Scottish Criminal Case Reports/2004/SAMUEL McBREARTY Appellant against HER MAJESTY'S ADVOCATE Respondent - 2004 S.C.C.R. 337

SAMUEL McBREARTY Appellant against HER MAJESTY'S ADVOCATE Respondent

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Note of Appeal Against Conviction

Appeal Court, High Court of Justiciary

13 April 2004

Appeal--Defective representation--Charges of child abuse--Credibility of witness--Witness known to have told specific lies including false allegation of separate rape by another person and to have convictions for dishonesty--Witness known to have serious psychiatric problems--Witness not cross-examined on rape allegation--Decision by defence not to obtain expert opinion on witness's mental condition or pursue line of evidence that witness pathological liar--Post-trial reports indicating witness pathological liar and her account consistent with false-memory syndrome--Witness's evidence corroborated by other evidence--Whether defective representation leading to miscarriage of justice

Appeal--Defective representation--Duty of trial counsel to supply court with information

Evidence--Admissibility--Evidence relating to credibility of witness--Expert evidence that witness had pathological propensity to lie for her own advantage and that her account consistent with false-memory syndrome--Whether admissible

The appellant was convicted on two charges of rape and a number of charges of lewd conduct committed in the 1960s involving three young girls. They included a charge of raping a complainer KM and two charges of using lewd practices towards her. The matter had come to light following a civil action against the appellant for damages raised by KM, who had thereafter reported the offences against her to the police. By the time the matter came to trial in 2001 KM had a number of convictions for dishonesty. She told a number of lies before and during the trial, including an allegation that the appellant had made her pregnant and a claim in a police statement that she had been raped by another person on the same day as the appellant had raped her, and that that person had been convicted of the rape. The defence were aware of these lies and also of a psychiatric report showing that she had serious psychiatric problems.

After considerable discussions with the appellant defence counsel decided to cross-examine KM on the basis of her lies, but not to raise the question of her psychiatric condition. Accordingly the defence did not obtain expert assessments as to whether she was suffering from a mental condition that resulted in her being a complete fantasist or whether she was suffering from false-memory syndrome. In coming to that decision they had taken into account that an expert might suggest that KM's behaviour was the result of sexual abuse, that the Crown might lead expert evidence to that effect, and that no such suggestion was present in the medical records available to the defence. Another factor in the decision was that other complainers were expected to give evidence corroborating KM which could be used to contradict any suggestion that KM's complaints were the result of fantasy or false memory. The defence also took the view that expert evidence as to the truthfulness or reliability of a complainer might not be competent, given the decision in *HM Advocate v Grimmond*, infra.

The defence also decided not to cross-examine the complainer on the false rape allegation. That decision was made in the light of an apparently successful cross-examination of her on other specific false statements, given the uncertain prospects on this matter and the absence of any way of judging what her reaction would be.

KM's evidence was corroborated on some charges on the basis of the *Moorov* doctrine by the other complainers, and also by direct evidence from one of them, part of whose account of offences against herself was corroborated by direct evidence from KM.

The appellant was convicted and appealed to the High Court on the ground, inter alia, of defective representation in respect of the failure to pursue a line of defence to the effect that KM was a pathological liar and to cross-examine her on, and lead evidence about, her false allegation of rape. The appellant produced a psychiatric report and the Crown produced a psychological report, both obtained after the trial, and both of which supported the contention that KM was a pathological liar and that her account of her memories was consistent with false-memory syndrome. Neither report, however, excluded the possibility that KM's account of her abuse by the appellant was true or that her difficulties as a witness were caused by the abuse libelled. The Crown accepted in the appeal that that evidence would have been admissible at the trial. It was submitted by the appellant that the scope of the defence of defective representation ('the *Anderson* defence') had been extended in *E v HM Advocate*, infra.

In the course of the appeal proceedings the court invited the trial counsel and solicitors to comment on the ground of defective representation. Senior counsel replied that he had no comment to make, and on being asked specific questions as to why certain decisions had been taken, he replied that he could not possibly recollect why they were taken. The junior trial counsel supplied the court with an account of the reasoning behind the decisions in question.

Held (1) that *E* was entirely consistent with *Anderson (J M) v HM Advocate*, infra, the key point in *E* being that counsel had failed to follow up lines of defence that were plainly crucial to the case despite have been urged to do so by the accused himself and in the course of the trial had failed to pursue lines of cross-examination which were obviously necessary if the defence was to be properly put before the jury (para 35);

(2) that in some cases it may be difficult to draw the dividing line between a judgment made by counsel in the presentation of the defence and a failure properly to present it at all, but that even in the area of professional judgment counsel may make a decision that is so absurd as to fly in the face of reason, in which case the court is entitled to hold that the defence was not properly conducted, and that to hold otherwise, in pursuit of a rigid legalistic distinction, would be to lose sight of the underlying question in every *Anderson* appeal, namely whether the accused was given a fair trial (para 36);

(3) that *Grimmond* correctly expressed the principle that the assessment of the truthfulness of a witness's evidence was a matter for the jury and not for expert evidence, the Crown having sought in that case to support the credibility and reliability of the complainers by leading evidence to the effect that they were likely to be telling the truth (para 48); but

(4) that the proposed defence evidence in the instant case was different in kind, that it was not evidence that KM was not telling the truth, but was evidence of the existence of an objective medical condition, namely that she was a pathological liar, and that such evidence was relevant to the question of her ability to give truthful and reliable evidence (para 49);

(5) that it made sense for the defence not to lead evidence of KM's mental condition but to go for the more straightforward option of showing that she was dishonest and had lied on numerous significant points (para 56), and that the decision not to follow up a line of attack on the basis of KM's mental condition was not unreasonable or perverse, but was entirely within the range of reasonable decisions that were open to the defence and was a reasonable and responsible exercise of counsel's discretion and judgment which could not

be said to have prejudiced the essential fairness of the trial (para 57);

(6) that so far as KM's false allegation of rape was concerned, the decision not to pursue it was made in reaction to the evidence she had already given (para 59), that there was a danger that decisions made under pressure during the trial are assessed out of their proper context when recollected in tranquillity in the appeal court, that senior counsel for the defence had amply demonstrated in cross-examination that KM had lied and been dishonest in numerous ways, and that having regard to the admissions he had obtained from her, his decision not to press cross-examination further was within the legitimate scope of his discretion (para 60); and

(7) that the appellant's convictions did not result from any deficiency in representation, that no matter how convincingly the defence established that KM was a liar, and even a pathological liar, that could never have been the end of the case, the real difficulty for the defence being that her account was supported on a *Moorov* basis and by eyewitness evidence (para 61); and appeal on *Anderson* ground refused.

Observed that although counsel is at liberty to decline an invitation from the court to comment on an *Anderson* ground of appeal, counsel should always bear in mind that as an officer of the court he has certain responsibilities to ensure that such appeals are decided properly and justly, and that if he withholds from the court an explanation that only he can give, there is a serious risk that the court may be unable to decide the appeal with proper knowledge and understanding of the case (para 64), and that senior counsel's attitude in this case was unhelpful to the court and adverse to the interests of justice (para 65).

E v HM Advocate 2002 SCCR 341; 2002 JC 215 (sub nom *A J E v HM Advocate*); 2002 SLT 715 explained.

HM Advocate v Grimmond 2001 SCCR 708 distinguished.

Solemn procedure--Judge's charge--Complainer in child abuse case shown to have given false evidence--Statement by advocate depute in speech to jury construable as invitation to speculate on cause of witness giving false evidence--Whether sufficiently corrected in charge

Solemn procedure--Conduct of Crown--Complainer in child abuse case shown to have lied and alleged to have written anonymous letters--Statement by advocate depute in speech to jury that they might think it reasonable that someone violated as badly as she said she had been might have difficulty in maturing into somebody capable of conforming to other norms--Statement unsupported by evidence--Whether construable as invitation to speculate

The appellant was tried on indictment on charges of child abuse. There was undisputed evidence that one of the complainers had told lies about a number of things. It had also been put to her in cross-examination that she had written certain anonymous letters, but she denied this. In his speech to the jury the advocate depute referred to the letters and said that if she did write them they might think that it was reasonable that someone whose body and mind had been violated as badly as she said hers had been, might very well have difficulty in maturing into somebody who was capable of conforming to the other norms and expectations of society. There was no evidence to support that suggestion.

The trial judge directed the jury that they must decide the case on the basis of evidence, that the speeches made to them and questions asked by counsel were not evidence, and that they must not speculate about matters on which there was no evidence.

The appellant was convicted and appealed to the High Court on, inter alia, the ground that the judge's directions did not adequately correct the advocate

depute's remark. The trial judge stated in his report to the appeal court that in his view the advocate depute's comment was not an invitation to the jury to speculate that psychological or psychiatric disorders might explain the giving of false evidence. The Crown accepted that the comment should not have been made.

Held (1) that the comment could have been construed as an invitation to speculate on the cause of the witness's false evidence (para 32); but

(2) that the strong directions given by the trial judge were adequate (para 33); and appeal on this ground refused

Cases referred to in the opinion of the court:

Anderson (J M) v HM Advocate 1996 SCCR 114; 1996 JC 29; 1996 SLT 155

Campbell v HM Advocate 2004 SCCR 220; 2004 SLT 397

D v HM Advocate 2003 SCCR 654; 2003 SLT 1146

Ditta v HM Advocate 2002 SCCR 891

E v HM Advocate 2002 SCCR 341; 2002 JC 215 (sub nom *A J E v HM Advocate*); 2002 SLT 157

Garrow v HM Advocate 2000 SCCR 772

Green v HM Advocate 1983 SCCR 42

Hemphill v HM Advocate 2001 SCCR 361

HM Advocate v Gilgannon 1983 SCCR 10

HM Advocate v Grimmond 2001 SCCR 708

Jeffrey v HM Advocate 2002 SCCR 822; 2002 SLT 1407

McIntyre v HM Advocate 1998 SCCR 379; 1998 JC 232; 1998 SLT 374 (sub nom *Townsley v HM Advocate*)

McKinlay v British Steel Corporation 1988 SLT 810

Moorov v HM Advocate 1930 JC 68; 1930 SLT 596

R v Robinson [1994] 3 All ER 346; 98 Cr App R 370

Toohey v Metropolitan Police Commissioner [1965] AC 595; [1965] 2 WLR 439; [1965] 1 All ER 148; 49 Cr App R 148

Winter v HM Advocate 2002 SCCR 720.

Samuel McBrearty was charged on indictment with a number of charges involving child abuse. His trial took place between 20 August and 7 September 2001 in the High Court at Glasgow before Lord Reed and a jury. He was convicted of the charges set out in the opinion of the court and appealed to the High Court by note of appeal against conviction on the grounds referred to in the opinion of the court.

When the appeal called at a procedural hearing on 21 November 2002 it was continued to await a psychiatric report and the court directed the Clerk of Justiciary to write to counsel and solicitor who represented the appellant at the trial 'requiring them ... to respond to the grounds of appeal' within 28 days.

At a further procedural hearing on 7 February 2003 the court allowed 42 days for the lodging of proposed amendments to the grounds of appeal, and ordered the case to be heard by a bench of three judges if such amendments were lodged.

On 13 May 2003 the amended grounds were received and the case was continued for a supplementary report from the trial judge, and for the Clerk of Justiciary to write to those representing the appellant at the trial with a request that they respond to the amended grounds and that they be reminded that a reply was awaited to the Clerk of Justiciary's letter of 27 November 2002.

On 11 July 2003 the case was continued to allow the Crown to obtain a psychiatric report, and the court directed the clerk of court to write once again to senior and junior counsel representing the appellant at the trial reminding

them that no reply had been received to earlier letters. On 12 August 2003 the case was further continued to await the psychiatric report. After a further continuation the case was heard on 13 November 2003 when authority was given for taking evidence from Dr Boakes and Dr Tully and warrant was granted for citing them to the diet of appeal to be afterwards fixed. In the event they were not called to give evidence.

The appeal was heard between 16 and 18 March 2004 by the Lord Justice Clerk (Gill), Lord MacLean and Lord McCluskey.

For the appellant: *The Dean of Faculty (Campbell QC), M E Scott QC*, instructed by *McCourts*, Solicitors, Edinburgh.

For the respondent: *Murphy QC, AD, Burke*.

On 13 April 2004 the Lord Justice Clerk delivered the following opinion of the court.

Lord Justice Clerk

Introduction

[1]

The appellant was tried at Glasgow High Court in September 2001 on 21 charges. There were two charges of rape, nine charges of lewd, indecent and libidinous practices, nine charges of assault and one charge of shameless indecency. The offences libelled were alleged to have been committed against girls at Quarrier's Homes, Bridge of Weir, over the years 1961 to 1968. There were five complainers. Before the trial, one of them, JF, became too ill to give evidence. The advocate depute dropped the charges relating to her. At the close of the Crown case he withdrew four charges of assault in relation to KM, two charges of assault and one charge of shameless indecency in relation to LJ, one charge of assault in relation to AF, and one charge of assault and two charges of lewd, indecent and libidinous conduct in relation to JS.

[2]

On 7 September 2001 the appellant was found guilty of the remaining charges, which related to KM, LJ and AF. We have set out charge (3) in the restricted form in which the jury convicted him.

> '(1) On various occasions between 1 October 1961 and 31 December 1964, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did assault [KM], born 11 March 1950 ... enter her bed, lie on top of her, place your hand over her mouth, force her legs apart and rape her.
>
> (2) On various occasions between 1 October 1961 and 10 March 1962, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did use lewd, indecent and libidinous practices and behaviour towards [KM], born 11 March 1950 ... and did enter her bedroom, partially remove or lift up her nightdress and touch her on the legs and buttocks.
>
> (3) On various occasions between 11 March 1962 and 31 December 1964, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did use lewd, indecent and libidinous practices and behaviour towards [KM], born 11 March 1950 ... then a girl of or above the age of 12 and under the age of 16 years and did enter her bedroom, partially remove or lift up her nightdress, touch her on the legs and buttocks, enter a bathroom while she was partially clothed, force her to kneel on the floor, pull her by the hair and insert your private member into her mouth: contrary to the Criminal Law Amendment Act 1922, section 4(1).
>
> (8) On various occasions between 1 October 1961 and 1 April 1968, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did assault [LJ], born 14 March 1951 ... remove her from a bed and force her to accompany you to a bathroom, lie on top of her and rape her.

> (9) On various occasions between 1 October 1961 and 13 January 1963, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did use lewd, indecent and libidinous practices and behaviour towards [LJ], born 14 March 1951 ... and remove her from a bed and force her to accompany you to a bathroom, remove her clothing and your clothing, induce her to kiss your private member, insert your private member into her mouth, emit semen over her body, induce her to masturbate you to the emission of semen, handle her breasts and lick her private parts.
>
> (10) On various occasions between 14 January 1963 and 13 January 1967, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did use lewd, indecent and libidinous practices and behaviour towards [LJ], born 14 January 1951 ... being a girl of or above the age of 12 and under the age of 16 years and remove her from a bed and force her to ac-

company you to a bathroom, remove her clothing and your clothing, induce her to kiss your private member, insert your private member into her mouth, emit semen over her body, induce her to masturbate you to the emission of semen, handle her breasts and lick her private parts: contrary to the Criminal Law Amendment Act 1922, section 4(1).

(17) On an occasion between 1 October 1961 and 8 February 1965, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did use lewd, indecent and libidinous practices and behaviour towards [AF], born 9 February 1953 ... and did enter a bathroom while she was naked and handle her private parts.

(18) On various occasions between 9 February 1965 and 28 June 1968, both dates inclusive, at Quarrier's Homes, Bridge of Weir, you did use lewd, indecent and libidinous practices and behaviour towards [AF], born 9 February 1953 ... being a girl of or above the age of 12 years and under the age of 16 years and did enter her bed and handle her breasts and private parts underneath her clothing, and induce her to handle your private member: contrary to the Criminal Law Amendment Act 1922, section 4(1).'

The jury convicted the appellant by a majority on charges (1), (2), (3) and (8), and unanimously on charges (9), (10), (17) and (18).

[3]

On 28 September 2001 the appellant was sentenced to 12 years' imprisonment in cumulo on the common law charges and to two years' imprisonment in cumulo on the statutory charges, the sentences to run concurrently and to be backdated to 7 September 2001. The appellant was 70 years old at the date of the sentence.

The background

[4]

The appellant was employed at Quarrier's Homes from about 1 October 1961 to about 28 June 1968. Quarrier's Homes cared for children who were orphans or whose families were unwilling or unable to look after them. The children were accommodated in Quarrier's Village, a largely self-contained community. The residential accommodation comprised about 30 houses. Each house accommodated about 14 children and was run as a self-sufficient unit. The appellant and his wife were the house parents in a house known as Cottage 5.

The case for the Crown

The complainers

[5]

AF lived in Cottage 5 from about the age of five. From 1961 onwards she was in the care of the appellant and his wife. She spoke to the essentials of charges (17) and (18). AF was unusually nervous. During her evidence she became distressed and was on the verge of vomiting. At the end of her evidence, she had to be helped from the court, as she was barely able to walk.

[6]

LJ lived in Quarrier's Homes from the age of two months. She was in Cottage 5 during the period when it was run by the appellant and his wife. She spoke to the essentials of charges (8), (9) and (10). She said that

she had seen the appellant getting into AF's bed at night, and the covers going up and down, and that she had also seen him getting into KM's bed at night. She said that he would go to her bed one night, then to KM's a few nights later, then AF's a few nights after that, and so on. She said 'it was like he was doing the room'. LJ too became distressed. It emerged during her evidence that she had suffered from depression and had received psychiatric treatment.

[7]

The trial judge says that both AF and LJ were good witnesses and that AF was particularly impressive.

[8]

KM spoke to the essentials of charges (1), (2) and (3). She said that the appellant regularly went into the girls' bedroom at night and climbed into her bed. He would hold his hand over her mouth and rape her. This began soon after the appellant's arrival in Cottage 5 and continued regularly until she left the Homes at the end of 1964. She had also seen him going into LJ's bed, and then hearing LJ crying. KM too became distressed while giving evidence.

[9]

KM was a difficult witness. According to the trial judge, she appeared to be a person of limited education and below-average intelligence, although a psychiatric report suggested that that might be attributable to anxiety and distress. She answered questions in a child-like manner and at times spoke in the present tense as if she were still living in the home. She appeared to be nervous of anyone in a position of apparent authority, such as counsel or the trial judge. Her demeanour when she first entered the court suggested great anxiety. Other aspects of her evidence, such as her incorrect statements as to her own age, and her amnesia about her father and half-siblings, indicated a strange personality. She burst into tears at the 'discovery' that she had a sister. These various aspects of her evidence appeared to the trial judge to be genuine rather than feigned.

[10]

The trial judge says that it was obvious that her evidence was going to cause the jury difficulty, as counsel recognised in their speeches.

[11]

It is not in dispute that KM told lies before and during the trial. In a statement to the police she falsely alleged that the appellant was responsible for a pregnancy that ended in a miscarriage after she left Quarrier's Homes and was a resident at St Euphrasia's, Bishopton. That could not have been true since by then she had had no contact with the appellant for over nine months. She lied in saying that she had never had a mobile phone. She lied about her age. She lied about the parentage of her daughter. She lied about having been recently visited by CID officers who enquired if she had been abused at Quarrier's Homes. She admitted that she had written friendly letters to staff at the Homes after she left. The transcript of the cross-examination shows that her evidence was evasive, untruthful and unsatisfactory. At one point, she was warned by the trial judge to tell the truth.

[12]

It was not in dispute that KM had eight convictions, including convictions for theft, attempted fraud, fraud and uttering. There was evidence that each of these complainers had received an anonymous letter, written in a threatening tone, to the effect that she should not disclose what had been secret. In cross-examination, it was put to KM that she had written the letters. She denied this.

[13]

KM raised a civil action against the appellant for damages for the sexual offences referred to in charges (1), (2) and (3) and thereafter reported these offences to the police. That report led to the enquiries that ended in this prosecution.

Corroboration

[14]

On the two rape charges, KM and LJ were capable of corroborating one another on the *Moorov* principle. If the jury did not accept KM's evidence, they could not convict on either of the rape charges.

[15]

On the charges of lewd, indecent and libidinous conduct, KM, LJ and AF were capable of corroborating one another, on the *Moorov* principle. If the jury did not accept KM's evidence, they could not convict on those charges in which she was the complainer and her evidence could not provide corroboration for that of either LJ or AF. But in that event, if the jury accepted the evidence of LJ and AF, there was a corroborated case against the appellant on each of the remaining charges in which they were the complainers.

[16]

In deciding whether or not to believe KM, the jury were entitled to have regard to the similar evidence of LJ on charge (8) and to the similar evidence of LJ and AF on charges (9) and (10) and (17) and (18) respectively.

[17]

This, however, was not a case that depended solely on the *Moorov* principle. There was direct eyewitness evidence from LJ that the appellant had gone into the beds of KM and AF at night. Her evidence indicated that he had done so on numerous occasions. This evidence, if believed, supported KM's evidence. Similarly, KM gave direct eyewitness evidence of having seen the appellant going into LJ's bed at night. That evidence, if believed, supported LJ's evidence.

The case for the defence

[18]

The appellant gave evidence that he was wholly innocent of the charges. He maintained that he could not have abused the complainers without his wife's being aware of it. His wife's evidence was to similar effect.

[19]

The defence also called a handwriting expert, John McCrae, who thought it highly probable that the anonymous letters had been written by KM, although he accepted that another expert might think that there was insufficient material on which to reach a conclusion.

[20]

The defence had done considerable work before the trial in recovering documentary evidence of KM's unreliability. The defence lodged as productions the summons in her civil action and her application for legal aid; a schedule of her previous convictions; and copies of three inconsistent statements that she had given to the police. The defence also lodged two correspondence files and the clinical notes relating to KM held by Leven Health Centre for the period 1982 to 1996. These documents showed inter alia that KM suffered from anxiety/depression and personality disorder. The defence was also provided by the Crown with two reports obtained by the Crown in support of a 'screens' application under section 271 of the Criminal Procedure (Scotland) Act 1995. One was by a consultant psychiatrist. The other was by the leader of a mental health team. These reports showed that KM had serious psychiatric problems for which she had received support from the psychiatric services. We need not go into the details.

[21]

Counsel for the appellant did not put any psychiatric evidence about KM before the jury; but the trial judge says in his report that it would have been manifest to the jury that she was a person with serious psychological problems, at least while in court during the trial.

[22]

In her police statement dated 21 July 1998 KM referred to a specific occasion on which the appellant raped her. She said that earlier on the same day she had been raped by a gardener at Quarrier's Homes named David. She said that after she returned to Cottage 5 and went for a bath, the appellant had raped her. She said that David had later been convicted of the rape and had been sentenced to two years' imprisonment. The Crown accepted that there

was no trace of any such conviction or sentence. A member of the administrative staff of Quarrier's Homes notified the defence solicitors that there was no record of there having been a gardener named David at the relevant time. In cross-examination KM denied having made that statement.

The speech of the advocate depute

[23]

In addressing the jury, the advocate depute dealt with the difficulties in KM's evidence and with the points put to her by the defence, including the authorship of the anonymous letters. He said:

> 'Many points will be made in relation to her, but your decision is, what effect do those points have on whether you accept her evidence on the real issue? [LJ] supported her to the extent of saying that she saw the accused getting into her bed. If she did write the letters, another point, and it was one which I put to Mr McBrearty, either she is an exceptionally malicious, or she is somebody who is an angry person, somebody who is seeking retribution against a person who abused her in her formative years but is just really not going about it in the best way or the most dignified way. You might think that she's someone who just in many respects doesn't really conform to the high standards of what society expects of its citizens. However, you might also think that it is reasonable that someone whose body, and dare I say

> mind, has been violated as badly as she said her body and mind were violated, may very well have difficulty in maturing into somebody who is capable of conforming to the other norms and expectations of society.'

It is agreed that this last remark was not supported by evidence.

The trial judge's charge

[24]

The trial judge directed the jury to reach their decision only upon the evidence. He specifically warned them against drawing conclusions from speculation. These were his directions.

> 'You on the other hand are responsible for all decisions as to the facts of this case as presented to you in the evidence. You must reach your verdict only upon the basis of the evidence and in the light of the directions about the law which I will be giving you. In their speeches, the advocate depute and counsel for the defence have drawn attention to matters which they suggest are important in the evidence and I may also mention some of the evidence in the course of my remarks but you should understand that it is your recollection of the evidence and your assessment of it that counts, not mine or anyone else's. If I refer to evidence I intend to do no more than remind you that you have heard evidence on a particular point (at pp 3-4) ... .
>
> 'So you decide questions of fact on the basis of the evidence led in this courtroom but not everything you have heard in this courtroom in the course of the trial has been evidence. Evidence generally consists of what witnesses have said on oath in the witness box. So the speeches made by counsel this morning, for example, are not evidence in the case. The questions asked during the trial by counsel or by myself are not evidence either. Even if the question takes the form of counsel making a factual assertion, what counsel says is not evidence. So you can't treat as evidence any assertions that counsel's questions may seem to contain unless of course a witness in his or her evidence has agreed with what was being suggested. So remember that the evidence which you been (sic) asked to assess takes the form of the answers which the various witnesses gave to questions which were put to them (at pp 5-6) ... .
>
> 'You must not speculate or guess about matters on which there is no evidence but on the other hand you are of course entitled to draw inferences from the evidence that you have heard. In other words, to add the evidence

> up and decide what conclusions should reasonably be drawn from it' (at pp 7-8).

The trial judge also reminded the jury in detail of the defence criticisms of KM's evidence (at pp 48-49).

Post-trial developments

[25]

The principal point in this appeal is that those representing the appellant failed properly to defend him because they failed to follow up an important line of investigation, namely the obtaining of an expert opinion on the mental condition of KM, and failed to put to her, or to lead evidence, that she had made a false allegation of rape against the gardener.

[26]

KM's veracity was one of the principal issues considered in the preparation of the defence. There appeared to be grounds for an attack on her credibility and reliability on the basis that her mental state predisposed her to lie.

[27]

After the appeal was lodged, Dr Janet Boakes, a psychiatrist with a special interest in the subject of false-memory syndrome and related questions, studied the papers and interviewed KM. She concluded inter alia that KM had a pathological predisposition to lie for her own advantage; that she suffered from an extremely severe personality disorder, with marked histrionic features; that she was unable to distinguish between reality and fantasy, and that her account of her memories was consistent with false-memory syndrome. Dr Boakes also had doubts about the authenticity of the memories spoken to by LJ and AF. She also mentioned in her report that there was no scientific basis for the popular belief that any form of sexual abuse causes lifelong damage to the personality and gives rise to a wide range of psychiatric symptoms.

[28]

The Crown thereafter instructed Dr Brian Tulley, a clinical and forensic psychologist. He reviewed Dr Boakes's report. He broadly supported her conclusions on KM; but, unlike Dr Boakes, he was of the opinion that there was an overwhelmingly more probable likelihood that LJ and AF were drawing on authentic memory, even if some of the memories might have been distorted or contaminated somewhere along the line.

[29]

We assume that if Dr Boakes had been instructed by the defence before the trial, she would have interviewed KM and would have given evidence along the lines of her report.

The issues in this appeal

[30]

The appeal has resolved itself into two main issues, namely (1) whether the trial judge erred in failing adequately to correct the last remark made by the advocate depute in the passage that we have quoted; and (2) whether the legal representation of the appellant was defective in respect of the failure of counsel (a) to pursue a line of evidence to the effect that KM was a pathological liar, and (b) to cross-examine KM, and to lead evidence, about her false allegation of having been raped by the gardener.

Decision

The advocate depute's speech

[31]

The trial judge is of the view that in the words complained of the advocate depute was not inviting the jury to speculate that psychological or psychiatric disorders might explain the giving of false evidence. He understood that comment to mean that if the jury considered that KM had sent the anonymous letters, and if they accepted that she had a number of previous convictions, they should not automatically, and for that reason alone, disbelieve her evidence

that she had been the victim of sexual abuse in childhood. If she was telling the truth about that matter, it would not be surprising if she had not grown up into a model citizen.

[32]

That may be what the advocate depute meant; but in our view his comment could have been construed as an invitation to speculate on the cause of KM's false evidence. The Crown accepts that this comment should not have been made. In our view, the question is whether the trial judge's direction dealt with the problem adequately.

[33]

In our opinion, the strong directions that we have quoted were more than adequate in the circumstances. They sufficiently emphasised to the jury that they should decide the case on the evidence and not on speculation. We reject this ground of appeal.

The *Anderson* grounds

The scope of an *Anderson* appeal

[34]

Anderson (J M) v HM Advocate draws the distinction between a failure properly to present a defence and a judgment as to the conduct of the defence at the trial made in the exercise of professional discretion. In general, a complete failure to put forward an important line of defence, as for example in *Garrow v HM Advocate*, *Hemphill v HM Advocate*, *E v HM Advocate* and *Winter v HM Advocate*, will found a relevant ground of appeal, whereas a judgment made as to the manner of presentation of such a line of defence will not (*Anderson*).

[35]

The learned Dean of Faculty has pointed out that certain obiter dicta in *Jeffrey v HM Advocate* suggested that in *E v HM Advocate* this court had extended the scope of this ground of appeal beyond that countenanced in *Anderson*. In our opinion, *E v HM Advocate*, properly understood, is entirely consistent with *Anderson*. The key point in *E v HM Advocate* was that counsel had failed to follow up lines of defence that were plainly crucial to the case, despite his having been urged to do so by the accused himself, and in the course of the trial had failed to pursue lines of cross-examination that were obviously necessary if the defence was to be properly put before the jury (Lord Justice Clerk Gill at paragraphs 10-17; Lord Hamilton at paragraphs 10-15; Lord McCluskey at paragraphs 19-23 and 29).

[36]

In some cases, it may be difficult to draw the dividing line between a judgment made by counsel in the presentation of the defence and a failure properly to present it at all. But even in the area of professional judgment counsel may make a decision that is so absurd as to fly in the face of reason. In such a case, in our view, the court is entitled to hold that the defence was not properly conducted (*McIntyre v HM Advocate*, Lord Coulsfield at p 388). To hold otherwise, in pursuit of a rigid legalistic distinction, would be to lose sight of the underlying question in every *Anderson* appeal, namely whether the accused was given a fair trial (cf *E v HM Advocate*, Lord Justice Clerk Gill at paragraphs 8-10). These considerations are vital in this case.

The appellant's complaint

[37]

We have first to consider what the line of defence was to which the appellant's complaint relates. There is no doubt that it was to attack the credibility and reliability of KM. This, therefore, is not a case where a defence was not presented at all. At best for the appellant, it is a case where the defence was presented; but presented so inadequately that the appellant did not receive a fair trial.

[38]

Before the trial, it appeared that the credibility and reliability of KM could be attacked in two ways, namely by demonstrating that she had repeatedly told lies, some of them on important matters, and had been convicted of

dishonesty, and by demonstrating that she was a pathological liar. That brings us to the central question whether the defence was defective in either of these respects.

[39]

In accordance with its practice in such appeals, the court invited counsel and solicitors who defended the appellant to comment on this aspect of the appeal. Only the appellant's former solicitors, Beltrami and Co, Glasgow, submitted comments. Senior counsel, Mr Edgar Prais, QC, replied that he had 'absolutely no comment to make'. Since he was adamant that it was inappropriate to respond, his junior, Miss Dorothy Bain, felt bound by his decision.

[40]

The learned Dean of Faculty submitted that if Dr Boakes's evidence had been before the jury, it would have been vital to the credibility and reliability of KM on the questions whether she had been abused at all and, if she had, whether the appellant was the abuser. That evidence therefore related to the fundamental issues at the trial. The lack of it was inexplicable. It affected the fairness of the trial and caused a miscarriage of justice.

[41]

As the hearing of this appeal proceeded, we became increasingly concerned that we were being asked to make a judgment on the professional conduct of counsel without any explanations from those best placed to give them, namely counsel themselves, and were therefore having to decide the issue in a void. It seemed essential that we should know exactly why counsel had failed before the trial to pursue the question of KM's propensity to lie, and had failed to cross-examine, and lead evidence about, her unfounded allegation of rape against the gardener. These appeared to be obvious and relevant lines of attack on KM's credibility.

[42]

Since an appeal of this kind should not be decided upon conjecture, we invited Mr Prais and Miss Bain to answer the following questions.

1 Why was the decision taken in the course of preparation for the trial

(a) not to pursue the idea of having an expert assessment of the medical records of KM; and

(b) not to pursue the question of having the credibility and reliability of the other two complainers assessed from a psychological point of view?

2 Why was KM not cross-examined, and why was no evidence led by the defence regarding the false allegation of rape made by her against 'Donald' (sic), the gardener at Quarrier's Homes?

[43]

Mr Prais replied almost immediately: 'I cannot now possibly recollect why these decisions were taken.' Miss Bain submitted a detailed memorandum on the following morning. It has been an important factor in our consideration of the merits of this appeal. We are obliged to her for her assistance.

Defence preparations

[44]

In our assessment of the criticisms made on behalf of the appellant, our first consideration is that the appellant was defended by a team of capable and experienced counsel and agents who, it is clear, had a thorough grasp of the issues and gave the case a degree of preparation that is unusual in our experience.

[45]

The appellant's former solicitors commented on the complexity of the case. In the course of preparation they had numerous lengthy consultations, with the appellant individually and with counsel, and extensive correspondence and numerous lengthy telephone calls with the appellant. All aspects of the preparation of the case were discussed at length with the appellant. Miss Bain says that consultations with senior and junior counsel were held on Thursday, 18 November 2000, Saturday, 24 February 2001, Sunday, 3 June 2001, Tuesday,

10 July 2001 and Saturday, 11 August 2001. The Saturday and Sunday consultations lasted for the greater part of the day. There was a meeting on or about 17 July 2001 between the appellant, his son and the instructing solicitor and a consultation on Saturday, 21 July 2001 between senior counsel and the instructing solicitor. There were also informal meetings and discussions in the period before June 2001 between counsel and the appellant's son.

The attack based on KM's predisposition to lie

[46]

It is plain that counsel and solicitors considered and discussed the possibility of having expert assessments of the complainers' mental states. Miss Bain tells us that in light of the information within the medical records of KM, the defence considered whether to instruct psychological and psychiatric experts to assess whether (a) KM could be diagnosed as suffering from a mental condition that resulted in her being a complete fantasist or (b) she was suffering from false-memory syndrome. She says that it was clear that KM could be shown to be lying about profoundly significant matters and that her motive was financial.

[47]

The trial judge has doubted whether an attack based on KM's mental condition could logically have been advanced along with an attack based on her lying and dishonesty. He suggests that it would have been difficult to pursue both lines simultaneously. We disagree. In our opinion, the contention that KM's mental condition was such that she was a pathological liar was compatible with the contention that she had told certain specific lies and had been dishonest.

[48]

The trial judge has also suggested that there would have been a doubt as to the admissibility of Dr Boakes's evidence in view of *HM Advocate v Grimmond*, which had been decided by a single judge shortly before the trial. In our view, *Grimmond* was distinguishable from the present case. *Grimmond* correctly expresses the principle that the assessment of the truthfulness of a witness's evidence is a matter for the jury and not for expert evidence. In that case, the Crown sought to support the credibility and reliability of the complainers by leading evidence from a clinical psychologist to the effect that the complainers were likely to be telling the truth. That was a clear case of oath-helping (cf *R v Robinson*, Lord Taylor CJ at p 352b-d).

[49]

The proposed defence evidence in this case was different in kind. It was not evidence that KM was not telling the truth. It was evidence of the existence of an objective medical condition, namely that KM was a pathological liar. This is a distinction that was tentatively made by Lord Osborne in *HM Advocate v Grimmond* (at paragraph 11). Such evidence was relevant to the question of KM's ability to give truthful and reliable evidence (cf *McKinlay v British Steel Corporation*, Lord Justice Clerk Ross at p 813A; *HM Advocate v Gilgannon*; *Green v HM Advocate*). In our view, it would have been admissible (cf *Toohey v Metropolitan Police Commissioner*). In *E v HM Advocate* the court took it for granted, in the absence of any submission by the Crown to the contrary, that the defence would have been entitled to lead expert evidence as to the reliability of answers given by two children in the light of the interviewing techniques used and of the terms in which the children answered the questions (*E v HM Advocate*, Lord Justice Clerk Gill at paragraph 16, Lord McCluskey at paragraph 23). In *Campbell v HM Advocate* the court held that on an issue as to the credibility and reliability of police evidence, expert evidence was admissible on the scientific question of the ability of any person to recall a specific statement verbatim and of the ability of several persons to recall the same statement in near-identical terms.

[50]

We need not discuss this point further, because the advocate depute has accepted, rightly in our view, that the evidence of Dr Boakes, and for that

matter the evidence of Dr Tulley, would have been admissible at the trial.

[51]

We now consider the circumstances that led to the decision not to obtain and lead evidence of this nature. It is plain from Miss Bain's explanation that the question whether or not to instruct an expert psychiatric or psychological assessment of KM's capacity for truthfulness was carefully considered and rejected. The decision not to enquire further into the mental state of KM was deliberately made in order to present her as a de-

termined and calculating liar. This decision was taken after considerable discussions with the appellant over a period of about five to six weeks. The decision was not taken lightly.

[52]

There were four concerns about that line of enquiry, namely that (1) an expert review might suggest that KM's behaviour was a consequence of sexual abuse; (2) the instruction of a defence expert might trigger the instruction of an equivalent expert by the Crown who might express that view; (3) no such suggestion was present in the medical records available to the defence, and (4) it might not be competent to lead expert evidence as to the truthfulness and reliability of a complainer. The fourth of these concerns, which according to the defence solicitors was based on *Grimmond*, was not well founded for the reasons that we have given. But in our view the other concerns were legitimate and real. In the light of them, the decision of the defence team not to seek or lead evidence of this nature was entirely reasonable.

[53]

Miss Bain tells us that a factor in this decision was that LJ was expected to say that she had seen the appellant go into KM's bed at night, and that AF was expected to say that KM was a punchbag and that the appellant was hardest on her. There was concern that the Crown would use that evidence to contradict any suggestion that KM's complaints were a result of fantasy or false memory.

[54]

On the question of the psychological assessments of LJ and AF, Miss Bain says that there was nothing to suggest the presence of any psychological conditions affecting their credibility or reliability. The defence were therefore not in possession of any material that they could have provided to a psychologist for assessment.

[55]

These decisions were a matter for counsel's judgment. In every judgment of this kind there may, in our view, be a range of decisions that it would be reasonable to make. *Anderson* appeals are not to be decided on the counsels of perfection to which hindsight lends itself (cf *Ditta v HM Advocate*).

[56]

We accept the submission of the learned Dean of Faculty that evidence of KM's mental condition would have pointed against the conclusion that while KM lied on other matters, she told the truth on the matters libelled. That is certainly an important consideration, but it is not the only one. That line of evidence would have brought its own dangers. As the subsequent reports on the point have shown, neither expert went so far as to exclude the possibility that KM's account of her abuse by the appellant was true, or that KM's difficulties as a witness were caused by the sexual abuse libelled. With such difficulties in mind, in our view, it made sense to go for the more straightforward option of showing that KM was dishonest and had lied on numerous significant points. That enabled counsel to address the jury with some force on the proven dishonesty of KM on matters that were indisputable (transcript, pp 81-85).

[57]

On the whole matter, we can see no reason to conclude that counsel's decision not to follow up this line of attack was unreasonable or perverse. On the contrary, in the light of Miss Bain's explanation we consider that the decision was entirely within the range of reasonable decisions that were open to the defence team. In our view, the decision was a reasonable and responsible exercise of counsel's discretion and judgment. It cannot be said to have prejudiced the essential fairness of the trial (cf *D v HM Advocate*).

2004 S.C.C.R. 337 at 351

The attack based on KM's false allegation of rape against the gardener

[58]

Senior counsel was aware of KM's false allegation of rape and was in a position to prove that the allegation was made and that it was false. Since the Crown knew that the allegation was false, it is quite likely that the evidence to that effect could have been agreed by a joint minute. In the course of his cross-examination of KM senior counsel indicated that he would return to the false allegation, but in the event that was the last mention of it. At first sight, senior counsel's failure to cross-examine KM on the point surprised us. Such cross-examination was relevant (*Green v HM Advocate*) and was bound to be damaging to KM, whether she admitted or denied having made the statement and whether she admitted or denied its contents.

[59]

Miss Bain says that this matter was considered as a possible line of cross-examination, but that there were concerns as to how far the defence could take the proposition that the entire claim was false. She says that as the cross-examination of KM proceeded, senior counsel showed that she was lying or exaggerating on many matters. He elicited, for example, that it was only after she had consulted a solicitor about her civil action of damages that she went to the police. Senior counsel then discussed with his junior at the table whether he should raise the question of the false allegation of rape. They decided that it would be inappropriate to open up this subject with uncertain prospects of success and with no means of judging what KM's reaction would be. They felt that further questioning might undo the effect of cross-examination to that point. They decided that in view of his success in cross-examination up to that point, which seems to have surpassed counsel's expectations, that would be a suitable point at which to stop. This was a decision made in reaction to the evidence that KM had already given. Since the issue did not feature in the evidence of KM, no further evidence was led in relation to it.

[60]

An appeal court ought not too readily to substitute its own judgment for that made by counsel at the trial. There is a danger that decisions made under pressure during the trial are assessed out of their proper context when recollected in tranquillity in the appeal court. The court must have a realistic understanding of the difficulties experienced by defence counsel and agents in every criminal trial. In the course of cross-examination, counsel will sense the jury's reactions, he will sense whether a particular line of cross-examination may be dangerous, and he will have to make fine judgments whether or not to persist in particular lines upon which he has embarked. In this case, senior counsel for the appellant had cross-examined KM strenuously and effectively and, by means of information discovered in the course of the defence preparations, had amply demonstrated that she had lied and had been dishonest in numerous other ways. Having regard to the admissions that senior counsel obtained from KM, we consider that, whatever approach other counsel might have taken, his decision not to press cross-examination further was within the legitimate scope of his discretion.

[61]

We conclude therefore that these convictions did not result from any deficiency in representation. No matter how convincingly the defence established that KM was a liar, and even a pathological liar, that could never have been the end of the case. The real difficulty for the defence, which cannot be laid at counsel's door, was that whatever KM's history and mental state, her account was supported on a *Moorov* basis by the evidence of LJ and AF and was supported by the eyewitness evidence of LJ that the appellant had frequently got into KM's bed.

Convictions on charges (9), (10), (17) and (18)

[62]

Even if we had sustained this appeal on the *Anderson* ground, we would

have quashed only the convictions on charges (1), (2), (3) and (8). The obvious inference from the verdicts is that all of the jury were satisfied as to the credibility and reliability of LJ and AF, but that a minority of them were not satisfied as to the credibility and reliability of KM in relation to those charges to which she spoke. If there had been any substance in the *Anderson* ground, the quashing of the convictions that were dependent on the evidence of KM would none the less have left the other convictions intact.

Decision

[63]

We shall refuse the appeal so far as it relates to the convictions. We shall continue it on the question of sentence.

Postscript

[64]

This case has raised in an acute form a difficulty that the court has experienced in several *Anderson* appeals. The court recognises that when an *Anderson* ground is tabled, it can merely invite the trial counsel to submit comments on the ground of appeal. Counsel is at liberty to decline the invitation. Nevertheless, counsel should always bear in mind that as an officer of the court he has certain responsibilities to ensure that such appeals are decided properly and justly. If counsel withholds from the court an explanation that only he can give, there is a serious risk that the court may be unable to decide the appeal with proper knowledge and understanding of the case.

[65]

We are disappointed by senior counsel's attitude in this case. It was unhelpful to the court and adverse to the interests of justice. But for the courtesy of his junior, we would have had the greatest difficulty in dealing with this important appeal.

COMMENTARY

The importance of this case may lie not so much in the decision itself as in the court's interpretations of the earlier cases of *E* and *Grimmond*.

As far as *E* is concerned, only time will tell if the instant case has clarified and delimited that decision sufficiently to avoid the need for the whole line of post-*Anderson* cases to be considered by a Full Bench. It can certainly be placed along with *Ditta* and *D* as an example of a refusal by the court to accede to submissions based on *Anderson*, and a recognition of the need to allow counsel to use their discretion in making decisions about the conduct of a case.

It has not taken long for the court to show that my relegation of *Grimmond* to the refuse bin was at best premature: see the Commentary to *Campbell v HM Advocate*. Nevertheless, I venture to suggest, with respect, that there are problems about *Grimmond*.

The court in the instant case supports *Grimmond* on the basis that it proceeded on the principle that the assessment of a witness's evidence is a matter for the jury and not for expert evidence. That principle is not really in dispute. What is in dispute is the extent to which the jury are entitled to assistance in their task from expert witnesses, and the court may yet have to produce some criteria for determining what evidence can, and what cannot, be led for the purpose of giving them such assistance. Lord Osborne at one stage quotes the advocate depute's acceptance that the Crown were seeking to elicit expert opinion on the credibility of a witness (*Grimmond* at p 711C), but that was what was elicited in the appeal in *Campbell*. Lord Osborne also noted that the Crown specifically did not seek to lead that part of the expert report in *Grimmond* in which the statements of the witnesses were said to be credible and reliable (ibid), a position which is comparable with the way in which that part of the experts' reports in *Campbell* was not relied on by the court there.

2004 S.C.C.R. 337 at 353

It may also be noted that the difference between evidence that A is an incredible or unreliable witness and evidence that it is highly unlikely that he is telling the truth is not an easy one to grasp, and indeed may not be apparent to anyone other than a lawyer. Suppose the experts in *Campbell* had gone the extra mile and said that it was not merely highly unlikely but virtually impossible for people to recall specific statements verbatim in the circumstances of that case, would that have rendered their evidence inadmissible? Or is the question one of weight and not one of admissibility?

It may also be noted that a significant factor in *Grimmond* was the consideration that to allow evidence of the kind suggested would be inexpedient because it would open the door to the investigation of collateral matters and so waste the time of the court. With my usual rashness, I would venture to suggest that that is not an argument which is entirely consonant with the interests of justice, and is not likely to find much favour. In any event, it was not referred to in the instant case or in *Campbell*.

Grimmond can be distinguished from the instant case on the basis that what was in issue here was the existence of an objective medical condition. It is much less easy to distinguish it from *Campbell*, since both cases dealt with 'scientific' evidence based on the behaviour of people other than the witnesses in question. It can also be distinguished from both *Campbell* and the instant case on the basis that what was in issue in *Grimmond* was evidence proffered by the Crown, and was evidence designed to show that a witness might well be telling the truth, and not evidence designed to show that he or she was probably lying. The difficulty with that is that *Grimmond* leaves us with a situation in which the defence can make hay of the fact that the child complainers did not make all their complaints at once, and in which the Crown cannot lead evidence to show that such partial revelations are a normal feature of cases of child abuse. That consideration suggests that a compromise might be reached by allowing the Crown to lead such evidence in cases where the defence have

challenged the credibility of the witness's evidence because of the manner in which he or she originally revealed what he or she says happened.

On a totally different point, I wonder if anyone shares my slight unease at the proposition that *Moorov* witnesses not only corroborate each other but also enhance each other's credibility. It would be interesting to see a logician's analysis of the position.