a false rape allegation, he was deprived of a fair trial, in breach of article 6 of the Convention:

> "the immediately verifiable fact that [the first complainer] was incredible and unreliable about the rape disclosed in the statement of 28 April 2020 would be collateral and inadmissible and, in any event, struck at by section 274 [of the 1995 Act]. The effect of this decision of the Crown was to deprive the appellant of a fair trial in that he was prevented from demonstrating to the jury that [the first complainer] was not credible or reliable on such important matters."

As will appear, the contention in that ground of appeal that evidence of a false allegation of rape would be collateral and inadmissible reflected the way in which the law of evidence has recently been developed by the appeal court. The grounds of appeal also stated that the failure of defence counsel to make an application under section 275 of the 1995 Act ("section 275") for permission to cross-examine the first complainer in relation to this matter at the trial, and to lead evidence about it, constituted defective representation.

9. Leave to appeal was refused initially by Lord Mulholland. So far as the appeal concerned the charges brought by the Crown, he observed that, assuming that what was said in the grounds of appeal could be proved, the Crown had a duty not to bring charges which it knew to be false. In relation to the argument that the failure to make an application under section 275 had amounted to defective representation, he considered that any such application would inevitably have been refused on the ground that the

evidence in question was collateral. He referred in that connection to the decision in *CJM v HM Advocate* [2013] HCJAC 22; 2013 SCCR 215, where evidence of a similar nature had been held to be inadmissible for that reason. The complaint of a breach of article 6 was rejected in the light of the decision of the Judicial Committee of the Privy Council in *DS v HM Advocate* [2007] UKPC D1; 2007 SC (PC) 1, and that of the European Court of Human Rights ("the European court") in *Judge v United Kingdom* (2011) 52 EHRR SE17.

10. That decision was confirmed by the appeal court (Lord Pentland, Lady Wise and Lord Summers). In relation to the ground of appeal concerning the absence of a charge of rape based on the allegation made in April 2020, they observed that it would have been unconscionable for the Crown to bring a charge it considered to be false. In relation to the ground of appeal based on defective representation, they said that the evidence relating to the allegation in question was indubitably collateral, and a section 275 application seeking authority to introduce such evidence would have been bound to fail. In relation to the complaint that the trial had been unfair, they observed that Mr Daly had the opportunity to challenge the credibility and reliability of both complainers, and that there could be no unfairness in excluding collateral evidence from the jury.

11. Mr Daly then sought permission to appeal to this court on a number of grounds, including that the Crown had acted in breach of article 6 of the Convention by failing to include a charge or docket in the indictment relating to the allegation that Mr Daly had raped the first complainer when she was aged 13, and that the court had failed to secure a fair trial as required by article 6. (It should be explained that, in prosecutions for sexual offences, the Crown can give notice of its intention to lead evidence of an act or omission which is not the subject of a charge, but which is connected with a sexual offence charged, by including a docket in the indictment or complaint: 1995 Act, section 288BA.)

12. Permission to appeal was refused. The appeal court (Lord Pentland, Lady Wise and Lord Summers) stated:

> "The applicant had the opportunity at the trial to seek dismissal of the indictment on the ground that the prosecution was oppressive or in breach of his article 6 rights. He did not advance any such line of argument. Nor did he make an application under section 275 to lead evidence of the false rape allegation. The applicant having failed to avail himself of any of the procedural mechanisms and remedies that were available to him for the purpose of arguing that his trial was unfair, he cannot now be heard to complain of unfairness in the trial process. Similarly, having made no application to have the evidence of the false allegation admitted, it is not open to the applicant to submit now that his trial was unfair due to the non-admission of such evidence … In any event, the evidence of the

> false allegation was obviously collateral to the rape charges on the indictment and accordingly inadmissible under the common law. The allegation related to matters which were said to have occurred several years after the rapes which featured on the indictment. There was no meaningful or relevant connection between the false allegation and the rapes. *The evidence was no more than an attack on the character of [the first complainer] and therefore inadmissible under the common law.* The applicant was able to challenge the credibility and reliability of both complainers at the trial by cross-examination and by leading admissible defence evidence. The trial process provided sufficient safeguards for the applicant's rights." (Emphasis added)

As will appear, the italicised sentence reflects a general rule now applied by the appeal court.

13. In his appeal to this court, Mr Daly raises the question whether any of the following acts were incompatible with his right under article 6 to a fair trial: (1) the Crown not including the allegation that the first complainer had been raped when aged 13 in the indictment or in a docket, and (2) the appeal court's refusal of leave to appeal against conviction.

(2) The Keir case

14. Mr Keir was initially indicted on charges including three charges of sexual offences against the complainer. Charge 1 alleged that he raped her vaginally and orally at the Eagle Coaching Inn in Broughty Ferry, Dundee some time during the evening or early hours of 10 or 11 November 2019, while she was intoxicated and incapable of giving or withholding consent. Charge 2 alleged that he sexually assaulted her during a taxi journey between Broughty Ferry and Monifieth (about ten minutes' drive away) on 11 November 2019 by kissing her while she was intoxicated and incapable of giving or withholding consent. Charge 3 alleged that he sexually assaulted her on 11 November 2019 at his home address in Monifieth while she was intoxicated, asleep and incapable of giving or withholding consent, and, when she awoke, raped her.

15. While the proceedings were in their preliminary stages, the defence gave notice of a defence that the complainer consented to what occurred, or that Mr Keir had a reasonable belief in her consent. The defence also lodged an application under section 275 seeking leave to lead evidence to the following effect:

(1) In respect of charge 1, that in the Eagle Coaching Inn, and immediately before the parties entered the disabled toilet where intercourse took place, they flirted with each other, the complainer raised and discussed the subject of oral sex and suggested that they go into the disabled toilet for sex. She went to the disabled toilet and beckoned to Mr Keir to join her, and she then undid his trousers and removed her own clothing.

(2) In respect of charge 2, after leaving the Eagle Coaching Inn and before entering the taxi which took them to Mr Keir's house, the parties continued to flirt and held hands.

(3) In respect of charge 3, the complainer removed her own clothes.

16. The complainer was questioned by the Crown about these matters. Her position was that she had been so drunk that she had no recollection of being in the Eagle Coaching Inn or of having sex there, or of being in the taxi or arriving at Mr Keir's house. She accepted that CCTV footage taken at the Eagle Coaching Inn showed her gesturing to Mr Keir to follow her, and that they went to the toilets together. She conceded that it would have been reasonable for him to think that she was consenting to sex in the toilets. The footage showed that she was drunk. She also accepted that CCTV footage taken later the same evening at another bar in Broughty Ferry, the Fort Bar, showed her kissing Mr Keir's hand and sucking his finger or thumb. She had no recollection of these events. She said that she would rather not be asked about some of these matters but did not object.

17. The Crown then applied to the court to desert the trial diet in relation to charges 1 and 2 pro loco et tempore (ie not to proceed to trial on those charges for the time being, but keeping open the possibility of doing so at a later date). The Crown's position was that its application should be granted unless it could be shown that it was acting oppressively. The application was opposed by the defence, on the basis that they wished evidence about the events with which charges 1 and 2 were concerned to be before the jury, as it was relevant to their assessment of charge 3. The application was granted by Lady Stacey. She observed that if the defence wished to explore the circumstances of charges 1 and 2 it was open to them to satisfy the court that an application for leave to introduce evidence about those matters should be granted under section 275. The question whether the Crown was acting oppressively could best be decided in the light of an amended section 275 application.

18. The case accordingly proceeded to trial on an indictment containing only one charge of a sexual nature, alleging that Mr Keir sexually assaulted the complainer on 11 November 2019 at his home address in Monifieth while she was intoxicated, asleep and incapable of giving or withholding consent, and, when she awoke, raped her.

19. As before, the defence gave notice of a defence that the complainer consented to what occurred, or that Mr Keir had a reasonable belief in her consent. The defence also lodged an amended application under section 275 seeking leave to lead evidence from the complainer in cross-examination, and from Mr Keir in the event that he gave evidence, to the following effect:

> (1) That there were "bilateral expressions of sexual interest and intimate contact" between the complainer and Mr Keir inside the Eagle Coaching Inn in Broughty Ferry up to about 12.43am on 11 November. As well as flirting, this included spending 30 minutes together in the toilets: an episode which was initiated by the complainer.
>
> (2) That from the Eagle Coaching Inn the complainer and Mr Keir proceeded to the Fort Bar, where there were further displays of bilateral sexual interest and intimate contact in the form of the complainer kissing Mr Keir's hand and sucking his finger or thumb.
>
> (3) That in a taxi from the Fort Bar to Mr Keir's house, the complainer and Mr Keir were flirting and kissing.
>
> (4) That on arrival at the house the complainer either removed her own clothes, or the two of them assisted each other in removing their clothes, in anticipation of sexual contact.

20. The application submitted that this evidence was relevant to the credibility of the complainer. It stated that it was "entirely accepted that the thrust of this evidence cannot be to suggest that consent to prior sexual contact implies consent to later sexual contact". As will appear, that concession reflected the way in which the law of evidence has recently been developed by the appeal court. The application also stated that the events at the Eagle Coaching Inn and the Fort Bar could be immediately proved by CCTV footage.

21. In support of the application, counsel submitted that evidence of the events in the earlier part of the evening would be relevant to the complainer's and Mr Keir's credibility and reliability. His defence was one of consent. The complainer's account to the police was that her first recollection of intimacy was when she woke up in Mr Keir's bed to find him having intercourse with her. She did not know how she came to be in his bed or how the intercourse had started. Counsel submitted that the complainer's memory on these points could be shown to be incomplete because of the CCTV footage from the Eagle Coaching Inn earlier that night, which showed her beckoning Mr Keir into the ladies' toilets where they remained for about 30 minutes before emerging together and entering the disabled toilet for a shorter period. There was also CCTV footage from the Fort Bar showing the complainer kissing Mr Keir's hand and sucking his finger or thumb.

22. Lord Pentland granted the part of the application which concerned events at Mr Keir's house (ie the part summarised in para 19(4) above). The remainder of the application was refused. In a subsequent report to the appeal court, Lord Pentland explained that he considered the evidence concerning events prior to arrival at the house to be irrelevant, collateral and inadmissible. There were two fundamentally divergent accounts about what happened at the locus. Was the admitted sexual activity consensual or non-consensual? Nothing in the application was apt to bear on that central issue. The fact (if it be a fact) that the complainer took part in consensual sexual activity with Mr Keir at places other than the locus earlier that night was not capable of yielding any legitimate inference as to her state of intoxication at the time of the alleged rape, her capacity to consent to sexual activity at that time, or the appellant's belief at the material time in her capacity to consent. Evidence about the earlier events was likely to be distracting for the jury and to give rise to a danger of shifting their attention away from the real question in the case and on to irrelevant side issues.

23. The case proceeded to trial. The complainer said in evidence that she probably had far too much to drink, that she had no recollection of being in some of the pubs or of leaving the last pub, and that her next recollection was of slowly waking up while lying on her back in a bed. She felt the sensation of fingers pushing inside her. There was a person lying beside her, who got on top of her, pinning her down, then moved her legs apart and penetrated her. She pushed at his chest and said "no, no, no". He stopped what he was doing. She realised that it was Mr Keir. She got out of bed, grabbed as many of her clothes as she could find and left the house. Once she got to a phone box she dialled 999 and reported that she had been raped.

24. In order to corroborate that account, the prosecution relied on evidence that the complainer was distressed when she made the 999 call. The recording was played to the jury and revealed how distressed she was at that time. A police officer who came to the phone box in response to the call gave evidence that the complainer was very shaken and was crying. It was a matter of agreement that the complainer and Mr Keir had sexual intercourse. It was also agreed that when she arrived at his house her blood alcohol level was around 221 mg of alcohol per 100 ml of blood (the figure being arrived at by back-calculation from a blood sample taken by the police). That blood alcohol level was agreed to be associated with disorientation, confusion, dizziness, difficulty in speaking, staggering, drowsiness and amnesia. It was also agreed that the complainer and Mr Keir had been together in various pubs in Broughty Ferry between about 4.45 pm and 1am, before going to his house. There was evidence that she had drunk a large amount of alcohol during that time. It was also established that various items of clothing belonging to her were found in Mr Keir's house. CCTV footage was played to the jury which had been taken before the complainer and Mr Keir travelled to his house. She appeared to be heavily intoxicated, to the extent that she was unsteady on her feet and was seen to stumble.

25. Mr Keir did not give evidence, but his police interview was before the jury. It was edited to remove references to sexual activity at the Eagle Coaching Inn. In it, he said that the complainer agreed to come back to his house with him. They undressed each other and got into bed. A variety of sexual activities then took place, in which the complainer was an active and consenting participant. This continued for 45 minutes to an hour, until a difficulty arose when he could not remember her name. That resulted in a change of attitude on her part and in her leaving the house. Asked why he thought the sex was consensual, Mr Keir said that the complainer was the one who instigated it, that she was the one who wanted it to carry on, that there was nothing to cause him to think that it was not consensual and that there was no change in her demeanour until the last second. He would not say that she was intoxicated.

26. The judge directed the jury that the question they had to decide was whether the Crown had proved that the complainer did not consent to the sexual activity detailed in the charge. Consent could not be given if she was incapable of consenting because she was asleep or if she was so intoxicated as to be unable to consent. They could only convict if they accepted the complainer's account of what happened and rejected Mr Keir's account. In other words, they would have to reject Mr Keir's account that after the complainer had been drinking but while she still appeared quite capable of making choices, even though those choices might have been influenced by the effects of alcohol, she agreed to have sex with him. They would also have to accept the complainer's evidence that she only became aware of sexual activity when she awoke to feel fingers inside her and then became aware of Mr Keir penetrating her, and that she did not consent to any of this.

27. Mr Keir was convicted and was sentenced to five years' imprisonment. He appealed on the grounds that Lady Stacey erred in allowing the Crown to desert the trial diet in respect of charges 1 and 2 on the original indictment pro loco et tempore, and Lord Pentland erred in refusing the part of the section 275 application relating to events prior to arrival at the house. As a result, he had not received a fair trial as required by article 6 of the Convention. In support of the appeal, counsel for Mr Keir submitted a note explaining why the evidence in question was said to be relevant. In it, he stated that the relevant issue was the complainer's capacity to consent. The fact that she had the capacity to consent during the period about which the Crown led evidence of drinking and intoxication was, it was said, relevant to the question of whether she had capacity to consent at the time of the critical events. Counsel added that the appeal did not reopen the question whether past consent was relevant to future consent, the court having long decided that it was not.

28. Leave to appeal was refused initially by Lord Mulholland. In relation to the complaint about the fact that two charges had been deserted, he observed that the desertion of the charges could not be said to be oppressive, since the evidence to be led in support of those charges was irrelevant to the proof of the remaining charge of which Mr Keir was convicted. In relation to the partial refusal of the section 275 application, he

said that the appeal court had repeatedly made it clear, as a matter of law, that consent to a sexual act could not be given in advance. He continued: "If consent cannot lawfully be issued in advance, the question of consent in relation to the sexual act between the accused and the complainer specified in the charge cannot be illuminated, or determined to any extent, by prior expressions of interest in sexual conduct with the appellant, or by expressions of interest in any particular type of sexual activity". As will appear, that statement reflected the approach adopted by the appeal court in recent cases. As the evidence covered by the part of the application which was refused could not assist in determining the real issue in the case, it was collateral and irrelevant. Lord Mulholland's conflation of the concepts of evidence being collateral and being irrelevant also reflected the appeal court's approach.

29. That decision was confirmed by the appeal court (Lord Doherty, Lord Armstrong and Lord Braid). In relation to the first ground of appeal, they stated that it was not arguable that the decision to allow desertion of charges 1 and 2 was oppressive. If any evidence in relation to the charges in question was relevant and its probative weight outweighed its prejudicial effect, section 275 would have permitted its use. The need to make a section 275 application was not oppressive. In relation to the second ground, the evidence in question was collateral. It was not capable of yielding any legitimate inference as to the complainer's state of intoxication at the time of charge 3, her capacity to consent at that time, whether she consented at that time, or whether the appellant reasonably believed that she consented at that time. Any such evidence would be likely only to distract the jury from the real issues.

30. Permission to appeal to this court was refused, for reasons which were explained by Lord Doherty. He observed that the jury were faced with two conflicting accounts of the circumstances of charge 3. Given the nature of those accounts, there was no scope for the jury to reach the view that even if the complainer did not consent, Mr Keir might nevertheless have reasonably believed that she was consenting. Reasonable belief was not a live issue on the evidence. The critical issue was whether, as the complainer said, she was asleep when the applicant began to have sex with her, or whether, as Mr Keir said, she was awake, consenting and actively participating. Whether she had been capable of freely consenting to sexual interaction at earlier times in public houses, when the volume of alcohol she had consumed and its effects on her might well have been different, and whether she had been capable of freely consenting to kissing in the taxi, were matters which were collateral to that issue. Even if, contrary to the court's view, the evidence was not collateral, its probative value was not significant and likely to outweigh any prejudice to the administration of justice arising from its being admitted or elicited.

31. In his appeal to this court, Mr Keir raises the question whether any of the following acts were incompatible with his right under article 6 to a fair trial: (1) the Crown's application for the desertion of charges 1 and 2 on the original indictment, (2) its opposing the section 275 application, (3) the court's granting the Crown's application to desert those charges, and (4) its refusal of the section 275 application.

3. The Crown's decision as to the charges in the indictment

32. The argument that it was incompatible with article 6 of the Convention for the Crown not to include a particular charge or docket on the indictment, in the case of Mr Daly, or to apply for the desertion of the diet in respect of certain charges on the indictment, in the case of Mr Keir, was addressed relatively briefly by counsel, as their submissions focused primarily on the law of evidence and section 275. The argument can also be dealt with briefly by the court in the circumstances of these cases. It is appropriate to do so in order to avoid further lengthening what is in any event a substantial judgment.

33. It was accepted by the appeal court in the case of Mr Daly that he had the opportunity at the trial to seek dismissal of the indictment on the ground that the prosecution was oppressive or in breach of his article 6 rights (see para 12 above). That was also true in Mr Keir's case, as Lady Stacey pointed out (see para 17 above). The ability of the defence to bring a plea in bar of trial on that basis is well established by authority. For example, in *Montgomery v HM Advocate* 2000 JC 111, 117 (affirmed [2000] UKPC D2; 2001 SC (PC) 1; [2003] 1 AC 641), Lord Justice-General Rodger explained:

> "[U]nder section 57(2) of the [Scotland Act 1998] the Lord Advocate has no power to act in a manner which is incompatible with Convention rights. Therefore, putting the matter generally, he and his representatives have no power to act in a manner which would prevent an accused person from having a fair trial. But it was always the case that a Lord Advocate and his representatives were not entitled to act oppressively, in a manner which would prevent an accused person from having a fair trial; if they did, the court could intervene and sustain a plea of oppression in bar of trial (*McFadyen v Annan* 1992 JC 53). While the authority now given to Convention rights in our law means that, when considering what constitutes a fair trial, the court must take account of Convention law and jurisprudence, the issue will still fall to be dealt with under our existing procedures … In other words, even when relying on an alleged breach of article 6 on the part of the Crown, an accused person may still seek to focus the issue by means of a plea of oppression."

Accordingly, if the conduct of the Crown was incompatible with the right to a fair trial, it was open to the accused to bring a plea in bar of trial on the ground of oppression. Neither appellant did so.

34. They were right not to do so. It is not the purpose of the charges brought against an accused, or of matters mentioned in a docket to the indictment, to enable the defence to lead or elicit evidence. The subject matter of the charges or docket will, of course, affect the scope of the evidence which can be led at the trial, since the evidence has to be relevant. However, subject to the inescapable criterion of relevance, the defence is entitled to decide for itself what evidence it wishes to lead in accordance with the law governing the admissibility of evidence, without being dependent on decisions taken by the Crown as to the contents of the indictment.

35. It follows that if in the present cases the defence wished to lead evidence about matters which were not mentioned in the indictment, they were entitled to do so, provided that the evidence was admissible in accordance with the law of evidence. Given the nature of the evidence, that meant that it was necessary to obtain the permission of the court to lead the evidence, under section 275. The absence of charges or a docket relating to the matters which the defence wished to explore in evidence did not prevent the accused from applying to the court to have evidence relating to those matters admitted. That is what the defence did, in the case of Mr Keir. It is what they would have done, in the case of Mr Daly, if such an application had not been considered to be hopeless, as the court also held when it was argued that the failure to make such an application amounted to defective representation. If the actual or correctly anticipated decision of the court to refuse to allow such evidence to be admitted resulted in a denial of the accused's right to a fair trial, then this court can so decide.

36. As will appear when we come to consider the application of the law of evidence, the approach adopted recently by the appeal court effectively treats the issues at the trial as being exhaustively defined by the charge against the accused. Anything falling outside the scope of the charge is likely to be treated as a collateral issue, with the consequence that evidence relating to it will be held to be inadmissible. If this approach is applied as narrowly as it has been, it runs the risk, as Lord Glennie pointed out in his dissenting opinion in *CH v HM Advocate* [2020] HCJAC 43; 2021 JC 45, para 98, of giving "licence to the Crown to set the agenda for the trial and to narrow the libel so as to exclude the possibility of the accused giving his account of what he says really happened". That is because his account, in so far as it differs from that set out in the charge, will be treated as raising matters falling outside the scope of the charge (as, for example, in *CH v HM Advocate* itself). However, the problem, if there be a problem, is one arising from the way in which the law of evidence is applied by the courts. It is that subject which needs to be examined, and if need be addressed, rather than the Crown's role in framing the charges which it brings against the accused.

37. In those circumstances, the Crown's decisions not to include charges in relation to certain allegations on the indictment, or not to include the allegations in the form of a docket to the indictment, cannot be regarded as having in themselves affected the fairness of either trial. In considering the compatibility of the proceedings with article 6 of the

Convention, the focus is more aptly on the court's application of the law of evidence. That was indeed the primary focus of the submissions on behalf of both appellants.

4. Scots law and practice prior to recent developments

(1) Relevant evidence and collateral issues

38. In general terms, evidence must be relevant in order to be admissible, and the ultimate test of whether it is relevant is whether it has a reasonably direct bearing on the matter under investigation (*W Alexander & Sons Ltd v Dundee Corpn* 1950 SC 123, 131). It is said in the leading Scottish textbook on the law of evidence that "relevant evidence may be regarded as being either direct evidence of a fact in issue, or evidence of a fact … bearing on the probability or improbability of a fact in issue, or evidence of a fact which has a bearing only on the admissibility of other evidence, or on the credibility of a witness": *Walker and Walker, The Law of Evidence in Scotland*, eds Ross, Chalmers and Callander, 5th ed (2020) ("*Walker and Walker*"), para 1.3.1.

39. Evidence which satisfies one or other of those requirements may nevertheless be ruled inadmissible on a variety of grounds reflecting the interests of justice. For example, hearsay evidence may be relevant, but is generally excluded in criminal proceedings because of the risk of its unreliability. Unlawfully obtained evidence may be relevant, but may be excluded in criminal proceedings where its admission would result in unfairness to the accused. Relevant evidence may also be excluded if it concerns a collateral issue: that is to say, if it concerns a fact which has only an indirect bearing on the subject matter of the case, and will open up a disproportionate inquiry into a matter with which the proceedings are not concerned, with the risk that the jury will be distracted from the proper focus of their attention. The principle was explained by Lord President Robertson in the civil case of *A v B* (1895) 22 R 402, 404:

> "… courts of law are not bound to admit the ascertainment of every disputed fact which may contribute, however slightly or indirectly, towards the solution of the issue to be tried. Regard must be had to the limitations which time and human liability to confusion impose upon the conduct of all trials. Experience shews that it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing on the matter in hand."

However, although the pursuer could not lead evidence in support of the allegations raising collateral issues, the Lord President added that "this does not preclude the defender

from being cross-examined about those two matters, for his credibility may be tested on matters going to character, although not relevant to the issues" (ibid; see also *H v P* (1905) 8 F 232; *C v M* 1923 SC 1).

40. The same approach applies in criminal proceedings. For example, in *Moorov v HM Advocate* 1930 JC 68, 87, Lord Sands said:

> "A certain alleged fact may be relevant in so far that, if established, it might help a fair mind to come to a certain conclusion. Nevertheless, it may fall to be excluded if its ascertainment raises a separate issue from that which is being tried. The alleged fact if put in cross and admitted may be relevant, but nevertheless it may be of a kind which cannot otherwise be proved, for, if it is disputed, it would require to be tried as carefully as the issue before the court, and the allowance of such collateral inquiries would make proofs endless."

41. The position as it was understood shortly before recent developments was summarised by Lord Kingarth, giving the opinion of the appeal court, in *Thomson v HM Advocate* [2010] HCJAC 11; 2010 JC 140, para 16:

> "At common law it has long been understood that a trial judge may, *subject always to consideration of the interests of justice in the particular case*, rule evidence to be inadmissible which relates to any collateral matter which could be said to have only an indirect bearing on the issues in question and which could take up court time and risk distracting the jury." (emphasis added)

In the light of recent developments in the law, it is necessary to draw attention to the words in that passage which have been italicised. That dictum was cited with approval by Lord Justice General Hamilton in *CJM v HM Advocate*, when the appeal was first considered by a bench of three judges: [2012] HCJAC 83, para 22.

(2) Evidence as to credibility

42. Traditionally, it has been accepted that, at common law, evidence of facts affecting credibility or reliability can be elicited from the witness in cross-examination (henceforth, the term "credibility" will be used to include reliability as well as truthfulness). That was noted, in relation to matters characterised as collateral, in paras 39 and 40 above. If a prior

conviction relevant to credibility is denied, an extract conviction can be produced. By statute, evidence of a prior statement, inconsistent with the witness's evidence in court, is also admissible provided specified conditions are met. Having referred to that and other statutory rules, *Walker and Walker* states as follows (para 1.6.3):

> "Apart from these statutory rules, it is thought that evidence of facts affecting the credibility of a witness, apart from the evidence of the witness himself, or unless the facts are also relevant to the questions at issue, is generally inadmissible. This is not because the facts are irrelevant, but because it is inexpedient to spend time on the investigation of collateral issues. Thus it may be admissible to lead evidence that a witness was drunk at or about the time when he claims to have been assaulted, or that he was not in a position to witness the commission of the crime which he describes in his evidence, because these facts are relevant to the decision of the case as well as to the credibility or reliability of the witness."

43. According to that account of the law, the exclusion of evidence of facts going to credibility, apart from the evidence of the witness himself, or unless the facts are also relevant to the questions at issue, is "not because the facts are irrelevant, but because it is inexpedient to spend time on the investigation of collateral issues". That reflects the editors' earlier definition of relevant evidence as including evidence going solely to credibility (para 38 above). The fact that the exclusion of relevant evidence is based on its characterisation as collateral also appears to imply, following *Thomson v HM Advocate* (para 41 above), that its exclusion is "subject always to consideration of the interests of justice in the particular case".

44. That is a possible explanation of the authorities, some of which are cited in footnotes to that passage in *Walker and Walker*, where evidence going solely to credibility, other than evidence from the witness himself, was admitted. As *Walker and Walker* explains, in *King v King* (1841) 4D 124 it was held competent not only to cross-examine a witness as to bias against a party, but also to prove it by other evidence. In *Green v HM Advocate* 1983 SCCR 42, evidence of the tendency of the complainer to make false allegations of sexual assault was considered relevant to an appeal against conviction.

45. As that example illustrates, in the context of sexual offences, and especially rape, the distinction drawn in the passage quoted from *Walker and Walker* between evidence going solely to credibility and evidence which is also relevant to a fact in issue gives rise to particular difficulties. The reasons are explained in Munday, *Cross & Tapper on Evidence*, 13th ed (2018) ("*Cross on Evidence*"). As Dr Munday states (p 335), rape is

rare in being a crime where the state of mind of the complainant is important. Dr Munday continues (pp 335-336):

> "Sexual intercourse, whether or not consensual, most often takes place in private, and leaves few visible traces of having occurred. Evidence is often effectively limited to that of the parties, and much may depend upon the balance of credibility between them. This has important effects for the law of evidence since it is capable of reducing the difference between questions going to credit and questions going to issue to vanishing point. If the only issue is consent and the only evidence is the testimony of the complainant, the conclusion that she is unworthy of credit must be decisive of the issue."

As Dr Munday goes on to observe, the difficulties caused by this aspect of rape cases (and other cases concerned with sexual offences committed against adults) recur in relation to much of the evidence used to resolve them, as the evidence used to establish the complainant's disposition or to challenge her credibility is likely to raise collateral issues, which may prove time-consuming, difficult to resolve, and confusing to the jury (for the sake of brevity, the complainant, in English terminology, or complainer, in Scottish terminology, is assumed to be female, as is usually the case).

46. In Scotland (and, in practice, in England and Wales) the complainer's testimony is not literally the only evidence bearing on consent. There is a requirement under Scots law for corroboration, but it can be provided by evidence of the complainer's distressed condition (*Lord Advocate's Reference (No 1 of 2023)* [2023] HCJAC 40; 2024 JC 140), as in Mr Keir's case, or by evidence of a de recenti statement by the complainer, or a statement forming part of the res gestae (*Lord Advocate's References (Nos 2 and 3 of 2023)* [2024] HCJAC 43; 2025 JC 200), or in certain circumstances (as in Mr Daly's case) by the evidence of another complainer. The complainer's credibility remains decisive of the issue, as indeed the trial judges made clear to the jury in the present cases.

47. The difficulty of maintaining an analytical distinction in cases of this kind between evidence going to credibility and evidence which is relevant to a fact in issue can be illustrated by some examples. In *Cumming v HM Advocate* 2003 SCCR 261, the court admitted evidence that one of the complainers, as an adult, behaved in a flirtatious manner towards the accused, who was charged with having sexually abused her when she was a child. The court observed that the evidence "was relevant to the credibility of [the complainer], *and hence the question of guilt of the* accused" (para 16; emphasis added). The evidence could be regarded as undermining the credibility of her evidence that she was abused, since a woman who had been sexually abused might be considered unlikely to behave in a flirtatious manner towards the abuser; but, for the same reason, it could also be regarded as bearing on the likelihood that the alleged abuse occurred. In the same

case, the defence was also permitted to lead evidence that the complainers made no allegation against the accused until prompted to do so by others. The evidence was admitted as being relevant to credibility, but it might also have been considered relevant to proof of the facts in issue, if the circumstances were such that the complainers might, if they had been sexually abused, have been expected to report the matter spontaneously. In *Moir v HM Advocate* [2007] HCJAC 20; 2007 JC 131 ("*Moir (No 2)*"), an appeal against conviction was allowed because the defence had not been allowed to pursue a line of cross-examination of one of the complainers to the effect that she had requested the Crown to withdraw the charges against the accused. That was a matter which might undermine her credibility, since one reason for seeking to withdraw the charges might be that the allegations were untrue; but it could also be argued to have a bearing on the facts in issue, on the basis that a person who had been the victim of sexual offences might be expected to support the prosecution of the person who had assaulted her.

48. However, as the passage cited earlier from *Cross on Evidence* explains, the difficulty is not merely one of legal analysis. More fundamentally, the problem is that the complainer's credibility is likely to be the decisive issue at the trial, but evidence which is relevant to credibility may raise issues which are collateral to the subject matter of the charge. Where the complainer's credibility is the critical issue, justice to the accused requires that he should be permitted to challenge her credibility, if grounds for such a challenge exist. However, the court cannot admit all evidence which is relevant to credibility, if the trial and the jury are not to be overwhelmed and distracted by the investigation of collateral issues. A balanced solution has to be found, which secures a fair trial.

49. In practice, during the period preceding recent developments, the courts allowed a greater latitude to the defence to challenge the credibility of complainers in cases of rape and other sexual offences than the approach set out in *Walker and Walker* would suggest. For example, in *Cumming v HM Advocate* the defence was permitted to lead evidence that the complainers had a motivation to make false allegations against the accused and that one of them had threatened to do so. In other cases, such as *Green v HM Advocate* and *HM Advocate v Ronald* [2007] HCJ 11; 2007 SCCR 451, evidence was admitted that the complainer had made false allegations of sexual offences against third parties. It was also common in practice for complainers to be cross-examined, and for evidence to be led, about other aspects of their conduct which bore on the credibility of their account of the facts in issue, as is illustrated by *Cumming v HM Advocate* and *Moir (No 2)*.

(3) Bad character in cases of sexual offences

50. One particular type of evidence which may bear on the credibility of testimony is evidence of bad character. Such evidence differs from the evidence previously discussed, as its effect is not merely to undermine the credibility of the witness's testimony in relation to the particular facts in issue, for example by demonstrating bias or a motivation

to lie, but to suggest that the witness is a person whose testimony is generally unworthy of credit. Such evidence is not generally admissible at common law. Lord Justice Clerk Macdonald said in *Dickie v HM Advocate* (1897) 24 R (J) 82, 83 that there are two reasons why that is so. First, it is the duty of a court to protect witnesses from attacks which they cannot be prepared to meet, and which they can claim no right to meet, by leading evidence to rebut them. Secondly, such inquiries would introduce collateral issues, which might often protract proceedings and obscure the true issue which was being tried.

51. An important exception to that general rule was established in the 19th century in relation to sexual offences. In *Dickie v HM Advocate*, Lord Justice Clerk Macdonald explained that in relation to such cases some specialties had been introduced "for obvious reasons" (p 83). The first specialty related to evidence of previous sexual relations between the complainer and the accused. It would be competent to prove that the complainer had consensual sexual relations with the accused a short time before the alleged offence. That was considered to be in the interests of justice, "for in considering the question whether an attempt at intercourse be criminal, and to what extent criminal, it is plainly a relevant matter of inquiry on what terms the parties were immediately before the time of the alleged crime" (p 84).

52. The second specialty was that evidence of a complainer's bad moral character (by which was meant a reputation for being sexually active) could be led. Such evidence was considered relevant as bearing upon her credibility when alleging that she had been subjected to criminal violence by someone desiring to have intercourse with her. Such evidence might, it was said, seriously affect the inferences to be drawn from her conduct at the time. On the other hand, it was not permissible to lead evidence of individual sexual activity with other men: "it could only be allowed upon the footing that a female who yields her person to one man will presumably do so to any man – a proposition which is quite untenable" (p 84).

53. Although the latter rule has been criticised in the recent case law in the light of changes in attitudes towards sexual morality, the underlying approach of the Victorian judges was based on a recognition of certain features of trials for sexual offences. First, it was recognised that evidence of a prior sexual relationship between the complainer and the accused might be relevant, provided it was sufficiently close in time to the events in question. The rationale was that the relationship between the parties immediately before the events in question could be relevant to the jury's assessment of the complainer's state of mind at the time of those events: that is to say, their assessment of whether she consented or not.

54. Secondly, allowing evidence of bad moral reputation, as it was then perceived, but not of individual occurrences of immoral behaviour, to be admitted was a way of enabling evidence which was regarded (according to the attitudes of the period) as bearing on credibility to be admitted in cases where credibility was likely to be decisive of the issue,

without a lengthy investigation of collateral issues. Although the particular rule applied in the Victorian cases has been rendered out of date by supervening changes in attitudes, there remains a justification for allowing a greater latitude for the admission of evidence bearing on credibility, in a situation where it is decisive of the issue, than might be permitted in other contexts.

5. The modern development of the law

(1) The Sexual Offences (Amendment) Act 1976

55. Legislative reform of this branch of the law in the United Kingdom began in England and Wales. The concern was that discredited and discriminatory stereotypes about women and sex lingered on in the criminal courts: in particular, that sexually active women were more likely to consent to intercourse and were less worthy of belief. This was believed to result in a low conviction rate in rape cases and in humiliating and intrusive questioning of the complainant that was irrelevant to the charge against the defendant, and to deter women from reporting such offences.

56. When the *Report of the Advisory Group on the Law of Rape* (1975) (Cmnd 6352) ("the Heilbron Report") set out the approach which it suggested should be adopted, it advised that, while questions and evidence as to a previous sexual association between a complainant and an accused "will, in general, be regarded as relevant to the issues involved in a trial for rape" (para 134), the reverse would generally be true in respect of a sexual history with other men. The Sexual Offences (Amendment) Act 1976 adopted that approach, introducing in section 2 a leave requirement for evidence concerning sexual activity with men other than the accused.

(2) The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985

57. The Scottish Law Commission also produced a *Report on Evidence in Cases of Rape and Other Sexual Offences* (1983) (Scot Law Com No 78). In para 3.9 the Commission noted that evidence of prior intercourse between a complainer and an accused was admissible in a trial for rape, quoting the explanation for this given by Lord Justice Clerk Macdonald in *Dickie v HM Advocate*. The Commission commented that it was not aware of any practice in modern times of restricting such questions to establishing the relationship between the parties "immediately before the time of the alleged crime", as the Lord Justice Clerk had stated. It was unclear to what extent there might be permissible exceptions to the general rule prohibiting evidence of sexual intercourse with men other than the accused, or as to the limits, if any, on evidence as to previous or subsequent sexual relationships with the accused (para 3.11). There was a need for a review of the law.

58. Like the authors of the Heilbron Report, the Commission considered that evidence of a previous sexual relationship between the complainer and the accused would generally be relevant in cases where consent was in issue, although this would not always be the case, for example in respect of a chance encounter many years before (para 5.5). It followed that the requirement for leave should extend to any sexual history of the complainer, including that involving the accused person (para 5.6).

59. Section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 implemented some of the Commission's recommendations by inserting new sections into the Criminal Procedure (Scotland) Act 1975. In particular, section 141A required the court in trials for most sexual offences, including rape and attempted rape, not to admit, or to allow questioning designed to elicit, evidence "which shows or tends to show that the complainer – (a) is not of good character in relation to sexual matters; (b) is a prostitute or an associate of prostitutes; or (c) has at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge". That provision was subject to section 141B, which required the court to allow such questioning or admit such evidence where it was satisfied, on an application by the accused, (a) that the questioning or evidence was designed to explain or rebut evidence adduced, or to be adduced, otherwise than by or on behalf of the accused, (b) that the questioning or evidence was as to sexual behaviour which took place on the same occasion as the sexual behaviour forming the subject-matter of the charge, or was relevant to a defence of incrimination (ie blaming a third party), or (c) that it would be contrary to the interests of justice to exclude it. Sections 141A and 141B were subsequently re-enacted as sections 274 and 275 of the 1995 Act.

60. This legislation gave the courts a broad discretion to admit questioning or evidence about the complainer's previous sexual activity. Later research suggested that such evidence continued to be adduced even in circumstances which were not justified under the legislation: B Brown, M Burman and L Jamieson, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (1992).

(3) The Youth Justice and Criminal Evidence Act 1999

61. Similar concerns in England and Wales about the failure of the reforms to achieve their objectives led to the enactment of section 41 of the Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act"), which imposes restrictions on evidence concerning the complainant's sexual experience with the accused as well as with other men. Similar legislation also applies in Northern Ireland, under article 28 of the Criminal Evidence (Northern Ireland) Order 1999 (SI 1999/2789). Consideration of the case law concerning the application of article 6 of the Convention in these contexts may help to inform the discussion of how article 6 applies in relation to the corresponding law in Scotland (as was observed in relation to disclosure in *HM Advocate v Murtagh* [2009] UKPC 36; 2010

SC (PC) 39; [2011] 1 AC 731, para 46). As will appear, the approach adopted in England and Wales differs from that recently adopted in Scotland.

62. Section 41(1) applies in trials for sexual offences, and prohibits questioning or evidence about the sexual behaviour of the complainant except with the leave of the court. Section 41(2) permits leave to be given only in the circumstances specified in subsections (3) and (5), and only if refusing would risk rendering unsafe any conclusion of the jury or the court (as applicable) on any relevant issue in the case. Under section 41(3)(a), leave can be given where the evidence or question relates to a relevant issue in the case and that issue is not an issue of consent. Leave can also be given where consent is an issue and the sexual behaviour of the complainant is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused (section 41(3)(b)), or where the sexual behaviour of the complainant to which the question or evidence relates is so similar to sexual behaviour forming part of the event which is the subject matter of the charge, or to any other sexual behaviour of the complainant which took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence (section 41(3)(c)). Section 41(4) provides that the evidence is not to be allowed under subsection (3) if the purpose (or main purpose) for which it would be adduced is to establish material for impugning the credibility of the complainant as a witness. Section 41(5) enables leave to be granted if the evidence is necessary to rebut or explain prosecution evidence.

(4) R v A (No 2) and later English cases

63. In *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45, a defendant accused of rape claimed that the complainant had initiated consensual sexual intercourse on the occasion in question or, if not, that he had believed that she had consented. He sought to establish that there had been a consensual sexual relationship between them over the preceding three weeks, the most recent act of sexual intercourse having occurred approximately one week before the alleged offence. At a preparatory hearing, the trial judge held that this evidence was inadmissible under section 41. The Court of Appeal allowed the accused's appeal. It held that the evidence was admissible under section 41(3)(a) on the issue of the accused's belief in consent, but inadmissible on the issue of consent under section 41(3)(b) or otherwise. On a further appeal, the House of Lords held that evidence of a prior consensual sexual relationship with the defendant might, in the circumstances of an individual case, be relevant to the issue of consent as well as belief in consent. Although article 6 of the Convention permitted account to be taken of the interests of the complainant and of society in general, the defendant's right to a fair trial would be infringed if he were denied the admission of relevant evidence where its absence led to his unjust conviction (the latter proviso reflected the case law of the European court at the time; as will be explained, a wider approach has more recently been adopted). Such evidence could be admitted under section 41(3)(c), construed in accordance with section 3 of the Human Rights Act, where the evidential material was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6. The case

was remitted in order for an assessment to be made of whether that test was satisfied on the facts.

64. Lord Slynn of Hadley considered that the restrictions placed by section 41 on the admission of evidence of previous sexual activity between the parties were prima facie capable of preventing an accused person from putting forward evidence which might be critical to his defence, and could therefore prevent the accused from having a fair trial (para 10). In particular, section 41(3)(c) if read literally or even purposefully was disproportionately restrictive, and must be read together with article 6 so as to permit the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers is necessary to make the trial a fair one (para 13).

65. Lord Steyn identified the issue as being the relevance of the prior relationship between the parties to the complainant's state of mind on the occasion in question. He observed that, as a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is, he said, "a species of prospectant evidence which may throw light on the complainant's state of mind" (para 31). He recognised that the complainant's prior consent to intercourse with the accused cannot prove that she consented on the occasion in question. It might, however, be relevant to that issue (ibid):

> "The fact that the accused a week before an alleged murder threatened to kill the deceased does not prove an intent to kill on the day in question. But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue."

Lord Steyn acknowledged that "each decision to engage in sexual activity is always made afresh". However, "the mind does not usually blot out all memories". Accordingly, "a prior relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular occasion" (ibid).

66. Lord Steyn referred to an article by Professor Diane Birch about the operation of section 41 ("A Better Deal for Vulnerable Witnesses?" [2000] Crim LR 223), in which she posed the question whether the jury were simply to be told what happened in the bedroom without any context, and suggested that there would have to be some concept of background evidence that it was necessary for the jury to know in order to make sense of the evidence in the case. Lord Steyn commented that it was difficult to dispute this assessment (para 32).

67. It followed that sometimes logically relevant sexual experiences between a complainant and an accused would have to be admitted in order to ensure a fair trial. On the other hand, there would be cases where previous sexual experience between a complainant and an accused would be irrelevant, such as an isolated episode distant in time and circumstances (para 45). Where the line was to be drawn must be left to the judgment of trial judges.

68. The other speeches were to similar effect. Lord Hope of Craighead observed that he did "not regard the *mere* fact that the complainant had consensual sexual intercourse with the accused on previous occasions as relevant to the issue whether she consented to intercourse on the occasion of the alleged rape" (para 105: original emphasis). Lord Clyde accepted that evidence of sexual behaviour of the complainant with the defendant, outside the event which is the subject of the trial, might be relevant to a defence of consent (para 125) because it might indicate a state of mind on the part of the complainant towards the defendant which was potentially highly relevant to her state of mind on the occasion in question (para 133). It followed that whether sexual behaviour was relevant would depend on whether an inference could be drawn from it as to the complainant's state of mind on the occasion in question. It might be so remote in time as to make the drawing of any inference from it impossible; but in many cases it might be highly relevant, and a fair trial would be endangered if in such a case it was excluded (para 136). Lord Hutton saw the question of whether prior sexual behaviour was relevant to consent as turning on whether it took place in the context of a close and affectionate relationship which was still on foot a relatively shortly time before the events in issue. The existence of such a relationship was relevant to the assessment of the complainant's state of mind on the occasion in question (para 152). Where the accused wished to give evidence of previous acts of sexual intercourse with the complainant in the course of a recent close and affectionate relationship, such evidence would be a central and essential part of his defence. To deny him the opportunity to cross-examine the complainant and to give such evidence would compromise the overall fairness of the hearing and would deny him the essence of a fair trial. The right of a defendant to call relevant evidence, where the absence of such evidence might give rise to an unjust conviction, was an absolute right which could not be qualified by considerations of public interest, no matter how well founded that public interest might be (para 161).

69. The speeches disclose a consensus that the relevance of prior sexual activity between the complainant and the accused does not lie in the bare fact of prior consent. It lies in the inference which may be drawn from the previous relationship between the complainant and the accused about the complainant's feelings towards the accused, and the bearing which that inference may have upon the jury's assessment of her state of mind at the time of the events which are the subject matter of the charge. Whether such an inference can be drawn, which would have a bearing on the assessment of the complainant's state of mind at the material time, evidently depends on the circumstances, as the speeches acknowledged. The paradigm case of irrelevant evidence was of a casual sexual encounter at some remote time in the past. There would be no meaningful connection between such an event and the complainer's state of mind at the material time.

The paradigm case of relevant evidence was of consensual intercourse within the context of a close and affectionate relationship which was on foot shortly before the events in question. Between those two ends of the spectrum, a judgment would have to be made as to whether the evidence about the previous relationship between the complainant and the accused was capable of yielding an inference about the complainant's attitude towards the accused which might bear on the assessment of her state of mind at the material time. If the evidence met the test of relevance, the question which would then arise under article 6 of the Convention was whether its exclusion would endanger the fairness of the trial.

70. In relation to section 41(4) (the prohibition on admitting evidence going solely or mainly to the credibility of the complainer as a witness), Lord Hope observed (para 75):

> "At first sight this is a serious intrusion on the accused's right to a fair trial. In cases where the accused who is on trial for rape admits that he had sexual intercourse with the complainant on the occasion in question but says that it was with her consent the credibility of the two parties is likely to be the critical issue."

Lord Clyde remarked (para 138):

> "It seems to me that [section 41(4)] will require a very fine analysis in its practical application. Issues of consent and issues of credibility may well run so close to each other as almost to coincide. A very sharp knife may be required to separate what may be admitted from what may not. The purpose of subsection (4) may be taken to be the abolition of the false idea that a history of sexual behaviour in some way was relevant to credit. The recognition of that myth as heresy is to be welcomed. But the subsection may have to be carefully handled in order to secure that that myth remains buried in the past and at the same time secure the availability of evidence of sexual behaviour which is properly admissible as bearing on the issue of consent."

71. In subsequent cases concerned with section 41(4) the Court of Appeal has distinguished between evidence the purpose (or main purpose) of which appears to be merely to impugn the complainant's general credibility as a witness, and evidence which supports the defendant's explanation of why a false allegation has been made against him, or supports his account of the events with which the charge is concerned. For example, in *R v Martin* [2004] EWCA Crim 916; [2004] 2 Cr App R 22, the evidence in question, to the effect that the defendant had rejected the complainant's advances on a previous

occasion, resulting in her threatening him, showed a motive on the complainant's part to fabricate the allegation against him. As the court stated, while the effect of the questioning would have been to impugn the credibility of the complainant, the main purpose was to lay the basis of the defendant's explanation of the falsity of her allegation (para 29). The evidence also supported his case that he had not wanted a sexual relationship with the complainant. The court indicated that, had it not concluded that section 41(4) could be interpreted as permitting the admission of the evidence, it would have had to consider whether section 41(4) should be read down, applying section 3 of the Human Rights Act, in order to ensure a fair trial (para 38).

72. In the later case of *R v F* [2005] EWCA Crim 493; [2005] 1 WLR 2848, the defendant was charged with the sexual abuse of the complainer when she was a child. She accepted that she had had a sexual relationship with him when she was as an adult, but maintained that she had been an unwilling participant and had submitted to it because she was under his domination. He maintained in his defence that she had been an enthusiastic participant in the adult relationship and that her allegations of sexual abuse were motivated by a desire for revenge because he had ended the relationship. It was held that evidence of photographs and video tapes of a sexual nature, which showed her apparently enjoying the relationship which she had had with the defendant as an adult, should have been admitted, as it not only affected her credibility but was also relevant to the jury's consideration of the defendant's contention that the complaint was motivated by a desire for revenge, and of the even more critical question whether he had abused her as a child.

(5) R v Seaboyer

73. In *R v A (No 2)* several of their Lordships cited extensively from the judgment given by McLachlin J on behalf of the majority of the Supreme Court of Canada in *R v Seaboyer* [1991] 2 SCR 577. That case, like *R v A (No 2)*, is an instructive example of the demise of a blanket exclusion (as might also be said of *R v Martin* and *R v F*). The case concerned the constitutionality of a legislative provision excluding evidence of the complainant's sexual activity with other men unless it fell within narrowly defined categories. McLachlin J's judgment contains a clear explanation of why the interests of justice must be prioritised when they come into an unavoidable conflict with the protection of the privacy rights of complainers, and of how, where possible, such conflicts may be avoided.

74. McLachlin J took as her starting point the basic purpose of the criminal justice system (p 609):

> "It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues … A law which prevents the trier

> of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial".

The difficulty was that relevant evidence about the complainant's sexual behaviour might divert juries from the real issues in the trial and prejudice the fact-finding process. Accordingly, McLachlin J formulated the issue in the case as being whether the provision in question "may exclude evidence which is relevant to the defence and the probative value of which is not substantially outweighed by the potential prejudice to the trial process" (p 613).

75. The answer was that it might. Canadian and American jurisprudence afforded numerous examples of evidence of sexual conduct between the complainant and persons other than the accused which would be excluded by the provision but which should clearly be received in the interests of a fair trial, notwithstanding the possibility that it might divert a jury. Examples included evidence relevant to a defence of honest belief, evidence supporting an attack on the credibility of the complainant on the ground that she was biased or had a motive to fabricate her evidence, evidence relevant to explain the physical conditions on which the Crown relied to establish intercourse or the use of force, and evidence relevant to explain young complainants' knowledge of sexual matters.

76. McLachlin J concluded that the provision in question overreached the justifications put forward for it. The first was to prevent the jury from being diverted by irrelevant evidence of other sexual conduct of the complainant which would unfairly prejudice them against the complainant and thus lead to an improper verdict. However, "a provision which categorically excludes evidence without permitting the trial judge to engage in the exercise of whether the possible prejudicial effect of the evidence outweighs its value to the truth-finding process runs the risk of overbreadth" (p 617). It is to be observed that the same might be said about a common law rule having the same effect.

77. The second justification was to encourage women to report sexual offences against them. However, reporting was only the first step in the judicial process, not an end in itself. Even if it was assumed that increased reporting would result in increased convictions, the argument was unpersuasive (p 617):

> "To accept that persuasive evidence for the defence can be categorically excluded on the ground that it may encourage reporting and convictions is … to say either (a) that we assume the defendant's guilt; or (b) that the defendant must be hampered in his defence so that genuine rapists can be put

> down. Neither alternative conforms to our notions of fundamental justice."

78. The third justification was to maintain the privacy of the complainant. However, it could be argued that, important as it was to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in a case of conflict: "if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted" (p 618).

(6) The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

79. In the light of the concerns expressed about the limited impact of the legislative changes introduced in Scotland in 1985, the Scottish Executive issued a consultation paper on proposals for change: *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials* (2000). It recognised that sexual offences "have particular elements which clearly distinguish them from other types of crime", the first of which was that "in no other crimes does the consent of the alleged victim play such a pivotal role" (para 87). It also recognised that "clearly, the fact that the consent or otherwise of the complainer is under scrutiny from the outset will lead directly to a diversion of attention from what the accused said or did, to what the complainer said or did (or, frequently, what she did <u>not</u> say or do)" (para 88: original emphasis).

80. The consultation paper went on to consider criticisms of the current law, which was taken to be set out in sections 274 and 275 of the 1995 Act. It proposed changes which were influenced by McLachlin J's judgment in *R v Seaboyer*, and adopted a similar approach of requiring the court to assess whether the evidence in question has significant probative value which is not substantially outweighed by the danger of prejudice to the proper administration of justice (paras 110-112). It also proposed that evidence of a complainer's bad character should only be admitted where it is relevant to the issue of whether the complainer is worthy of belief, and is of specific instances of behaviour casting doubt on her honesty or showing a motive to fabricate allegations (para 116).

81. These proposals were subsequently adopted by the Scottish Executive in its report, *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials* (2001). Although some of the consultation responses suggested that the proposals did not fit well into the existing law, since specific instances of dishonest behaviour would normally constitute inadmissible collateral evidence, the report stated that "sex offence trials may be different in that consent tends to be the central issue, so there is inevitably a focus on the behaviour of the complainer (which may include instances of past behaviour)" (para 44).

82. The Scottish Parliament responded by enacting the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 ("the 2002 Act"), which repealed the existing versions of sections 274 and 275 and inserted new versions in the 1995 Act. The Policy Memorandum which accompanied the Bill noted at para 35 that section 41 of the 1999 Act had been interpreted in *R v A (No 2)* so as to ensure compatibility with the Human Rights Act. It explained that the weighing exercise incorporated in the Bill was seen to provide a valuable safeguard in this respect, and was more akin to the approach adopted in Canada.

83. Section 274(1), as then inserted and as it remains in force, provides as follows:

> "(1) In the trial of a person charged with an offence to which section 288C of this Act applies [ie a sexual offence], 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);
>
> (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
>
> (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—
>
> (i) is likely to have consented to those acts; or
>
> (ii) is not a credible or reliable witness; or
>
> (d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above."

Accordingly, section 274(1) applies to evidence of bad character, evidence of sexual behaviour not forming part of the subject matter of the charge, and evidence of other behaviour bearing either on consent or on credibility.

84. Section 274 is subject to section 275, as substituted by the 2002 Act. Section 275(1) provides:

> "(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; or
>
> (ii) any condition or predisposition to which the complainer is or has been subject;
>
> (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."

85. It is to be noted that section 275(1) confers on the court a statutory power to "admit such evidence or allow such questioning as is referred to in subsection (1) of section 274" where the conditions set out in section 275(1)(a) to (c) are met. As has been explained, the evidence which can be admitted under that statutory power includes evidence of bad character, other evidence bearing on credibility, and evidence of sexual behaviour not forming part of the subject matter of the charge. Such evidence can be admitted where, among other conditions, it is "relevant to establishing whether the accused is guilty of the offence" (section 275(1)(b)). The premise of the provision is therefore that such evidence may be relevant to that question. That was recognised in some of the early authorities on section 275, such as *Cumming v HM Advocate*, para 16, and *DS v HM Advocate*, para 78.

86. Section 275(2) provides that "the proper administration of justice", as that phrase is used in section 275(1)(c), includes:

> "(i) appropriate protection of a complainer's dignity and privacy; and
>
> (ii) ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies, relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict".

87. The remaining provisions of section 275 lay down requirements as to the procedure to be followed when an application is made under that section. Section 275(3) requires that the application must be in writing and must set out "(a) the evidence sought to be admitted or elicited; (b) the nature of any questioning proposed; (c) the issues at the trial to which that evidence is considered to be relevant; (d) the reasons why that evidence is considered relevant to those issues; (e) the inferences which the applicant proposes to submit to the court that it should draw from that evidence"; and (f) any other information specified in an Act of Adjournal.

88. Sections 274 and 275, as substituted by the 2002 Act, differ from the predecessor provisions in several respects. In particular, first, the prohibition in section 274 is not confined to questioning or evidence relating to sexual matters, but extends to any questioning or evidence of bad character, any evidence which might found the inference that the complainer is likely to have consented to acts forming part of the subject matter of the charge or that she is not a credible or reliable witness, and any evidence that the complainer has ever been subject to any condition or predisposition which might found such an inference. Plainly, such evidence may be highly material, and its admission may be essential to the fairness of the proceedings. It may therefore be misleading to describe section 274, as it has been described in the recent Scottish case law, as creating a strong statutory prohibition on the admission of such evidence. Section 274 has to be read together with the equally important power to admit such evidence which is given by section 275. The two sections have to be read together as a unified statutory scheme.

89. It is also necessary to note section 275A of the 1995 Act, which was inserted by the 2002 Act, and section 275C, which was inserted by the Vulnerable Witnesses (Scotland) Act 2004. Section 275A provides that where questioning is allowed or evidence is admitted under section 275, any previous relevant conviction of the accused – in broad terms, any conviction for a sexual offence – can be laid before the jury, unless the accused objects. Such an objection can be made on the ground that the disclosure of the conviction would be contrary to the interests of justice. However, the court is required, unless the contrary is shown, to presume that the disclosure of a conviction is in the interests of justice.

90. Section 275C provides that expert psychological or psychiatric evidence is admissible for the purpose of rebutting any inference adverse to the complainer's credibility as a witness which might otherwise be drawn from "any behaviour or statement subsequent to, and not forming part of the acts constituting, the offence to which the proceedings relate and which is not otherwise relevant to any fact in issue at the trial". The section is premised on the possibility that evidence may be admissible which goes to the credibility of the complainer but is not otherwise relevant to any fact in issue. If such evidence were not admissible, the question of leading expert evidence in rebuttal would not arise.

(7) The early case law on sections 274 and 275

91. It is necessary to mention only two of the early cases concerning sections 274 and 275, as inserted by the 2002 Act.

(i) Moir (No 1)

92. A challenge to sections 274 and 275 was mounted in *Moir v HM Advocate* 2005 1 JC 102 ("*Moir (No 1)*"), on the ground that the restriction imposed by section 274(1)(c) on cross-examination designed to test the credibility of a complainer by reference to her non-sexual behaviour, and the procedural requirements imposed in connection with obtaining leave for such cross-examination under section 275(3), were incompatible with article 6 of the Convention. If that were so, then it followed that the provisions of the 2002 Act which substituted the new sections 274 and 275 were to that extent outside the legislative competence of the Scottish Parliament. The challenge was rejected, on the basis that section 275 reserved to the discretion of the judge the allowance of questioning or evidence falling within the scope of section 274, where the circumstances of the case required it in the interests of a fair trial.

93. Lord Justice Clerk Gill, with whose opinion the other members of the court agreed, recognised the legitimacy of the aims of protecting the complainer against unfair and intrusive attacks, and excluding evidence which would prejudice a fair trial. However, he observed (para 30):

> "But the protection of the complainer cannot be seen apart from the basic principles of fairness in Scottish criminal procedure which entitle everyone accused of a crime to defend himself, to confront his accusers and to have a fair opportunity to put his own case. These principles underpin a value that is fundamental to criminal jurisprudence in a free society, namely the protection of the citizen from being wrongly convicted."

That dictum was cited with approval by Lord Rodger of Earlsferry in *DS v HM Advocate* (para 74).

94. The Lord Justice Clerk noted that, if section 274 had imposed an absolute prohibition on the questioning or evidence to which it referred, there would have been a violation of article 6 of the Convention (para 34). In that regard, he referred to the judgment of McLachlin J in *R v Seaboyer*. However, the legislation recognised that "there may be circumstances in which such questioning or evidence is necessary for the proper conduct of the defence" (ibid). That statement is significant in relation to the more recent case law, as it recognises – as, of course, do sections 274 and 275 themselves – that the admission of evidence or questioning concerning the complainer's bad character, or of other evidence going to the complainer's credibility, or of evidence of sexual behaviour of the complainer not forming part of the subject matter of the charge, may be essential for the proper conduct of the defence, and therefore for a fair trial.

95. The Lord Justice Clerk noted that, instead of prohibiting such questioning or evidence, section 275 placed the question of its admissibility under judicial control, recognising that the relevance of evidence on the matters mentioned in section 274(1) would vary according to the circumstances of the case. Section 275 reserved to the discretion of the judge the allowance of such cross-examination and evidence where the circumstances of the case required it in the interests of a fair trial. The exercise of that discretion would depend, in general, on the apparent relevance of the evidence, the disadvantage, if any, to which the accused would be put if it were not allowed, and the overall consideration of the interests of justice (para 34).

96. The Lord Justice Clerk observed that the probative value of evidence that the complainer had a sexual experience with another man might be much less than that of evidence that she had a sexual relationship with the accused; and there might be strong reasons for the court's allowing reference to a matter affecting the complainer's character that had no conceivable sexual connotations, such as a previous conviction for perjury or for perverting the course of justice, or some mental condition that predisposed her to fantasise or to exaggerate (para 35).

97. In response to a submission that section 275 was not wide enough to allow the complainer to be asked if she and the accused had lived together before the date of the alleged rape, the Lord Justice Clerk said that a prior course of cohabitation between the complainer and the accused would not fall within the scope of section 274(1); but, if there were any doubt on the point, it should be removed if the section was read with section 3 of the Human Rights Act (para 27). In that regard the Lord Justice Clerk referred to the speech of Lord Steyn in *R v A (No 2)*.

(ii) DS v HM Advocate

98. The case of *DS v HM Advocate* concerned a challenge to section 275A. The accused was charged with the indecent assault of a teenage girl. His defence was that she consented. He had a previous conviction for indecent behaviour towards another teenage girl. He wished to adduce evidence bearing on the complainer's credibility, falling within section 274. He made an application under section 275, and also challenged the compatibility of section 275A with article 6 of the Convention. That challenge came before the Judicial Committee of the Privy Council, and was rejected. Lord Hope and Lord Rodger gave the principal judgments, with which the other members of the Board agreed.

99. Lord Hope began by emphasising the fundamental nature of the right a fair trial. The purpose of section 275 was to ensure that the accused would receive a fair trial, notwithstanding the restrictions imposed by section 274. The three tests set out in section 275(1) were designed to achieve that purpose consistently with the proper administration of justice, which included the appropriate protection of the complainer's dignity and privacy. Lord Hope also explained how a number of words and phrases in sections 274 and 275 were to be interpreted so as to ensure the compatibility of the legislation with article 6 of the Convention.

100. First, contrary to the view expressed by the majority of the court in *Moir (No 2)*, the word "behaviour" in section 274(1)(c), construed in a way that was compatible with the accused's rights under article 6 of the Convention, did not extend to evidence that was directed simply to words that the complainer might have said to a third party which bore on her credibility or reliability. Restricting the accused's right, for example, to lead evidence that the complainer told a third party that she had consented to the acts charged, bearing section 275A in mind, would be incompatible with his right to a fair trial (para 46). Lord Rodger agreed (para 77).

101. Secondly, in agreement with the view expressed by the Lord Justice Clerk in *Moir (No 1)*, any doubt as to whether the phrase "sexual behaviour" in section 274(1)(b) extended to a prior course of cohabitation between the accused and the complainer must be removed when the phrase was read with section 3 of the Human Rights Act (para 46). Lord Rodger agreed, commenting that whatever the ultimate significance of such evidence turned out to be, it could never have been the intention of the legislature to prevent an accused from leading evidence or asking questions to show that he and the complainer had at one time lived together. That was consistent with the impossibility of applying the language of section 275(1)(a) ("a specific occurrence or occurrences") to a period of cohabitation (para 75).

102. Thirdly, in section 275(1)(a), the phrase "a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating …" was to be read as if there were a comma after "behaviour": the words following "demonstrating" modified only the phrase "specific facts", and not "sexual or other behaviour". That was necessary to avoid an undue restriction on the accused's right to a fair trial (para 47). Lord Rodger agreed, explaining that section 275(1) permits the court to admit evidence or questioning which relates to each of the four heads listed in paragraphs (a) to (d) of section 274(1) (para 71).

103. Lord Rodger observed that provided the restrictions in section 274 were not interpreted too broadly, sections 274 and 275 constituted a balanced response to the problem which the legislature set out to tackle and one which was consistent with the accused's article 6 rights (para 78):

> "When the court gives the appropriate permission under section 275(1) … if the jury accept the evidence, it will be relevant to establishing whether the accused is guilty of the offence with which he is charged. Plainly, the evidence is not admitted simply for its bearing on the credibility of the complainer as a witness … Where the evidence is admitted, the jury must simply be entitled to take into account what the complainer's character or condition or predisposition was, or how she had behaved before or after the incident in question, when deciding whether the Crown has proved the accused's guilt of the crime charged."

So understood, section 275 reflects the reality, in relation to offences of this kind, that evidence going to credibility is often decisive of the issue. That is also consistent with the reasoning of the appeal court in *Cumming v HM Advocate*, discussed at para 47 above.

6. Recent developments

(1) Evidence of character, or of non-sexual behaviour bearing on credibility

104. The process whereby the appeal court developed the common law concepts of "relevant" and "collateral" evidence, so as generally to exclude evidence relating to the prior or subsequent sexual behaviour of the complainer, or her credibility, from trials for sexual offences began in *CJM v HM Advocate*, a case which was heard by a Full Bench. The accused was charged, among other things, with indecently assaulting a member of his family when she was a young child. He applied under section 275 for permission to lead evidence and cross-examine the complainer to the effect that when she was aged about 17 (two years before reporting the events with which the charge was concerned), she made a false allegation of a sexual nature against another man who was unrelated to

her. Following a police investigation, she admitted the falsity of the allegation and was charged with wasting police time but not prosecuted or convicted. The application to admit the evidence was refused. The accused subsequently appealed against his conviction. There does not appear to have been any argument directed towards article 6 of the Convention.

105. Lord Justice Clerk Carloway, in an opinion with which the majority of the court agreed, took as his starting point the general principle that evidence is only admissible at common law if it is relevant. Evidence was said to be relevant "when it either bears directly on a fact in issue (ie the libel) or does so indirectly because it relates to a fact which makes a fact in issue more or less probable" (para 28). Although *Walker and Walker* was cited in support of that statement of the law, the Lord Justice Clerk omitted the category of relevant evidence mentioned there of "evidence of a fact which has a bearing only … on the credibility of a witness" (para 38 above): the category with which the case before the court was concerned.

106. The Lord Justice Clerk characterised the evidence in question as evidence of bad character, proposed to be introduced with the purpose of undermining the complainer's general credibility. It was, he said, "evidence that, at least on one view, has no direct or indirect connection with the facts in issue, but may conceivably affect the weight to be attached to testimony" (para 29). That statement would appear to imply that the evidence was irrelevant, if relevant evidence is evidence that bears directly or indirectly on a fact in issue, as the Lord Justice Clerk had said in the preceding paragraph. The possibility that a collateral issue might be raised in cross-examination even if it could not be proved by leading evidence, supported by the authorities mentioned in paras 39 and 40 above, was not mentioned.

107. The Lord Justice Clerk went on to state that evidence of either good or bad character is "collateral to the issues for decision as defined in the libel", and therefore generally inadmissible (para 29). The only exception to the exclusion of collateral evidence was said to arise "where the collateral fact can be demonstrated more or less instantly and cannot be challenged", as by the production of an extract conviction (para 32). Accordingly, the Lord Justice Clerk said (ibid):

> "It is not, therefore, simply a matter of the judge at first instance determining 'fairness' or 'justice' in an individual case, but of applying the well-tried and tested rule which exists for pragmatic reasons".

Since the complainer in the instant case had not been convicted of wasting police time, it followed that the evidence sought to be adduced was inadmissible at common law, with the consequence that sections 274 and 275 need not have been considered (para 35).

108. One apparent implication of the Lord Justice Clerk's reasoning was that previous cases in which the court admitted evidence which bore on the credibility of testimony but did not otherwise bear directly or indirectly on the facts in issue as defined by the charge against the accused, and which was not capable of instant verification, had been incorrectly decided. The Lord Justice Clerk took the opportunity to express disapproval of the approach adopted in one such case, *HM Advocate v Ronald*, where evidence had been admitted that the complainer had a history of making false accusations (para 41). This had implications also for the approach taken by the appeal court in *Green v HM Advocate*, as Lord Clarke pointed out (para 53). Criticism was also expressed of other previous decisions of the appeal court, including *Cumming v HM Advocate*, discussed in paras 47 and 49 above, on the basis that the court had been excessively concerned with fairness to the accused (para 44).

109. In an opinion agreeing in the result but disagreeing with the Lord Justice Clerk's reasoning, Lord Clarke expressed the view that the evidence in question was relevant (para 50):

> "If, for example, there exists evidence that a complainer in a rape case has, on a number of occasions in the past, made allegations of rape, either against the accused, or against him and other persons, or simply against other persons, which can demonstrably be shown to have been untrue then, for myself, I have little doubt that the evidence of those false allegations having been made would pass the test of relevance. An innocent accused would reasonably think so."

110. Lord Clarke also explained why it can be not only analytically difficult, but potentially inimical to a fair trial, to base the admissibility of evidence on a strict distinction between evidence going to credibility and evidence going to the facts in issue, in a context where credibility is the central issue in the trial (ibid):

> "In the area of sexual offences, the judge or jury is not infrequently left with having to make a stark choice in resolving the issues of whether the alleged conduct took place and, if so, whether it was consensual, ultimately by having regard simply to what the complainer and accused themselves say about these matters. It has been said, by the Court of Appeal, in my judgment, with some justification, that in sexual cases 'where the disputed issue is a sexual one between two persons in private, the difference between questions going to credit and questions going to the issue is reduced to vanishing point' (see *R v Funderburk* [1990] 1 WLR 587, 597)."

Lord Clarke also referred in that regard to the speech of Lord Clyde in *R v A (No 2*) (para 70 above). Consistently with that approach, Lord Clarke observed (ibid) that "having regard to the overarching requirement of a fair trial being provided to the accused, it may be necessary to scrutinise anxiously whether the term 'collateral' is not being used too readily with the effect of excluding evidence, highly relevant to the accused's defence, having regard to the issues that the court has to resolve, the exclusion of which might properly be regarded as involving unfairness".

111. Lord Clarke was also critical of the Lord Justice Clerk's view that exceptions to the exclusion of "collateral" evidence should be permitted only where the material was instantly verifiable, commenting that "the means of establishing the previous allegations, and their falsity, cannot and should not be made subject to such a prescriptive regime" (para 51). Instead, in the context of the case before the court, consideration should be given to such matters as the connection in time and other circumstances between the content of the charge before the court and the false allegations, the context and circumstances in which those allegations were made, the steps necessary to set up and challenge the false reports, and the probative value of those reports. Applying that approach, Lord Clarke agreed that the evidence in the instant case had been properly excluded.

112. The Lord Justice Clerk clearly considered that judges in some previous cases had been insufficiently protective of the interests of complainers. The approach which he laid down was intended to provide complainers with effective protection against questioning and evidence which was unnecessarily intrusive and demeaning. No-one could reasonably take issue with that objective. However, the alternative reasoning of Lord Clarke raises a number of important issues, which it is necessary for this court to consider in so far as they bear on the right of the accused to receive a fair trial in accordance with article 6.

113. One might also observe that the court might have been assisted if its attention had been drawn to the acceptance in *R v Seaboyer* (para 75 above) and *R v A (No 2)*, para 79, that it might be necessary to admit evidence that a complainant was biased against the accused or had a motive to make a false allegation in order to secure a fair trial in accordance with article 6 of the Convention or the corresponding provision of the Canadian Charter of Rights and Freedoms. The court might also have been assisted by reference to the discussion of related issues in cases such as *R v Martin* and *R v F* (paras 71-72 above), where the Court of Appeal, faced with a statutory prohibition of the admission of evidence if the purpose (or main purpose) for which it would be adduced was to impugn the credibility of the complainant as a witness, distinguished between evidence which does no more than impugn her credibility and evidence which, while it has that effect, also supports the proposition being advanced by the defence, or indirectly bears on the facts in issue.

114. It may be best to begin discussion of *CJM v HM Advocate* with some comments on terminology which also bear on the substance of the matter. As explained above, the Lord Justice Clerk appears to have treated evidence going to the credibility of the complainer's testimony as irrelevant as well as collateral. Similarly, in *CH v HM Advocate* he described evidence as being "irrelevant and collateral" (para 5). In the same case, he summarised the effect of *CJM v HM Advocate* as being said that "evidence is relevant if it makes a fact in issue more or less probable: the testimony must have a reasonably direct bearing on the subject matter of the prosecution; this would exclude collateral evidence" (para 36). The implication is not only that collateral evidence is irrelevant, but also, seemingly, that all evidence going to credibility is irrelevant, since it does not have a direct bearing on the subject matter of the prosecution.

115. Although usage has not been uniform, collateral evidence has not usually been characterised as irrelevant. As explained earlier (paras 39-40 above), the word "collateral" has commonly been used to describe a particular category of evidence which is relevant but is nevertheless held to be inadmissible. That is the way in which the term has been used, for example, in *Walker and Walker* since its first edition in 1964. That is why Lord Clarke said in *CJM v HM Advocate* that "the words 'collateral' and 'irrelevant' do not amount to the same thing" (para 50). As Lord Malcolm explained in *SJ v HM Advocate* [2020] HCJAC 18; 2020 SCCR 227, para 19, and Lord Glennie in *CH v HM Advocate*, para 92, the word "collateral" is generally used to describe an issue which is relevant but about which evidence is nevertheless held to be inadmissible in the interests of justice, because of the indirect bearing of the issue on the subject matter of the trial and the risk that its investigation will unduly prolong the trial and distract the jury from their proper focus. If, on the other hand, evidence is irrelevant, it follows that it is inadmissible, without any need to ask whether it is collateral, or to consider whether it is instantly verifiable. Indeed, if evidence is irrelevant, it is difficult to see why its instant verifiability should render it admissible.

116. This question of usage bears on the relationship between the common law and the statutory scheme. The Lord Justice Clerk in *CJM v HM Advocate* reasoned on the basis that sections 274 and 275 were intended to restrict the admissibility of evidence which was admissible at common law (para 43). If, therefore, evidence was inadmissible at common law, it followed that there was no need to consider the statutory provisions. That reasoning, which was in accordance with dicta in *Moir (No 2)* and *DS v HM Advocate*, has been followed ever since: see, for example, *CH v HM Advocate*, paras 34-36. However, its soundness, in the context of the stricter approach to common law admissibility adopted since *CJM v HM Advocate*, depends on a number of assumptions, none of which appears to have been examined in the recent case law.

117. The first is the basic assumption that the statutory provisions were intended to supplement the common law, rather than to create a scheme governing the admissibility of the evidence to which they apply. That is not self-evident. Section 274 is not qualified in its terms: on its face, it applies to all evidence and questioning falling within its scope,

whether such evidence would have been admissible at common law or not. Section 275 is equally wide in scope. Taken together, the two sections might be understood as establishing an elaborate scheme for assessing the admissibility of such evidence.

118. The second, related, assumption is that the test of relevance imposed by section 275(1)(b) is the same test as that laid down in *CJM v HM Advocate*. As has been explained, evidence which was "relevant" to establishing guilt would, at the time of the provisions' enactment (and at the time of *Moir (No 2)* and *DS v HM Advocate*), have been widely understood as including evidence bearing on the credibility of the complainer. It would, as previously explained, have been widely understood as including evidence concerning collateral issues. Section 275(1)(c) imposes a test which can be applied to collateral evidence, but it is different from the test laid down by the Lord Justice Clerk. It is not a test based on instant verifiability – a test derived not from cases concerned with collateral evidence in general, but from cases concerned specifically with bad character evidence. The legislation establishes a nuanced test which requires account to be taken of the probative value of the evidence on the one hand, and any risk of prejudice to the proper administration of justice on the other hand. The proper administration of justice is defined as including, in addition to appropriate protection of a complainer's dignity and privacy, "ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies … relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict". In cases concerned with such offences, the credibility of the complainer is generally an issue which is to be put before the jury, and it is generally of critical importance to the jury's verdict. It is, in most such trials, the central issue in the case.

119. If one grants the first and second assumptions, the Lord Justice Clerk's reasoning also depends on two further assumptions: first, that if the judiciary developed the common law subsequent to the enactment of the provisions so as to restrict the admissibility of evidence, the scope of application of the statutory scheme would be correspondingly narrowed; and secondly, if so, that it was constitutionally appropriate for the judiciary so to develop the common law.

120. In relation to the first of these points, although the statutory scheme was (ex hypothesi) intended to be more restrictive than the common law as it was understood and applied at the time when sections 274 and 275 were enacted, as a result in particular of directing the courts to treat the proper administration of justice as including appropriate protection of a complainer's dignity and privacy, it does not follow that the scope of the statutory scheme was intended to fluctuate in response to changing judicial approaches to the common law. If, for example, when the 2002 Act was enacted the meaning of the word "relevant" in section 275(1)(b) corresponded to the definition given in *Walker and Walker* as explained in para 38 above, that statutory meaning would not necessarily change merely because the appeal court subsequently adopted a narrower definition for the purposes of the common law.

121. If the statutory scheme takes as its starting point the common law as it was understood and applied at the time of its enactment, as Lord Johnston considered in *Moir (No 2)*, paras 25 and 27, that also gives sections 275 and 275C a more meaningful role to play. As explained earlier, the evidence which the court can admit under section 275 includes evidence that the complainer is not of good character (section 274(1)(a)), evidence of sexual behaviour not forming part of the subject matter of the charge (section 274(1)(b)), and evidence of behaviour which might found the inference that the complainer is not a credible or reliable witness (section 274(1)(c)(ii)). Section 275 is accordingly premised on the admissibility of evidence falling within each of those categories. Section 275C is premised on the possibility that evidence may be admissible which goes to the credibility of the complainer but is not otherwise relevant to any fact in issue, and which is capable of being rebutted by expert psychological or psychiatric evidence (and, therefore, is not capable of instant verification). One might question whether these provisions were intended by the legislature to have the limited significance which the approach adopted in *CJM v HM Advocate*, and in the later cases discussed below, has allowed them.

122. In relation to the second point, once the legislature has established a regime (ex hypothesi, partly common law and partly statutory, operating in combination) which it considers appropriate for the admissibility of evidence in such cases, it might be argued that it is no longer open to the courts, within the limits of constitutional propriety, to impose a different and more restrictive regime through the development of the common law, with the effect of rendering the statutory regime largely or even partly redundant.

123. It should be added, in relation to that point, that although the Lord Justice Clerk supported his reasoning by reference to authority, the effect of *CJM v HM Advocate* and later authorities has clearly been to impose a stricter approach to admissibility in cases concerned with sexual offences. That is reflected in the disapproval of earlier authorities, and in the necessity to issue repeated admonitions to judges to give less weight to considerations of fairness to the accused (eg *RN v HM Advocate* [2020] HCJAC 3; 2020 JC 132, para 22; *CH v HM Advocate*, para 6). The fact that there has been a change in approach was accepted by the Crown in their written case in the present appeals, where it was attributed to a modern understanding of sexual autonomy and a renewed judicial emphasis on the scrutiny of relevance.

124. The foregoing points are relevant in the present context because, as Lord Clarke pointed out, the Lord Justice Clerk's approach raises issues in relation to the accused's right to a fair trial: a right which was protected by the balanced scheme enacted by the legislature, as was explained in *Moir (No 1)* and *DS v HM Advocate*. The approach makes no allowance for the special features of trials for sexual offences, as discussed in paras 45, 48, 53-54, 79 and 81 above. The resulting position gives rise to the difficulty which arises in relation to sexual offences of distinguishing evidence going only to credibility from evidence which affects credibility but also has a bearing on the subject matter of the charge. More fundamentally, it gives rise to the problem discussed at para 48 above: that

if the credibility of the complainer's evidence is decisive of the issue, then justice to the accused requires that it should be possible in principle for him to challenge her credibility, where grounds for such a challenge exist. Clearly, there have to be limits to such challenges, if the trial is not to be overwhelmed by the investigation of collateral issues; but a complete exclusion (extract convictions apart) is unlikely to be compatible with a fair trial, as is illustrated by the English and Canadian experience. Lord Clarke's suggested approach, based on an assessment of the probative value of the evidence and the countervailing risks which its admission might pose to the interests of justice, is aligned to that adopted by the Canadian Supreme Court in *R v Seaboyer*, and later by the Scottish Parliament in sections 274 and 275. The way in which the English courts have interpreted the prohibition on evidence going to credibility in section 41(4) of the 1999 Act also demonstrates a more flexible approach, interpreting the legislation as permitting the admission of such evidence where it has a bearing on the subject matter of the charge or where it supports the defendant's defence to the charge.

125. The Lord Justice Clerk's approach, requiring judges to apply a rule that collateral evidence is inadmissible unless instantly verifiable without considering the interests of justice in the case before them, might also be contrasted with the statement in *Thomson v HM Advocate* that the exclusion of collateral evidence is "subject always to consideration of the interests of justice in the particular case" (para 41 above). As was emphasised in *Moir (No 1)* and *DS v HM Advocate* (para 93 above), the principle of fairness underpins a fundamental value of criminal jurisprudence in a free society.

(2) Evidence of sexual behaviour not forming part of the subject matter of the charge

126. In *LL v HM Advocate* [2018] HCJAC 35; 2018 JC 182, the accused was charged with rape. His defence was consent, or a reasonable belief in consent. The defence applied under section 275 for permission to lead evidence that the complainer and the accused had been friends before the incident and had engaged in consensual sexual intercourse on an occasion ten months before the alleged rape at the address where the accused was then living. The application stated that the fact that the accused and the complainer were friends who previously engaged in consensual sexual activity of a similar nature at the accused's home lent support to his defence. The application was refused on the basis that the evidence had no bearing on whether there was consent or a reasonable belief in consent on the occasion in question. That decision was upheld on appeal, on the basis that the evidence was irrelevant and inadmissible at common law.

127. Lord Brodie, giving the opinion of the court, said that the court "simply do not see why the fact that there was free agreement and reasonable belief as to that agreement on one occasion, makes it more or less likely, as a matter of generality, that there was free agreement and reasonable belief as to that agreement on another occasion many months later" (para 14). He continued:

> "That is not to say that there may never be cases where a previous act of intercourse might not be relevant to the issue as to whether the complainer consented on a subsequent occasion or to the issue of whether an accused reasonably believed that the complainer was consenting. However, in such a case particular circumstances would have to be averred to demonstrate what was said to be the connection between what we would see as, prima facie, unrelated events."

128. As in the case of *CJM v HM Advocate*, the court's decision is unsurprising on the facts. The reasoning is similar to that of the House of Lords in *R v A (No 2).* It proceeds on the basis that the bare fact of prior consensual sexual activity is not relevant to a defence of consent: it may have been an isolated or casual encounter with no bearing on the facts in issue. However, it will be relevant if the circumstances enable a connection to be made between the previous activity and the facts in issue which bears on the question whether consent was given. The House of Lords explained in *R v A (No 2)* how such a connection might be made: if the circumstances enable an inference to be drawn about the complainant's attitude towards the accused which may bear upon the jury's assessment of her state of mind at the time of the events which are the subject matter of the charge.

129. On the other hand, Lord Brodie's description of successive acts of intercourse between the same couple as "prima facie, unrelated events" has been repeated time and again in the later case law (eg *SJ v HM Advocate*, para 67; *CH v HM Advocate*, paras 66, 67, 115 and 131). With respect, it overstates the position. Such events may very well be related, and commonly are: after all, much if not most sexual activity takes place within the context of relationships, such as those between married or unmarried couples, or between boyfriend and girlfriend, of which repeated sexual activity forms an ordinary incident. However, the point being emphasised was the requirement that a connection between those events be demonstrated, in the application under section 275, by averring the "particular circumstances" which would make the earlier activity relevant to the issue of consent at the material time.

130. That requirement is consistent with acceptance that evidence of prior or subsequent sexual activity between the parties can be relevant, as the Scottish courts have long accepted: see, for example, *Dickie v HM Advocate* (para 51 above). Indeed, its significance may be such that its exclusion would render the trial unfair, as was recognised in *R v A (No 2).* However, there are indications in cases since *LL v HM Advocate* that the approach has hardened to the extent that, while the possibility of such evidence being admitted continues to be acknowledged, it appears to be more theoretical than real.

131. For example, in the unreported case of *Thomson v HM Advocate*, 13 December 2019 (summarised in the *Preliminary Hearings e-Bench Book*, para 9.13), the accused was charged with anal rape. His defence was consent. He sought to lead evidence that in the 24 hours preceding the incident the complainer expressed her willingness to have anal sex with him, and that in the months following the incident he and the complainer continued to meet regularly for consensual sexual intercourse. The evidence was held to be irrelevant at common law. Lord Justice Clerk Dorrian, delivering the opinion of the court, stated:

> "… the fact that a person may have consented to sexual activity on one occasion has *no bearing at all* on whether they consented on another occasion, either before or after the incident in question, *save possibly, in particular circumstances, in the immediate aftermath*. Far less does the fact that on an earlier occasion a complainer discussed the possibility of one type of sexual conduct have a bearing on the question whether that individual later in fact consented to such activity." (Emphasis added)

132. With all possible respect, this is troubling, both as a general proposition and in its application to the facts of the case before the court. Evidence that the complainer had expressed a willingness to have anal sex shortly before the incident, if accepted, might well be considered by the jury to bear on the probability that she consented to anal sex during the incident, and would therefore strengthen the defence. That seems to be obvious as a matter of common sense. The fact that someone has recently indicated a willingness to accept something is relevant to the probability that she willingly accepted it. Evidence that the complainer and the accused continued to meet regularly for consensual intercourse after the incident, if accepted, might also be considered by the jury to bear on the likelihood that she had been raped, since the jury might well regard it as unlikely that a woman who had been raped would then maintain a relationship of that kind with the rapist. That again seems obvious as a matter of common sense. Depriving the accused of the opportunity to put evidence before the jury which would, if accepted, have significantly strengthened his defence, is difficult to reconcile with the right to a fair trial under article 6.

133. In *HM Advocate v JW* [2020] HCJ 11; 2020 SCCR 174 the accused was charged with rape, including anal rape. His defence was consent. He applied under section 275 for permission to lead evidence (1) that the complainer had sent him text messages in the days prior to their meeting in which she said that she had a high sex drive and enjoyed anal sex, and (2) that they had had further consensual sexual intercourse a few hours after the events with which the charges were concerned.

134. Lord Turnbull refused the application. In relation to head (1), his decision was based on the legal principle that consent to sexual intercourse must be contemporaneous (para 19):

> "If consent cannot lawfully be issued in advance, the question of consent in relation to the sexual act between the accused and the complainer specified in the charge cannot be illuminated, or determined to any extent, by prior expressions of interest in sexual conduct with the accused, or by expressions of interest in any particular type of sexual activity."

That, with respect, is a non sequitur. The rule of law that consent to sexual activity cannot be given in advance has no bearing on the question whether prior expressions of a desire to engage in sexual activity with the accused may be relevant to a defence of consent, or of reasonable belief in consent. Plainly it is possible that they may be, if they provide support for the accused's account of events, as the evidence in question did. The fallacy in the reasoning can perhaps be illustrated by considering another rule of law: that the mens rea of murder must be present at the time of committing the act which causes death. That rule of law is perfectly consistent with the admissibility of evidence of previous expressions of a desire to kill. The evidence does not confirm that an intention to kill was present at the material time, but it is relevant to an assessment of the probability that it was.

135. In relation to head (2), Lord Turnbull considered that "the contention that the appellant engaged in consensual sexual intercourse with the complainer at a point between 09.30 and 10.30 has no bearing at all on whether she consented to sexual activity with him in the early hours of the morning at his house at some time between 04.30 and 07.00" (para 26). He considered that to admit the evidence would conflict with respect for the autonomy of the complainer. In that regard he cited the speech of Baroness Hale of Richmond in *R v Cooper* [2009] UKHL 42; [2009] 1 WLR 1786, a case concerned with mental capacity to consent to sexual relations, where the issue was whether capacity was general or person- and situation-specific. In the passage on which Lord Turnbull relied, at para 27 of her speech, Lady Hale observed that it was difficult to think of an activity which was more person- and situation-specific than sexual relations: "[o]ne consents to this act of sex with this person at this time and in this place".

136. That observation is unquestionably correct; but it has no bearing on the question whether evidence that a person had consensual sexual relations with an accused a few hours after he is alleged to have raped her may be relevant to the issues which the jury have to decide. Plainly it may be, because a jury may consider that it is unlikely that a woman would willingly have sexual relations with a man who raped her a few hours earlier. As Lord Steyn observed in *R v A (No 2)*, the mind does not usually blot out all memories. Just as evidence of distress can shed light on a complainer's account that she

was raped, so evidence of the absence of distress, indeed that she and the accused were on intimate terms, can equally bear on an assessment of her evidence that he had raped her not long before.

137. The logical fallacy in Lord Turnbull's reasoning is the same as that which affected his reasoning in relation to head (1): the supposition that because one fact, A, does not entail another fact, B, therefore A has no bearing on the probability of B. As Lord Steyn observed in *R v A (No 2)*, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. Unfortunately, this fallacy appears to have become embedded in the courts' approach to applications under section 275.

138. Lord Turnbull concluded that since the evidence had no direct bearing on the issues in the case, it could only bear on the credibility of testimony, and was therefore collateral. Since it could not be verified instantly, it was therefore inadmissible, applying *CJM v HM Advocate.* A coda to Lord Turnbull's opinion records that his decision was affirmed on appeal (para 38). No opinion appears to have been issued. As in the case of *Thomson v HM Advocate*, the apparent effect of the decision was to deprive the accused of the opportunity of placing evidence before the jury which would, if accepted, have significantly strengthened his defence. In principle, this is difficult to reconcile with the right to a fair trial under article 6.

139. A more nuanced approach, similar to that proposed by Lord Clarke in *CJM v HM Advocate* in relation to evidence bearing on credibility, was proposed in Lord Malcolm's minority opinion in *SJ v HM Advocate.* Lord Malcolm considered that "questioning or evidence as to a prior sexual relationship with the accused may, not always, but may bear on a fact, or allow an inference of fact, which is relevant to the issue of consent" (para 24). Every case would depend upon its own particular facts and circumstances, including the nature and extent of the behaviour and the purpose of the evidence in the context of the issues at the trial. For example, "if it is intended to demonstrate a close and affectionate relationship, that may well be treated differently from a one-off and disputed alleged previous act of consensual sexual intercourse" (para 26). Accordingly, "applications under section 275 based on the prior sexual history of the complainer and the accused should not be more or less automatically refused as raising irrelevant or collateral matters" (para 28).

140. In deciding whether such evidence should be admitted or excluded as collateral, Lord Malcolm considered that "the signposts are provided in section 275(1) of the Act, and in particular the requirement in [subsection] (c) that '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', keeping in mind that the proper administration of justice includes 'appropriate protection of a complainer's dignity and privacy'" (para 25). He added that he had

"concerns about an approach which would render this test largely redundant, with all or at least most applications being refused on the basis of the second of the three cumulative tests in section 275(1), namely that of relevancy under subsection (1)(b)" (ibid). He commented that it "is that evaluation based upon the particular circumstances of a case … which provides the safeguard against miscarriages of justice and breaches of article 6" (ibid). That approach is consistent with *R v A (No 2)*.

141. This area of the law was reconsidered by a Full Bench in *CH v HM Advocate*. The accused was charged with having raped the complainer while she was intoxicated and incapable of consenting, after they went back to his house after an evening out together. He applied under section 275 for permission to lead evidence that he did not have intercourse with the complainer when they returned from their evening out, as she was drunk and "coming on to him" in a disinhibited manner, but they had consensual intercourse shortly before they went out for the evening, and did so again the following morning. The total period involved, according to the opinion of Lord Glennie, was about 12 hours. It was argued that, without the evidence about what had happened before they went out, and the evidence about his rejecting her advances when they got back, the accused would be severely hampered in explaining his version of events; and that the evidence of consensual sexual activity within a short period after the alleged incident was relevant as bearing on the complainer's credibility (although the point was not argued, it would also, and more importantly, be relevant to the jury's assessment of whether she had been raped, as explained earlier). The application was refused.

142. Lord Justice General Carloway considered this to be "a classic case of an accused person attempting to deflect the jury's attention away from the real issues for trial by introducing irrelevant and collateral matters" (para 5). He cast doubt on the authority of *R v A (No 2)*, on the basis that "it predates the dicta of Lady Hale in *R v Cooper* (para 27) which might be seen as more reflective of modern thinking and values" (para 8). The problem with this line of reasoning was explained at paras 136-137 above.

143. Lord Justice Clerk Dorrian, in an opinion with which the majority of the court agreed, expressed disapproval of the decision in *Oliver v HM Advocate* [2019] HCJAC 93; 2020 JC 119 to admit evidence, undisputed by the complainer, that she had chosen to stay with the accused in his flat during the day or two following the alleged sexual offences, and that during this time they engaged in sexual intercourse. The evidence was admitted on the basis that the jury might take the view that "the complainer's decision to continue to reside in the same house with him and to engage in consensual sexual relations with him over the following day or two undermine the complainer's credibility" (*Oliver v HM Advocate*, para 9; again, more importantly, the evidence would also go to the question whether the offences had been committed). The Lord Justice Clerk disagreed with that reasoning (para 64):

> "If evidence of conduct some weeks after an alleged incident is not capable of throwing light on the question of consent at the time of the alleged incident (as the court in *Oliver* determined) what is the basis for saying that such evidence is capable of throwing light on the issue if it relates to something which happened within a day or so? In each case the argument is essentially the same, namely that evidence of a subsequent consensual act is capable of bearing on the question whether a prior act was consensual. I fail to see how this can be other than collateral."

It appears to have been her opinion that the evidence should have been excluded as collateral even though it was undisputed. The Lord Justice Clerk expressed approval of the decision in *HM Advocate v JW* to exclude similar evidence, where the subsequent consensual acts took place within a few hours of the alleged rape (para 135 above).

144. The Lord Justice Clerk went on to say that "[t]he other aspect of *Oliver v HM Advocate* which gives rise to concern is the suggestion that communications in which a willingness to engage in sexual intercourse at some time in the future was expressed may be relevant to the question whether, on an entirely different and subsequent occasion, such consent was in fact given" (para 65). This, she said, "seems to me to be entirely inconsistent with *GW v HM Advocate* [2019] HCJAC 23; 2019 JC 109 and I again agree with Lord Turnbull in *JW*" (ibid). *GW v HM Advocate* is the authority which established that consent must be given at the time of the sexual activity. Accordingly, in the view of the Lord Justice Clerk, evidence indicating a willingness to consent to sexual intercourse, expressed at a time prior to the critical events, is necessarily irrelevant because of the rule that consent must be given contemporaneously. The problem with this reasoning was explained at para 134 above.

145. The accused's account of what had happened during the incident with which the charge was concerned was also considered to fall within the scope of section 274(1). The Lord Justice Clerk rejected the Crown's submission that the evidence did not require an application under section 275 because it was merely the accused's account of the subject matter of the charge. She did so because his account involved sexual behaviour which was not detailed in the indictment, and therefore did not form "part of the subject matter of the charge" (para 74). This reasoning reflects a literal reading of the legislation; but it is difficult to attribute to the legislature an intention that the accused should be prohibited from giving his account of the critical events unless the court exercises the power under section 275(1) in his favour. Even if the legislation could otherwise be interpreted as enabling the court to prevent the accused from placing his account before the jury, such a reading would be incompatible with his Convention right to a fair trial.

146. The majority of the court also rejected a submission that it was necessary to lead evidence of prior sexual behaviour between the complainer and the accused in order to provide context or background to his account of what happened during the incident in question: unless the evidence in itself met the test of relevance, it could not be admitted in order to provide context. Past practice was less inflexible, as has been noted *(SJ v HM Advocate*, para 79). There may, of course, be cases where the defence case can be properly put and evaluated by the jury without any need to refer to previous sexual behaviour. However, there may be others where to disallow any reference to previous sexual behaviour would deprive the defence account of all credibility. For example, the jury may find it difficult to accept a defence that the complainer's allegation is motivated by malice if they are unaware of a sexual background which might explain why she should be prepared to make a false allegation. More generally, extracting an account of the critical events from their historical context may have fatal consequences for the credibility of that account. This needs to be recognised in order to secure a fair trial (as it was in *R v A (No 2)*: para 68 above), possibly through a sufficiently generous understanding of the concept of relevance.

147. Lord Glennie dissented. He emphasised the contrast between the approach now adopted to the common law and the basis upon which sections 274 and 275 were enacted, observing that the current approach appears to assume that all or almost all the evidence falling within the scope of the statutory scheme is to be excluded on the basis that it is irrelevant or collateral. He also commented that "the court has sometimes been at pains to point out that it was not suggesting that a previous sexual encounter could never be relevant to the question of consent. But instances where that evidence might be relevant are clearly to be regarded as exceptional" (para 93). He considered that the relevance of evidence of a prior sexual relationship between the complainer and the accused should be a matter of proper consideration in each case, without any predisposition to hold it to be irrelevant. The necessary gatekeeping exercise, designed to ensure the policy objective of preventing the admission of unnecessary and humiliating evidence about a complainer's private, intimate and sexual history, was better served by the proper application of the statutory tests in sections 274 and 275 than by adopting an approach to relevance which parted company with logic and common sense.

148. A final illustration of the way in which the law is now applied is the case of *Javaid v HM Advocate*, unreported, 26 July 2024. The complainer and the appellant went in his car to a hotel, where they had intercourse. The issue was whether it was consensual. The appellant wished to lead evidence that the complainer had been touching him sexually on the way to the hotel, and that they had kissed in the car when he dropped her at her home after they left the hotel. Permission was refused. In an opinion given by Lord Justice General Carloway, the evidence was said to be irrelevant. Even if, as the appellant maintained, there had been an agreement to go to the hotel in order to have intercourse, it was doubtful whether evidence of the agreement would be admissible, since consent must be given at the time of the sexual activity and cannot be given in advance.

149. In the foregoing cases, as well as finding that the evidence sought to be adduced was inadmissible at common law, the court also considered that it would in any event be inadmissible under section 275, as its probative value was insignificant and outweighed by the risk of prejudice to the administration of justice. That conclusion was inevitable, given the court's view that the evidence was irrelevant.

7. The relevant principles of Convention law

(1) Introduction

150. Article 6 of the Convention guarantees certain rights of persons charged with criminal offences. It provides as follows (so far as material):

> "1. In the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> …
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him …"

151. The case law of the European court has made it clear that the admissibility of evidence is primarily a matter for regulation by national law. The European court's task is to ascertain whether the proceedings as a whole were fair: see, for example, *Murtazaliyeva v Russia* (2018) 47 BHRC 263, para 139. In considering that question, the exclusion of evidence which is relevant to the defence may, of course, be a highly material factor.

152. As a rule, the rights conferred by article 6(1) and (3)(d) "require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him": see, for example, *Saïdi v France* (1993) 17 EHRR 251, para 43. There must also be equality of arms between the prosecution and the defence: *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 60.

153. What those requirements mean is illustrated by cases concerned with the situation where an applicant complains that he was not allowed to call or question certain witnesses. The test formulated by the European court, as explained in *Murtazaliyeva v Russia*, para 158, consists of three questions: first, whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; secondly, whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine the witness; and thirdly, whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings.

154. In relation to the first of those tests, the court's previous case law had held that the applicant had to refer to the relevance of the witness's testimony for the establishment of the truth, or to its ability to influence the outcome of the trial. In *Murtazaliyeva v Russia* the Grand Chamber explicitly reformulated the standard "by bringing within its scope not only motions of the defence to call witnesses capable of influencing the outcome of a trial, but also other witnesses who can *reasonably be expected to strengthen the position of the defence*": para 160 (emphasis added). The relevance of testimony also determined whether an applicant had advanced sufficient reasons for his or her request to call the witness: its relevance might be so apparent that even scant reasoning would suffice: para 161. The court also said that the answers to the first two questions would generally be strongly indicative as to whether the proceedings were fair: para 168.

155. Mutatis mutandis, a broadly similar approach appears to be relevant to the admission of other forms of evidence. The court has, for example, found that proceedings were unfair where there was a failure to disclose documents to the defence at a stage when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses: *Rowe and Davis v United Kingdom*, para 65.

156. The case of *Poropat v Slovenia* (Application No 21668/12), judgment of 9 May 2017, is particularly relevant in the present context. The applicant had been the defendant in criminal proceedings in which he was charged with making a threat against the complainer, RH, in front of the building where they both lived. The applicant denied that he had done so, and maintained that the incident had been invented by the complainer, with whom he had been in several legal disputes. There was no witness present at the material time, but evidence was admitted from a work colleague of the complainer, KC, to the effect that the complainer had telephoned him soon after the incident and had told him about the threat. The applicant sought to have evidence admitted from a friend of his,

DC, to the effect that he had seen the complainer influencing witnesses to give false evidence against the applicant in earlier proceedings. The domestic courts declined to admit the evidence on the ground that it was irrelevant: the witness could not give evidence about the incident which formed the subject matter of the proceedings. In other words, the evidence bore only on the credibility of testimony. The courts also refused a request by the applicant that video footage be recovered from surveillance equipment which the complainer had installed on his property. The complainer maintained that the footage had not been retained and that it would not in any event have covered the location where the incident occurred. The applicant was convicted.

157. The European court found that there had been a violation of article 6(1) and (3)(d). It noted that the alleged offence had not been witnessed by any independent witnesses, and that the applicant had been convicted solely on the basis of the testimony of the complainer and his colleague. It also noted that the applicant's request to have DC's evidence admitted "could not be said to have been vexatious and it was indeed relevant to his main line of defence – challenging the reliability of RH and KC" (para 47). The court went on to note that the domestic courts' reasons for refusing the request "express what would appear to be the courts' position that such evidence could not be, as a matter of principle, considered relevant … as it did not relate to the actual incident which was the subject of the charges" (para 49). The court continued (para 50):

> "This position of the courts made it impossible for the applicant to challenge the witnesses' credibility by having the evidence relating to their prior conduct examined. Having regard to the foregoing, to the evidence on which the court relied in reaching its finding that the applicant was guilty… , and to the failure of the authorities to secure the video surveillance footage…, the court finds that an unfair advantage in favour of the prosecution was created and that consequently the applicant was deprived of any practical opportunity to effectively challenge the charges against him".

158. The European court's reasoning is relevant in the present context. In proceedings where the credibility of testimony was critical, a refusal in principle to accept the relevance of evidence going to credibility but not otherwise bearing on the subject matter of the charges was found to have had the effect of depriving the accused of any practical opportunity of effectively defending himself, and therefore of rendering the trial unfair. As in the English cases discussed in paras 71-72 above, the evidence did not merely impugn the credibility of testimony, but also supported the defence being put forward.

159. In applying the principles described above to criminal proceedings concerning sexual abuse, the European court has regard to their special features. It accepts that in such cases certain measures may be taken for the purpose of protecting the victim, in

accordance with article 8 of the Convention, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence. This was explained, for example, in *SN v Sweden* (2004) 39 EHRR 13, para 47:

> "The court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, *provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence*. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours." (emphasis added)

The words which have been italicised reflect the fact that the right to respect for private life under article 8 is a qualified right, whereas the right to a fair trial under article 6 is unqualified.

160. The case law of the European court in this area has addressed a number of issues, including sexual behaviour evidence. The latter issue is particularly relevant in the present case.

(2) Sexual behaviour evidence

161. There are a number of cases in which the European court has considered the compatibility with article 8 of questioning during a trial which concerned the complainer's sexual behaviour. The applicant in the case of *Y v Slovenia* (2016) 62 EHRR 3 had given evidence at the trial of a family friend who was accused of having sexually assaulted her seven or eight years earlier, when she was 14 years old. At the trial, the applicant was cross-examined by the accused personally over several hearings. The European court reiterated that "certain measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence" (para 103). As the applicant's testimony at the trial provided the only direct evidence in the case, the interests of fair trial required the defence

to be provided with an opportunity to cross-examine her (para 105). However, "a person's right to defend himself does not provide for an unlimited right to use any defence arguments" (para 106). In concluding that there had been a violation of the applicant's rights under article 8, the court emphasised the humiliating and degrading nature of the questions put to the applicant by the accused in cross-examination, which "exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence" (para 109).

162. The applicant in *JL v Italy* (Application No 5671/16), judgment of 27 May 2021, had given evidence at the trial of several men accused of raping her. The court noted that the lawyers for the defence "did not hesitate, in seeking to undermine the applicant's credibility, to put personal questions to her concerning her family life, her sexual orientation and her intimate choices. These questions were sometimes unrelated to the facts, which is firmly contrary not only to the principles of international law with regard to the protection of the rights of victims of sexual violence, but also to Italian criminal law" (para 132). However, the questioning was not found to have resulted in a violation of article 8, as the prosecutor and the judge had intervened to protect the complainer.

163. The only decisions of the European court directly concerned with the compatibility with article 6 of restrictions on the admissibility of evidence concerning a complainer's sexual behaviour appear to be two cases brought against the United Kingdom. The first case, *Oyston v United Kingdom* (Application No 42011/98), decision of 22 January 2002, concerned the application of the Sexual Offences (Amendment) Act 1976, discussed at para 56 above. The applicant had been convicted of raping a young woman. He complained that the restrictions imposed by the legislation applied only to the cross-examination of the complainant, and not to the cross-examination of a female witness called by the defence, thereby creating an inequality of arms. That complaint was rejected on the basis that it was not suggested that the applicant's counsel had been prevented from putting such questions to the complainant as were considered necessary for the furthering of his defence. It was also accepted that it would have been possible to object to any improper line of questioning of the female defence witness, "eg if it had related to matters which could not affect credibility or could only do so in a slight degree or there was a great disproportion between the imputation made and the importance of the witness's evidence". The court was not prepared to rule in the abstract that the legislative differentiation between the complainant and other female witnesses was incompatible with article 6.

164. The applicant also complained about the refusal of his appeal, based on fresh evidence relating to sexual behaviour of the complainant with another man after the events with which the trial was concerned. The evidence was said to bear on the complainant's credibility. The complaint was rejected on the basis that the Court of Appeal had considered the evidence and had concluded, for reasons which the European court accepted, that it had no relevance to the question whether the complainant had been raped by the applicant.

165. The case of *Judge v United Kingdom* concerned the application of sections 274 and 275 in the domestic case of *Judge v HM Advocate* [2009] HCJAC 103; 2010 SCCR 134, several years before the developments in Scots law and practice with which the present appeals are concerned. The applicant was convicted of several offences of sexual abuse committed against three girls who had been in his care as foster children. Prior to trial, he applied under section 275 for permission to adduce evidence, first, that one of the complainers had indicated to a witness, some time before she disclosed that she had been abused, that she did not believe the allegations made by the other complainers; and secondly, that some years before she disclosed the abuse, the applicant had made allegations of theft against her which were reported to the procurator fiscal. The application under the first head was refused on the basis that one witness cannot generally give evidence about the credibility of another witness. The application under the second head was refused on the basis that the test of relevance under section 275(1)(b) was not met. An appeal against conviction was refused. The appeal court (Lord Reed, Lord Mackay of Drumadoon and Lord Brodie) held that the evidence of the comment about other complainers' evidence was inadmissible at common law and did not fall within the scope of section 274. In relation to the evidence of the allegations of theft, none of the tests in section 275(1)(a), (b) and (c) was met. This was "bad character" evidence, but the application did not seek to prove the commission of specific thefts. It did not render the accused's guilt of sexual abuse more or less likely. Even if assumed to be relevant, its probative value was insignificant. The appeal court emphasised the lack of any temporal or other connection between the making of the allegations of theft and the disclosure of abuse.

166. The European court rejected the applicant's complaint that there had been a violation of article 6(1) and (3)(d). It described the statutory scheme established by sections 274 and 275 as "careful and nuanced", observing that it "does not place an absolute prohibition on the admission of such evidence" – ie evidence of sexual history or bad character – "but allows for its admission when that history or character is relevant and probative" (para 29). It added that "the legislation recognises that there may be circumstances in which such questioning is necessary for the proper conduct of the defence; instead of prohibiting such questioning, it places it under judicial control and accords a margin of discretion to the presiding judge in allowing such questioning". The court noted that the prohibition in section 274 was not confined to matters relating to the complainer's sexual history but, as in *Judge* itself, excluded other forms of evidence which were intended to cast doubt on the character of the complainer. In that regard, the court observed that "there may be strong reasons for allowing such evidence", and that, "subject to a test of relevancy, the prohibition should not be applied without due regard for the right of the defence to challenge effectively the evidence of a complainer" (ibid). On the facts, the reasoning of the domestic courts was accepted.

167. Contrary to the tenor of the submissions on behalf of the Lord Advocate, this cautiously expressed decision did not give carte blanche approval to the scheme set out in sections 274 and 275. Like all decisions and judgments of the European court, it was concerned with the individual case before the court. The decision merely established that

the statutory scheme is capable of being applied compatibly with article 6, and had been so applied in the case before the court.

168. The European court in *Judge v United Kingdom* was not concerned with the approach adopted to the common law since *CJM v HM Advocate*, and its decision cannot be regarded as implying that that approach is compatible with article 6. On the contrary, the court expressed approval of the structure of the statutory scheme in relation to evidence of sexual history and bad character because "it allows for its admission when that history or character is relevant and probative" (para 29). The effect of the recent Scottish case law has been to remove from judges the ability to admit such evidence in most cases, on the basis of a rule that it is irrelevant or collateral at common law.

8. The compatibility of the current approach with article 6 of the Convention

169. The implication of *Judge v United Kingdom*, and other jurisprudence of the European court, is that the approach which is currently adopted by the Scottish courts to the admissibility of evidence in cases of rape and other sexual offences is liable to result in violations of article 6. It is not this court's function to decide whether it has done so in any particular cases, other than the two appeals before the court.

170. Notwithstanding the sensitive and controversial nature of the issues in this case, it is necessary to be unequivocal about some fundamental points. First, the purpose of a criminal trial is to determine whether the accused is guilty of the crime with which he is charged, and if so, to impose an appropriate sentence. It is fundamental to our conception of justice that the innocent must not be convicted or punished. This fundamental principle underpins article 6 of the Convention. The interest protected by article 6 is not only that of the individual accused. It is also societal, for no society governed in accordance with the rule of law can tolerate the conviction and punishment of the innocent.

171. The right of the innocent not to be convicted is dependent on the right to a fair trial. That is another fundamental commitment of our society. A fair trial is one which respects the right of the accused to present a full answer and defence to the charge against him. This depends on his being able to call the evidence necessary to establish his defence and to challenge the evidence called by the prosecution. As was said in *R v Seaboyer*, p 608, "the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled". It follows that the law of evidence, if it imposes excessive restrictions on the ability of the accused to present his defence and to challenge the evidence relied on by the prosecution, can be incompatible with the right to a fair trial.

172. Trials for sexual offences do not form an exception to these general principles. The right to a fair trial is as important here as in any other context, particularly given the

gravity of a charge such as rape, and the serious consequences which follow from conviction. However, it is also of great importance that the law should give proper weight to the interests of the complainer in a trial for a sexual offence. It is intolerable that the complainer should be subjected to needlessly intrusive and humiliating questioning, as sometimes happened in the past. It is also important that evidence should not be admitted where it is unnecessary to enable the accused to present his defence and may merely prejudice the jury against the complainer. But the accused cannot be presumed to be guilty. On the contrary, he is entitled to a presumption of innocence: it is for the prosecution to prove his guilt to the satisfaction of the jury; and, as has just been explained, he is entitled to present a full defence. It is of vital importance that he should have that opportunity. If he is wrongly convicted, in a typical case where there is no eyewitness and no medical evidence bearing on the critical issue, then there is little or no prospect of a miscarriage of justice being detected after the trial.

173. It is inherent in an adversarial system of criminal justice that, by pleading not guilty, the accused is challenging the truth of the complainer's allegations. In cross-examination of the complainer, counsel for the defence will properly seek to undermine the credibility of her testimony and suggest that she is not to be believed. That will often be a more intrusive exercise than it would be in a trial for a non-sexual offence.

174. In particular, where consent is an issue, as in most cases involving adult complainers, the question whether the accused is guilty will depend on the complainer's state of mind at the time of the events in question. In order to challenge her testimony about her state of mind at that time, and to support a defence account suggesting a different state of mind, the defence will generally have to rely on her behaviour, sexual or non-sexual, before or after the events in question, as pointing towards the probability that her state of mind at the time of those events was different from her account of it in the witness box, and as supporting the probability that the accused's account is true. Where the accused is able to put forward some positive explanation as to why the complainer should make an unfounded allegation against him, that explanation equally forms an important part of his defence.

175. It may therefore be inevitable that a fair trial in such cases will involve the complainer being asked intrusive questions about her private life and, in some cases, that evidence about intimate aspects of her life may have to be placed before the jury. The law must ensure that such intrusions into her privacy are no more than is necessary to ensure that the accused receives a fair trial. That can be done, for example, by refusing to allow irrelevant questioning, by recording the complainer's evidence in advance of the trial or closing the court to the public when she gives her evidence, and by placing evidence which she might find embarrassing before the jury when she is not present. But if the intrusion is necessary to ensure a fair trial, then it has to be accepted.

176. It is also important that the jury's fact-finding process should not be distorted by the admission of evidence whose probative value to the defence is outweighed by the risk which its admission presents to the proper carrying out of that process. There is a difference between the accused's being able to mount a proper defence, such as one of consent or of a reasonable belief in consent, and the accused's trying to secure an acquittal by prejudicing the jury against the complainer, for example by encouraging them to adopt a censorious attitude towards her behaviour. Section 275(1)(c) enables the court to guard against that risk. It is however a provision which needs to be applied with care where evidence is of significant probative value. The possibility should be borne in mind that the risk of prejudice consequent on the admission of such evidence may be capable of being addressed. As Lady Hale observed in *DS v HM Advocate*, para 94, in relation to evidence admitted under section 275A, the answer does not have to be to withhold the evidence from the jury; they can be given clear and careful directions about how to use it.

177. The general principles described above are reflected in the case law on article 6. As explained earlier, the judgment of the Grand Chamber in *Murtazaliyeva v Russia* indicates that the defence should be able to call evidence which can reasonably be expected to strengthen its position. The case of *Poropat v Slovenia* indicates how that principle applies in a situation where the prosecution case depends on the credibility of the complainer. A refusal in principle to accept the relevance of evidence going to credibility but not otherwise bearing on the subject matter of the charges – evidence which in Scotland would have been treated as collateral, following *CJM v HM Advocate* – was found to have had the effect of depriving the accused of any practical opportunity of effectively defending himself, and therefore of rendering the trial unfair.

178. Similar principles apply in the context of sexual offences. Measures may be taken for the purpose of protecting the victim, but only provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. That test was met by sections 274 and 275, as then applied by the Scottish courts, in *Judge v United Kingdom.* The European court expressly noted the careful and nuanced nature of the legislative scheme, which allowed for the admission of evidence of sexual history when it was relevant and probative. It also noted that there might be strong reasons for allowing the other types of evidence falling within section 274, and observed that, subject to a test of relevancy, the prohibition on the admission of such evidence should not be applied without due regard for the right of the defence to challenge effectively the evidence of a complainer. When the European court referred there to relevancy, it did not have in mind the restrictive understanding of that concept laid down in *CJM v HM Advocate* and the later cases discussed above.

179. Seen against this background, the difficulty of reconciling the current Scottish approach to the admission of evidence in such cases with article 6 is evident. In relation to evidence of sexual behaviour not forming part of the subject matter of the charge, the problems inherent in the approach adopted in *Thomson v HM Advocate*, *HM Advocate v*

JW and *CH v HM Advocate* have been explained. That approach is liable to deprive the accused of the opportunity to put evidence before the jury which is obviously relevant, in the ordinary sense of the word, and which would, if accepted, significantly strengthen his defence. It is therefore liable to result in a violation of article 6.

180. The position is the same in relation to evidence of character, or of non-sexual behaviour bearing on credibility. The approach adopted in *CJM v HM Advocate* is based on the application of a simple rule, without any scope for consideration of the interests of justice. It appears from such cases as *Murtazaliyeva v Russia*, *Poropat v Slovenia* and *Judge v United Kingdom* that compliance with article 6 requires the adoption of a more nuanced approach which, as it was put in the latter case, pays due regard to the right of the defence to challenge effectively the evidence of a complainer.

181. It follows that the Scottish courts are under a duty to modify their current approach so as to ensure that decisions on the admissibility of evidence are in conformity with the Convention, by virtue of section 6(1) of the Human Rights Act. That will cause an inevitable degree of disruption and delay in cases concerned with sexual offences which have not yet gone to trial, cases where the trial is still in progress, and appeals that have not yet been decided. The interval between the hearing of these appeals and the delivery of this judgment should, however, have given the responsible authorities time to consider their response.

9. The present appeals

(1) The Daly case

182. Shortly after the hearing of these appeals, the court announced its decision to dismiss Mr Daly's appeal. It did so because it had concluded that the appeal should be dismissed, and it was undesirable to hold up proceedings before the appeal court, the Crown having accepted that there was a separate breach of the appellant's article 6 rights because of a failure to disclose documents.

183. The court's reasons for dismissing the appeal can be stated shortly. To recap, the evidence in question was that the first complainer, whom Mr Daly was charged with having raped when she was aged between five and seven, had made a statement two years after disclosing those rapes, to the effect that she had also been raped by Mr Daly when she was aged 13, and had become pregnant. She had given birth at her grandmother's house, and the baby had been given away. A medical examination concluded that it was highly unlikely that she had given birth to a full term baby, but that there was no way of confirming whether she had been pregnant and had had a miscarriage. Defence counsel's note for the purposes of the appeal recorded his understanding that the first complainer did not accept that the allegation was false.

184. The first point that needs to be addressed in relation to article 6 is that no attempt was made to introduce this evidence at the trial. However, that was because counsel recognised that any application for permission to adduce the evidence would inevitably have been refused, following *CJM v HM Advocate*. Counsel was correct in taking that view, as the reasoning of the appeal court made clear. It is not a barrier to a complaint under the Convention that an application was not made where it would have been bound to fail.

185. The evidence in question was relevant for the purposes of article 6 in so far as it might bear on the credibility of the first complainer. The gravamen of the evidence was that she had made a false allegation against Mr Daly, some years after disclosing the rapes which featured on the indictment, about another rape which was said to have occurred several years later. However, on the material available to the court, it was unclear whether the allegation was false, or at least had been a deliberate lie. To ascertain the truth would have required an investigation into an issue which was distinct in time and circumstances from the subject matter of the charges, prolonging the trial and potentially distracting the jury from the proper focus of their attention. Essentially, the jury would be invited to decide whether the accused was guilty of another rape in addition to the ones with which he was charged. The absence of the evidence did not prevent the defence from challenging the credibility of the first complainer by cross-examination and by leading evidence. Furthermore, the credibility of the first complainer's evidence could also be assessed, as the jury were directed, in the light of the evidence given by the second complainer that she too had suffered sexual abuse by Mr Daly when she was a child. In these circumstances, the trial process provided sufficient protection for the right of the defence to challenge effectively the evidence of the first complainer to comply with Mr Daly's rights under article 6.

(2) The Keir case

186. To recap, the complainer and Mr Keir spent several hours drinking together in bars before getting a taxi to his house. They engaged in sexual activity in the bars and in the taxi. If the case against Mr Keir had been that he had engaged in sexual activity with the complainer on arrival at the house by forcing himself on her against her will, then the evidence about the earlier sexual activity leading up to their arrival at the house would have been relevant to the issue of consent (or reasonable belief in consent, if that was an available defence on the facts), and its exclusion would have rendered the trial unfair.

187. However, that was not the allegation. Mr Keir was charged with having sexually assaulted the complainer at the house while she was intoxicated and asleep, and with having raped her when she awoke. Both the terms of the charge and the evidence led by the prosecution implied that this was a continuous course of events, with Mr Keir penetrating the complainer with his finger as she slept, and then, as she awoke, forcing himself upon her.

188. The sexual activity earlier in the evening had no bearing on the likelihood of whether the complainer was asleep, or half-asleep, at the material time. Nor was it Mr Keir's position that the complainer, having awoken, then consented to having sexual intercourse with him. His position was that her account of having been roused from her sleep was untrue. According to the account which he gave to the police, she had been an active and enthusiastic participant in sexual activity after arriving at the house, which continued until he upset her by forgetting her name. The jury were directed that they could only convict him if they rejected that account and accepted the complainer's account. Evidence about the sexual activity earlier in the evening could not give the jury any significant assistance in deciding which of those accounts might be true.

189. In particular, the argument submitted on behalf of Mr Keir, that the complainer's ability to consent to sexual activity earlier in the evening strengthened the probability of her being in a condition to consent to similar activity later that night, does not hold water. It is not known whether her blood alcohol level earlier in the evening was as high as it was later on (although the probability is that it was lower, as more alcohol was consumed as the evening went on); nor, even if it was as high, is it known whether she was capable of consenting to sexual activity earlier in the evening.

190. More fundamentally, the prosecution case was not merely that the complainer was too intoxicated to consent to the sexual activity detailed in the indictment; it was that she was asleep, and, when she awoke, was not in fact consenting. The defence case was that the entire account of the complainer's sleeping and then waking up was untrue. Evidence about the sexual activity earlier in the evening was capable of providing support for the defence case, in so far as it might be relevant to the jury's assessment of the complainer's state of mind at the time of the events detailed in the indictment. However, in the circumstances of the case, its probative value was very limited. The agreed evidence of the complainer's very high level of intoxication, as demonstrated by her blood alcohol level, undermined any inference which might otherwise have been drawn from her behaviour earlier in the evening. The CCTV evidence of her unsteadiness on her feet, which the jury saw for themselves, further weakened any such inference. In those circumstances, the appeal court was entitled to conclude that the probative value of the evidence about her behaviour earlier in the evening was outweighed by the risk that it might prejudice members of the jury against her, and so distort the fact-finding process.

191. The case against Mr Keir did not depend only on the evidence of the complainer. As was just mentioned, the medical evidence demonstrated how intoxicated she was, and the CCTV evidence showed her behaving in a manner which was consistent with a high level of intoxication. The recording of her 999 call enabled the jury to assess how distressed she was after leaving the house. The police officer who responded to the call gave eye-witness evidence of her distress. Mr Keir's counsel was able to cross-examine the complainer and the police officer. Mr Keir's version of events, as given to the police at interview, was before the jury (apart from the references to earlier sexual activity, which for the reasons explained above were of very limited probative value). He could

have given evidence himself if he had chosen to do so. In these circumstances, the trial provided sufficient protection of Mr Keir's rights to meet the requirements of article 6.

10. Conclusions

192. For the reasons explained above, the common law of Scotland in relation to the admission of evidence in trials for sexual offences, as currently applied, is liable to result in violations of the rights of the accused under article 6. However, it did not do so in either of the appeals before the court. The appeals should accordingly be dismissed.