

SCOTLAND / JUDGMENT

Gubinas v HM Advocate [2017]

ScotHC HCJAC_25 (09 May 2017)

[2017] ScotHC HCJAC_25

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

Gubinas v HM Advocate [2017] ScotHC HCJAC_25 (09 May 2017) [Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE] Scottish High Court of Justiciary Decisions You are here: BAILII >> Databases >> Scottish High Court of Justiciary Decisions >> Gubinas v HM Advocate [2017] ScotHC HCJAC_25 (09 May 2017) URL: <https://www.bailii.org/scot/cases/ScotHC/2017/HCJAC25.html> Cite as:

[2017] HCJAC 25, 2017 SCL 556, 2017 SLT 663,

[2017] ScotHC HCJAC_25, 2017 GWD 16-257 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 25 HCA/2016/000290/XC HCA/2016/000286/XC Lord Justice Clerk Lord Brodie Lord Malcolm OPINION OF THE COURT delivered by LADY DORRIAN, the LORD JUSTICE CLERK in APPEAL AGAINST CONVICTION By

(1) JUSTINAS GUBINAS and (2) NERIJUS RADAVICIUS Appellants against HER MAJESTY'S ADVOCATE Respondent First Appellant: Gebbie; Gray & Gray, Peterhead Second Appellant: Hughes; Faculty Services Limited, Edinburgh for Adam & Flowerdew, Solicitors, Peterhead Respondent: MacVicar, Sol Adv, AD; Crown Agent 9 May 2017

Background

[1] The appellants were charged, along with two other co-accused, with the rape and sexual assault of the complainer RD. RD had been in the same nightclub as the accused, and had left in a car with them, thinking she was going to a party in Fraserburgh. In fact she was taken to a farmhouse outside Fraserburgh where the assaults were alleged to have taken place. Evidence was led at trial that the sexual assaults were recorded on mobile phones. In the course of her evidence, RD accepted that the video footage taken from the mobile phones might appear to depict consensual sexual activity, but that in fact it showed her in a state of intoxication such that she was deprived of the ability to consent. She said that she was already intoxicated when she left the club, was force-fed more alcohol at the house, and coerced in various degrees and by various means, to participate in the acts in question. The appellants, and one of their co-accused, were convicted of rape, including anal rape of the complainer. Grounds of Appeal

- [2] The grounds of appeal for the first appellant are that: (1) the trial judge erred in repelling a submission of no case to answer, insufficient evidence having been led by the Crown to rebut the appellant's special defence of consent; (2) the trial judge misdirected the jury with regard to the video evidence, specifically that he failed to direct the jury that the video evidence should be considered through the testimony of witnesses; and (3) there was no evidential basis to convict the appellant of the anal rape of the complainer and that the jury's verdict in this regard was unreasonable.
- [3] For the second appellant the grounds are essentially those advanced as grounds 2 and 3 for the first appellant.
- [4] The court having raised the matter, both appellants were subsequently given permission to advance a further ground of appeal, namely that the trial judge had misdirected the jury on the use which could be made of statements to the police made by the appellants. Evidence at trial Ground one - sufficiency SUBMISSIONS – GUBINAS [5] Consent was a critical issue, the appellant having lodged a special defence of consent. The evidence relating to the appellant came from: (a) the complainer RD; (b) the appellant's police interview; (c) the video footage from the mobile phone; and (d) DNA evidence of stains found on bedding. The latter was not relevant to the question of consent. As to the remaining evidence:
- (a) The complainer maintained that all sexual activity was without her consent, but did not suggest that the appellant had assaulted her. She accepted that the video footage appeared to show consensual sexual activity with the appellant but said that "appearances can be deceptive". She gave evidence that she was given a lift home by the appellant and his then girlfriend later that day. (b) In his police statement, the appellant admitted having sex with the complainer. He admitted that he had filmed the complainer apparently having consensual sex with the co-appellant Radavicius, Radavicius having asked him to do so. The appellant Gubinas stated that the sex between himself and RD was entirely consensual and at her invitation. She had made a beckoning gesture with her hand to invite the appellant to engage in sex with her. Thereafter, he was not present during any sexual interactions between RD and others. (c) The video footage showed RD, naked, atop the co-appellant Radavicius and performing sexual acts upon him. It further showed her saying "C'mon" or "Mon" and gesturing to the appellant Gubinas in the beckoning manner he described. It showed the appellant Gubinas (apparently filmed by Radavicius, whom RD was still astride) joining in sex with RD from behind, as he described in his police interview. It also showed RD taking the appellant's penis in her hand, masturbating him, then taking his penis in her mouth whilst at the same time continuing to perform a sex act on the co-appellant Radavicius. On being shown the video footage of the incident, DC Ritchie stated that it appeared to be entirely consistent with the appellant's account of having had consensual sex with RD.

- [6] On the basis of this evidence there was insufficient evidence to corroborate mens rea on the part of the appellant or otherwise overcome the special defence of consent, and the submission should have been upheld. Crown submission – ground one
- [7] In considering a submission of no case to answer, the Crown case must be taken at its highest. In respect of circumstantial evidence the interpretation most favourable to the Crown must be adopted – *Fox v HM Advocate* 1998 JC 94 at pp113-114. The complainer gave clear evidence that she did not consent to the activity in question. That was corroborated by de recenti evidence of distress. Another witness spoke of the complainer as looking “upset”, “frightened” and “weird” shortly after the events in question.
- [8] The complainer gave evidence that she was so heavily intoxicated as to be incapable of consenting. This was supported by other evidence: CCTV evidence of her leaving the club showing apparent drunkenness, which would have been apparent to the appellant; the appellant’s police interview in which he makes it clear he knew she was drunk; that at the farmhouse the following words were said in a discussion amongst the men: “she is so drunk she won’t remember anything”. Consent means free agreement, which is absent when a complainer is incapable because of the effect of alcohol.
- [9] On the evidence noted above, the appellant could have had no reasonable belief that the complainer was consenting. There was little or no evidence of steps being taken to ascertain consent. The appellant was identified from a video as one of a group of men who, around 09.28-09.46 on 1 November 2014, woke the complainer by throwing back the bedcovers over her, and kicking her on the buttocks before sexual contact commenced. This behaviour was not supportive of a reasonable belief in consent. The appellant said that on being offered food after being wakened, the complainer had asked for sex. Asked how many people she wanted to have sex with, she allegedly said one, after which she had sex with the second appellant. Notwithstanding what she had said, the appellant, after filming the complainer having sex with the second appellant, Radavicius, had sex with her himself when he interpreted her gesture as a beckoning one.
- [10] There was a sufficiency of evidence from which the jury could conclude that the complainer did not consent and that the appellant could have had no reasonable belief that she did so.
Decision
- [11] In his report the trial judge correctly points out that the evidence to which attention is drawn in the grounds of appeal is largely that which was consistent with the appellant’s position. However, as can be seen from the brief summary of the Crown submission just given, there was other evidence which was incriminative of the appellant. We have given only a brief narrative of some of the factors which were relied upon by the Crown, but in our view there was a clear sufficiency of evidence.
- [12] Free agreement is absent where the conduct occurs at a time when a complainer is incapable because of the effects of alcohol. The complainer’s position was that this was indeed the case. There was other evidence supportive of a conclusion that she was very

drunk. The extent of her intoxication, the effect on her, and the inferences to be drawn from the evidence as a whole, including the video and CCTV evidence, was a matter for the jury to determine. There was evidence of distress which the jury could accept was related to the events in the house, and which could corroborate the complainer's account of lack of consent.

- [13] On the question of reasonable belief, the issue of the complainer's drunkenness, at the time she was allegedly raped, and more importantly, the appellant's knowledge of that as acknowledged in his police interview, is highly relevant. From the evidence the jury would be entitled to conclude that the appellant knew of the complainer's state of intoxication. For the purpose of the Sexual Offences (Scotland) Act 2009, whether a person's belief as to consent was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent, and if so what those steps were (section 16). The jury would, on the evidence, be entitled to accept the Crown submission that there was virtually no attempt made to ascertain consent. They would also be entitled to take into account the whole circumstances of the events, including the circumstances in which the complainer was woken up on that morning. The jury would on all of this evidence have been entitled to conclude that the appellant had no reasonable belief that the complainer was consenting. The trial judge was correct to repel the submission of no case to answer, and this ground of appeal must be refused. Ground two – misdirection on video evidence
- [14] The relevant passages of the judge's charge to which this ground of appeal relates are as follows: "Now ... you are, of course, entitled to have regard to the phone video evidence. [RD] accepted in her evidence that the footage depicted what appeared to be consensual sexual activity but, of course, you have to qualify that with the rest of her evidence. She said appearances can be deceptive and she explained what she meant by that. On the other hand, it's said for the defence that what is depicted in the video footage from the phone appears to be consensual sexual activity and the submissions for the defence are that because it depicts what looks like consensual behaviour, it can be inferred from that that that is, in fact, was what was happening, that [what] was being filmed was consensual conduct. Now, you'll have to assess that, ladies and gentlemen. If you thought that the men had good reason to think that she was consenting then that would allow you to form the view that they did have a reasonable belief for these purposes." [p38, line 21 to p39, line 21] "Now, support for the fact that the man was aware he did not have consent to do what he did, or was reckless as to whether or not he had consent, may come from evidence of force or observed distress at the time, but not from evidence of distress subsequent to the incident. So it's what's happening at the time that is important." [p40, lines 17-25] "You are here as judges, ladies and gentlemen, and not as witnesses so you form a judgement about what the footage shows, just as you would form a judgement about eye witnesses' descriptions of what has happened otherwise. Now, just because you have seen a record of the events made on the phone at the time or through the CCTV cameras at [the nightclub], you do not somehow become witnesses to these events yourselves. You stand back from what is depicted on the screen so far as this video evidence and CCTV footage is concerned, and you form your own

conclusions about what it depicts. Now, we have had witnesses who have given in their evidence descriptions of what they say the phone film footage shows. [RD] did that. DC Wilma Ritchie was asked for her views about what she thought it showed. You have to determine if their interpretation of what the footage shows as happening is correct. You have to decide what the footage shows and if it supports proof of the crime charged. Now, you can take into account what witnesses have said it showed, but you are not bound by their views. You must form your own views about what this video footage depicts and what inferences you can draw from it, such as whether or not the acts depicted were consensual on the part of [RD]. You've heard conflicting interpretations about what the video evidence shows. In assessing that evidence, you'll have to decide which view you prefer just as you'll decide between conflicting accounts by eye witnesses in any other aspect of the evidence in the case. Now, as I have been saying, in general you could form your own view about what the video evidence depicts, but the identification of a person depicted in the video or CCTV footage must come from a witness and, in that situation, you would have to decide if the witness's identification of the person said to be participating in the footage is correct." " [p64, line 7 top 66 line 2] "And so far as reasonable belief is concerned, then, again, the starting point for you is RD's evidence. You'll have to take into account what she said about the video footage taken by the phone depicts. You'll remember her comment "appearances can be deceptive". Her position was that what we see on the video is a person not knowing what she's doing, so you'll have to take that into account in this regard." [charge day two, p5 line 23 to p6 line 8] Submissions – Gubinas

- [15] In charging the jury that they must form their own views about what the video depicts, unfettered by the evidence of the witnesses (including the complainer), the trial judge invited the jury to go beyond simply an act of accepting or rejecting evidence and to act as witnesses. The trial judge failed to make it clear that the jury either accepted that the footage showed consensual sexual activity or it did not. If they did not accept that it showed consensual activity they required to set it aside. They were not entitled to consider that it supported evidence of the crime charged in the absence of evidence to that effect. The statement that the complainer's evidence was that what was seen on the video was someone not knowing what she was doing was incorrect, her evidence being that it showed her apparently indulging in consensual sex. Reference was made to Robertson v HM Advocate 2007 SCCR 129 ; Donnelly v HM Advocate 2000 SCCR 861 ; Gray v HM Advocate 1999 SCCR 24 ; and Steele v HM Advocate 1992 JC 1 . Submissions - Radivicius
- [16] It was not open to the jury to form their own views as to what the video evidence depicted – Steele v HM Advocate . The trial judge departed from the general dicta of that case that: It was a misdirection to tell the jury that they must form their own views about the footage. The matter was compounded when, after a request on their part, the jury were allowed to view the video without any further direction as to the way in which they could use that evidence. The jury were left with a direction that they should consider and interpret the video and decide for themselves, on the video, whether the appellant had a reasonable belief that the complainer was consenting to the relevant sexual activity.

- [17] It is difficult to find clear and succinct guidance when one looks at the three main cases Gray , Steele and Donnelly . The law is unclear: is the limit on the jury making their own assessment to be fixed at the issue of identification or at the point where some sort of expertise is required in order to interpret what is shown. There are only three reported cases on the subject and there is a disconnect among them as to the appropriate approach of the jury. Even the Jury Manual remarks that there are difficulties with the interpretation of Steele , a case which is now 25 years old. Because of the modern proliferation of video evidence from various sources the issue arises on an almost daily basis. The law is in a state of uncertainty and it is artificial to separate the question of identification from other matters shown on video evidence, if that be the current state of the law.
- [18] Many of the complainer's core allegations were contradicted by concessions she made in cross-examination, for example her acceptance that she kissed the appellant for about 2 minutes before leaving the nightclub; that she was a "quirky, outrageous, flirty person", the more so when she drinks, and that she can dance provocatively around men; that she might have drunk champagne in the car; that she drank more at the locus , which she liked, and that she had a high tolerance for alcohol; that she accepted she told the police surgeon she and the appellant were "getting it together"; and other matters of a similar ilk. These aspects of the evidence, enumerated in greater detail, constituted a strong exculpatory case which was compromised by the judge's erroneous and inadequate directions on the video evidence. Submissions for the Crown
- [19] The Advocate Depute submitted that these criticisms of the trial judge's charge were without merit. In Steele, the argument advanced was that the jury could not draw their own conclusions from the video evidence and that they had to be guided by the evidence given by the witnesses. That direction was described by the court on appeal as an inaccurate statement of principle.
- [20] Although dicta to the contrary may be found in Gray v H M Advocate 1999 SCCR 24 , that case proceeded on a concession and is thus (as noted in Hunt v Aitken 2008 SCCR 919 , para 7) of little value as a precedent. Donnelly related to the question of identification, an issue which carries well-known risks. In Steele, it was observed that evidence will almost always be required for such a matter, and the case of Donnelly may be distinguished from the present where identification was not an issue. In the present case no particular expertise was required to understand what the footage showed, and the jury were properly directed to make up their own minds about what it revealed. Decision
- [22] At the trial the appellants and the complainer presented different interpretations of what the video evidence depicted. There was no doubt that it showed the appellants and the complainer indulging in sexual activity. The appellants' position was that it showed consensual sexual activity. The complainer maintained that, whilst this might appear to be the case, that impression was misleading because it did not take account of her advanced state of intoxication.

- [23] There are two passages of importance in the opinion of the court in Steele, delivered by the Lord Justice General (Hope) : “The point was presented on either side as an issue of principle, but in practice questions of principle are likely to be overshadowed by what is practicable in each case. On the one hand there is the rule that the jury must proceed only on the evidence and that it is not open to them to speculate about matters which they cannot determine upon the evidence which has been led before them in court. For this reason evidence will almost always be required to speak to such essential details as place and time and the identity of persons or things shown on the recording. In this respect the position is no different from that which applies where other audio or visual evidence is produced. (pp4-5)” The court noted that it was undesirable for a trial to be prolonged by repeated playing of video recordings, and that any viewing by the jury required to be in the presence of the judge, the Advocate Depute and legal representatives. It then went on to say: “So it is likely to be of advantage for the witnesses to be asked to give their own opinions as to what is being shown on the tape in order that the jury's minds can be directed to the relevant points while the tape is being played. But, except in cases where some particular expertise is required to understand what is going on, the jury are free to make up their own minds about what the tape reveals.”
- [24] The first of these passages begins with the general statement that in practice questions of principle are likely to be overshadowed by what is practicable in a given case. It then addresses questions of identification, of specific individuals or a locus, rather than the general appearance of what is on the video. It suggests that when a question of such identification is in issue, a jury would not be entitled to reach their own conclusions, and the matter must be mediated through the evidence of witnesses. This was confirmed in Donnelly and Gray. There was ultimately no real issue about identification in the present case, but nevertheless the trial judge gave a direction that the jury could not conduct an identification for themselves (p65-66).
- [25] The second passage from Steele suggests, initially, at least, that in other cases the jury are at liberty to decide what is shown in a video and make up their own minds what is shown, unless the interpretation of it requires special expertise to explain what was going on. In the present case, there was no expertise required to understand what was going on in the video, and the only issue was whether what it showed was inconsistent with the complainer's evidence that she had not consented, and on the basis of the second passage from Steele the jury would properly be able themselves to consider the video and determine that issue themselves. Again, the remainder of the trial judge's directions appear to be consistent with Steele .
- [26] The matter is, perhaps, made slightly more complicated by virtue of the fact that having made the remarks in the second passage we have quoted, the court in Steele nevertheless went on to say that , in the circumstances of the case, where “so much of what was seen on the tape was disputed”, it was not satisfied that it had been a misdirection to tell the jury that they could not make up their own minds but had to be guided by the witnesses. There may,

of course, be many times when what is shown on a video is disputed as a matter of fact without any expertise being required to assist in the interpretation of what is happening. Indeed, the present case appears to be one such. We accept the submission made by counsel for the second appellant that the circumstances in which a jury may examine for themselves the content of a video are ill-defined in our law. We also accept that this is a matter which causes confusion within the profession. Paragraph 24-158.3 of Renton & Brown, Criminal Procedure , on the subject of interpretation of video evidence commences with the words “The law is not altogether clear on this matter”. The matter is introduced in the Jury Manual with the words: “The terms in which the jury are to be directed as to how they should treat such evidence is unclear. The only three cases dealing with video evidence.... give limited assistance.”

- [27] The most recent of the cases was reported in 2000. Even since that time there has been a significant increase in the use of video evidence in court. We consider that it is undesirable that the law in this area should be in a state of uncertainty. We consider that this would be an opportune time for the matter to be reviewed by a larger court, and on this ground of appeal alone, we will put the case out for a hearing before a bench of five judges. Ground three – unreasonable verdict
- [28] It is a matter of agreement, as also explained by the trial judge, that the only significant evidence relating to anal penetration came in respect of an accused who was acquitted. There was thus no evidential basis upon which to convict the appellants in respect of that averment. This ground of appeal must therefore succeed to the extent that the part of the libel relating to anal penetration must be deleted. Counsel for the first appellant suggested that the result was that the verdict as a whole had to be considered as unreasonable. The argument was difficult to follow. It seemed to be related to the first ground of appeal. There had been an allegation of force in the original libel, and some evidence thereanent, which the trial judge had recognised in repelling the section 97 submission. The fact that the jury had deleted the allegation of force meant that conviction of the appellant could only follow on the basis of lack of consent and lack of an absence of reasonable belief in consent. On the evidence no reasonable jury could have convicted the appellant on that basis. We are satisfied that there is no merit in that point and that the only consequence of the acceptance by the crown of this ground of appeal should be that the relevant averment should be deleted from the conviction. Ground four – misdirection in respect of statements
- [29] The trial judge ‘s directions included the following: “And again, so far as the police interviews are concerned, where, as is the case here, [the appellants] did not give evidence themselves in court, what they said at interview is evidence only to show that that is what they said at the time, and their attitude or reaction at that time as part of the general picture which you have to consider, but the evidence of what they said at interview is not evidence of the truth of what they said at that time, so you must bear that in mind.” [p84, line 19 to p85 line 6] Submissions- Gubinas

- [30] This was a misdirection. In the case of a mixed statement, it is open to the jury to accept any part of the statement as evidence of truth, when taken into account with all the evidence in the case. This was a material misdirection on a matter of importance, removing the evidential value which might be attached to exculpatory parts of the statement, in particular the explanation that sexual activity was consensual. Submissions –Radivicius
- [31] The trial judge should have directed the jury that the contents of the statements were available as evidence for or against the accused. The jury should have been directed that if they accepted any exculpatory part of the statements, or if they created a reasonable doubt, they should acquit. Although the trial judge did “pick up the threads” of a fuller explanation later in his charge, the overall effect was disjointed, ambiguous and misleading, resulting in a miscarriage of justice. The situation is similar to that which occurred in *Lennox v HM Advocate* 2002 SCCR 1 in which the sheriff had initially directed the jury that the statements were exculpatory and not admissible for their facts; then directed them that they had to consider all elements of the statements, pointing to guilt or innocence, and determine whether all or some of it was accepted as truth. The court considered that these directly contradictory statements can only have led to confusion and amounted to a miscarriage of justice in impairing the right of the appellants to rely on their statements. The position was the same in the present case. Submissions for the Crown
- [32] It is clear from the trial judge’s supplementary report that he correctly considered the statements to be mixed statements, and that his purpose was to charge the jury on that basis. Apart from the passage quoted, at p79 he directed the jury that evidence of what witnesses say an accused told them was “evidence in the case”; and added that incriminatory answers given by the subsequently acquitted co-accused were evidence against him because they were statements against interest. At pp80-81 the trial judge explained the incriminatory nature of certain statements made by the various accused, before going on to direct specifically how to approach a mixed statement. The trial judge said that: “if you believe the parts pointing to innocence, or if they raise a reasonable doubt in your mind about guilt, then you must acquit the man concerned and that’s irrespective of whether or not he gave evidence from the witness box.”
- [33] On the continuation of the charge the following morning, the jury were reminded that these statements were mixed statements and that it was for the jury to accept or reject any parts of the statement as they saw fit. Moreover, they were directed that they required to take account of any qualifications and explanations offered by the accused. Moreover, after the jury had retired they returned with questions, one of which was whether someone’s statement could be held against him. In answering that the trial judge made clear that the statements were mixed statements, that they contained some comments what were exculpatory and some which were incriminatory and that it was for the jury to decide which parts to accept and which parts to reject.

- [34] Further, the passage which had been criticised requires to be read in its context, which was one of explaining to the jury that the contents of a statement by one accused was not evidence against another.
- [35] In any event, looking at the charge as a whole, any ambiguity, or misdirection, in the passage criticised, was cured by the remainder of the charge and the jury could have been under no illusion as to how the statements should be treated. Decision
- [36] In his report the trial judge explains that the passage under consideration was intended to emphasise that neither of the appellants gave evidence and that what they said at the time was not given under oath. The trial judge had already given the jury detailed, and accurate directions about how to deal with mixed statements (pp 80 to 83). He then moved on to deal with the fact that these statements had often mentioned other accused who had not been present at the time the statement was made. Having explained this to the jury he then said: "So it comes to this, ladies and gentlemen. So far as these police interviews are concerned, you can take account of what was said at police interview only so far as, in each case, it concerns the person who was being interviewed at the time."
- [37] The passage which is subject to criticism appears immediately after this paragraph, and it appears to be a somewhat clumsy attempt by the trial judge to explain that the statements regarding other accused cannot be used because they were not evidence in court i.e. under oath.
- [38] In the directions given at pp 82 and 83, the jury were directed that: (i) they were entitled to take into account the whole of the evidence of what the appellants had said at interview; (ii) they required to determine how much of it they accepted as being true; (iii) if they accepted parts of it pointing to innocence or were left with a reasonable doubt they should acquit; and (iv) what was said at interview was not on oath or tested in cross examination. In the continuation of his charge the following day, the trial judge referred to the statements as "evidence", saying: "And I also explained to you how to deal with the evidence of each of the four men accused, arising from what they said to the police when interviewed." So far as both appellants are concerned, the reference to their "evidence" could only be a reference to their police statements. He later said: "If you believe the evidence of [an accused who gave evidence] or in the case of any, or all, of these men accused you believe the exculpatory parts of which they said to the police at interview.....you must acquit them."
- [39] Finally, when the jury returned with a question about the use of statements, the trial judge said: "Because they are mixed statements, they contain some comments which are exculpatory and some comments which are incriminatory. It's a matter for you which parts of the statements you accept and which parts you reject. If you're considering the effect of what you consider to be an incriminatory statement and you intend to accept that it was made, then it is the case that that would be evidence against the person who was being interviewed at the time and was making the statement. ...in....almost all of the transcripts, although there are certain bald statements made, there are other statements made at

different times which might be taken to be qualifications of what has been said at different moments, so when considering what to accept and what to reject, you ought to take that into account, the fact that there might have been some explanation of what was meant in other pts of the transcript.”

[40] It is axiomatic that a judge’s charge should be viewed as a whole and in the context of the trial to which it relates. The charge is not to be scrutinised as if the jury had not heard the evidence and the speeches. Having examined the judge’s charge as a whole, and in its proper context, we are satisfied that this ground of appeal has no merit and ought to be refused. The passage in question occurs in a different part of the charge from that dealing with the use to be made of the statements for or against the speaker, and we are not persuaded that it ought to be viewed as a misdirection. In any event, there are passages both before and after that, not least in the response to the question from the jury, which make the position on mixed statements absolutely clear, and we do not consider that this passage would have cast doubt on these detailed directions. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotHC/2017/HCJAC25.html>

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF’s page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/scot/cases/ScotHC/2017/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/gubinas-v-hm-advocate-2017-scothc-hcjac-25-09-may-2017>

Prepared on 24 October 2026 · Esheria