Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from Lord Carloway, The Lord Justice Clerk

The interests of victims and witnesses are rightly given greater prominence in the modern court system than they have been in the past. I fully support that development. Many of those who come to the courts are victims of sexual offences, often very serious sexual offences, and ensuring a fair trial – and one which ensures that the innocent is acquitted, and that the guilty convicted – is a critical function of the legal system.

The concern in the original consultation paper [Equally Safe etc] was that members of the public, who make up juries, hold ill-founded preconceptions about the nature of sexual violence and that these make the understanding of victims' responses to such crimes more difficult [para 3.1]:

eg 1 that sexual assault is almost always violent
2 that, if assaulted, a victim would almost always resist
3 that a delay in reporting indicates that the complaint is false.

That is the underlying reason for the legislation. It wants the judge to tell the jury that, as a matter of law, these things are not true in fact. That is unusual in our system. What is proposed is that a juror's apparent pre-conceptions can be addressed in the judge's directions.

It is recognised that, in a given case, the Crown can lead evidence to rebut defence evidence from which an adverse inference can be drawn about a complainer's credibility or reliability stemming from that complainer's behaviour or statements after a particular incident [1995 Act s 275C, introduced by the Vulnerable Witnesses (Scotland) act 2004 s 5]. In practice such evidence, of the type which the legislation contemplates, can be agreed by Joint Minute. It is not controversial.

It has hitherto been the function of the Crown to prove the case against the accused. It is for the Crown to explain to the jury why a conviction should follow. If the case involves a non-violent sexual offence with no resistance where there has been no recent report – or one or more of these features are present – it is for the Crown to address these matters in the speech to the jury. It is then for the defence to make such submissions as they wish to the jury on such matters, depending upon the particular circumstances of the case.

If it were suggested by the defence, not by adducing evidence since evidence is not required, but in a jury speech that a particular charge had not been made out because of the absence of violence, resistance or a recent complaint, a judge would correct these as erroneous statements of the law. He would probably go on to say, however, that these are all matters for the jury to weigh in the balance.

However, what is proposed is that the judge should essentially take on the mantle of the prosecution in making statements of fact dressed up as law. This could be done;

but the method of doing it is highly mechanistic and is likely to have little substantial effect within the dynamic of a real charge to a jury.

In a sexual offence, for example rape, a charge to a jury may last between 30 and 60 minutes or more depending upon the circumstances. Charges to juries in Scotland are intended to be real communications by the judge to the jury on the law which is to be applied to the case. The judge must also give the jury such guidance and assistance as he can properly afford in relation to the quality of, and weight which ought to be given to significant evidence in a case [Practice Note 18 February 1977]. He must not give the jury any hints, clues or suggestions, however, on what he thinks the jury ought to make of that evidence. Thus, at the start of a charge to the jury, he will state that, whereas the jury must take his statements about the law as accurate and that they must follow these directions, he will then contrast that by saying that it is entirely for the jury to decide upon the facts of the case and that, in relation to the facts, it is entirely for the jury to make their decisions, irrespective of the judge's directions, based on the evidence which they have heard in the courtroom.

In many cases, where the issue is live, the judge may well give the jury appropriate directions along the lines suggested. He will do it at an appropriate and relevant point in his charge and in a manner which is directly relevant to the particular circumstances of the case. It will be, in that sense, meaningful. It will be linked to the real situation. What this legislation does is to prescribe a particular formula to be rehearsed by the judge. It may, of course, in a given case, be followed by a "however" following which the judge feels bound to emphasise the defence points to the contrary in order to provide the balance between Crown and defence which is required of him.

For good reason, the content, nature and extent of appropriate directions in law which a judge gives a jury has always been regarded as a matter of judgment for the trial judge. That is his constitutional responsibility. He or she alone has heard the particular facts of the case and is best placed to assess what the live issues in the trial are, and how the jury should be directed. No two cases are the same. Experience has taught that the charge to the jury – an important element in the trial – requires to be tailored to the individual case. The judge is of course subject to the supervision of the High Court sitting in its appellate capacity. To impose a stock set of requirements impacts on the proper function of the judge. That is constitutionally novel, and may, in any event, add little in practical terms for the reasons I've already set out.

On the other hand, if Parliament were to state that these matters are to be regarded as being within judicial knowledge, that would enable a judge to state them to a jury at an appropriate time and in an appropriate case. However, simply to require a judge to state them in every case of a given class is unlikely to produce the desired result.

Lord Carloway
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