APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 23
HCA/2018/423/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the appeal under section 74 of the Criminal Procedure (Scotland) Act 1995

by

GW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Stewart QC, GJ Anderson; Paterson Bell (for Ferguson Walker, Glenrothes)
Respondent: L MacDonald AD; the Crown Agent

15 November 2018

Introduction

[1] This appeal raises the issue of whether, in terms of the Sexual Offences (Scotland) Act 2009, a person can consent in advance to having sexual intercourse whilst asleep. A subsidiary issue concerning the form of a special defence of consent also arises.

Legislation

[2] Section 1 of the Sexual Offences (Scotland) Act 2009 provides that:

> "(1) If a person ('A'), with A's penis –
>
> (a) without another person ('B') consenting, and
>
> (b) without any reasonable belief that B consents,
>
> penetrates … the vagina … of B then A commits … rape.
>
> (2) ... penetration is a continuing act from entry until withdrawal …
>
> (3) … where penetration is initially consented to but … the consent is withdrawn, subsection (2) is to be construed as if the reference … to a continuing act … were a reference to a continuing act from that … time."

[3] Section 12 provides that "consent" means "free agreement". Section 13 states that free agreement is "absent" in certain circumstances, including where the complainer is "incapable because of the effects of alcohol or any other substance of consenting".

[4] Section 14 provides that:

> "(2) A person is incapable, while asleep or unconscious, of consenting to any conduct."

The origins of this section are in section 10(2) of the draft Bill which was annexed to the Scottish Law Commission Report: *Rape and Sexual Offences* (No. 209), dated December 2007. This had proposed that free agreement would be absent:

> "(b) where, at the time of conduct, B is asleep or unconscious, in circumstances where B has not, prior to becoming asleep or unconscious, consented to the conduct taking place while B is in that condition".

[5] At Stage 1 of the passage of the Bill, various comments on this provision had been made to the Justice Committee (1st Report, 16 January 2009, paras 133 *et seq*). For example, on the one hand, Victim Support had said (para 134) that it was extremely important that consent is given at the time of the conduct. Rape Crisis Scotland had opposed the notion of prior consent because it went against the philosophical underpinnings of the Bill, which

were based on sexual autonomy (para 135). On the other hand, the Law Society had asked (para 136) whether "removing" prior consent from the Bill could result in criminalising a common activity. In a similar vein, the Lord Advocate (Elish Angiolini) had said (para 140), under reference to Article 8 of the European Convention (right to respect for private and family life), that:

> "A danger lies in criminalising conduct that is currently lawful … [I]f people who are in a long-term or even a short-term relationship agree explicitly or impliedly to such activity, it is not criminal".

Prof Gerry Maher, who had been involved in the drafting of the Bill at the SLC, had said (para 142) that he would be worried if prior consent were removed. If subsection 10(2)(b) were to be deleted, the question of whether it was rape to have intercourse while a person was asleep would arise. That ought to depend on whether the person had consented to having intercourse "in that state".

[6] At Stage 2 of the Bill (Justice Committee Report Col 1662, 24 March 2009), the Cabinet Secretary for Justice (Kenny MacAskill) proposed the substitution of this provision with what became section 14(2). He said that the new section:

> "replicates our understanding of the current law by providing that someone who is asleep or unconscious cannot give consent while in that state. The new section … does not, in terms, exclude the possibility of reasonable belief in consent, nor does it place any specific restrictions on how such a reasonable belief may arise.
>
> … [I]t would be for the court to decide whether any claim of reasonable belief … would be credible in a case in which such circumstances had arisen. It is highly unlikely that a court would regard a belief that the victim gave consent while he or she was incapable of giving such consent to be a reasonable belief."

[7] Section 15 states that:

> "(2) Consent to conduct does not of itself apply consent to any other conduct.
>
> (3) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct"."

[8] Section 16 provides that:

> "In determining … 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, to what those steps were".

[9] Section 78(2) of the Criminal Procedure (Scotland) Act 1995 requires a defence to be lodged where an accused maintains that the complainer consented to conduct said to constitute rape, or that he believed that she had consented.

[10] Section 274(1) of the 1995 Act prohibits the leading of evidence showing or tending to show:

> "that the complainer (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge"

[or]:

> "(c) has at any time (other than shortly before, at the same time as or shortly after the acts which form ... the subject-matter of the charge)."

engaged in behaviour which might found the inference that she is likely to have consented to "those acts". Section 275 provides an exception where the court is satisfied that: the evidence relates to a specific occurrence of behaviour or facts demonstrating a predisposition; the occurrence is relevant to whether the accused is guilty; and its probative value outweighs the risk of prejudice to the proper administration of justice.

Background

[11] The appellant is charged with, *inter alia*, the rape of a woman "whilst she was asleep and incapable of giving or withholding consent". He has lodged a special defence which states that he engaged in sexual intercourse "with the consent of" the complainer and "in

any event when [the appellant] reasonably believed her to be so consenting". An additional narrative then follows:

> "It was the practice of the parties … that on occasion [the appellant] would waken [the complainer] … by penetrating, or attempting to penetrate her vagina with his penis. [The complainer] consented to being awoken in this way".

It was explained before the Preliminary Hearing judge that what this meant was that consent had been given at the start of the relationship and had never been withdrawn. Such sexual activity (ie the penetration whilst the complainer was asleep) was a continuing feature throughout the relationship.

[12] The PH judge held that the use, in section 1 of the 2009 Act, of the present participle "consenting" meant that the consent had to be continuing for the conduct not to constitute rape. In terms of section 14, consent could not be continuing when a complainer was asleep or unconscious. There could be no defence of "prior consent", where the conduct arose when a complainer was asleep or unconscious.

[13] Although he had determined the matter on the basis that there was no ambiguity in the wording of the statutory provisions, the PH judge went on to look at the Parliamentary materials. He did not consider that the Cabinet Secretary's statement meant that section 14 had been intended to leave open the possibility that consent "need not be absent when a person is asleep". The provision proposed by the SLC, whereby prior consent could be given, had not been accepted. When read with section 1, where conduct took place when a person was sleeping, it was without consent.

[14] The PH judge did not consider that the special defence, notably those parts which referred to prior consent whilst the complainer was asleep, could be read to the jury. The material in the additional narrative (*supra*) required to be excised. The judge refused an

application under section 275 to permit evidence to the effect that the complainer had consented to being woken by vaginal penetration as a facet of the relationship.

Submissions

Appellant

[15] The appellant contended initially that there was a distinction between the protection which the law afforded to an accused who was in a continuing relationship and one who had been a party to a chance encounter. Where the persons were partners, the nature of the relationship, and the patterns, accommodations and negotiations in the relationship, formed sources of evidence from which a reasonable belief in consent could be inferred in circumstances where the conduct said to constitute rape had occurred when the complainer was asleep. In explaining the meaning of consent, section 12 of the 2009 Act was silent both on how free agreement was to be expressed and on its temporal context (ie when it was to be expressed). Intercourse whilst the complainer was asleep had been a facet of the relationship and one to which the complainer had consented in advance.

[16] The terms of the Act should not be construed as a bar to the operation of antecedent or prior consent in such circumstances. They did not stipulate that consent could not be granted prior to a complainer falling asleep. The purpose of section 14(2), in its exclusion of consent whilst asleep, was to prevent inarticulate noises, words spoken in an unconscious state, or acquiescence being regarded as indicative of consent. It was not intended to prevent a party from experiencing pleasure in waking in the midst of ongoing intercourse. It was ultimately accepted that the submission could apply to a casual encounter and was not confined to settled relationships. It should be possible for an accused to lead evidence of prior episodes as indicative of a reasonable belief in consent. The position of the Crown

meant that the section criminalised an aspect of human relations and as such was an interference with family life. Upon inquiry by the court, the appellant confirmed that he was not raising a point about the compatibility of the 2009 Act with Article 8 of the European Convention.

[17] The appellant had drawn the PH judge's attention to *R* v *JA* [2011] 2 SCR 440. He had sought to distinguish the analysis of the Canadian Supreme Court on the basis of differences in the legislation. The majority had been prepared to tolerate a situation in which their concept of consent would produce just results only in the vast majority of cases. This implied that in some cases an unjust result could follow. It was accepted that the majority view did not favour the appellant's position. The same applied to *KT* v *Procurator Fiscal, Falkirk* [2018] SAC (Crim) 15. Although not referred to in the opinion of the court, the PH judge's opinion had been drawn to the Sheriff Appeal Court's attention and effectively followed.

[18] A cautious approach should be adopted in the case of persons in an established relationship (*R* v *Ciccarelli* [2012] 1 Cr App R 15 at para 4). In England and Wales, the matter was dealt with by way of an evidential (rebuttable) presumption (Sexual Offences Act 2003, s 75) whereby, if an accused knew that a complainer was asleep or otherwise unconscious, the complainer was "to be taken not to have consented" unless sufficient evidence were adduced to raise an issue about whether she had consented. A similar provision existed in relation to reasonable belief. The presumption could be rebutted if there was evidence of prior consent (eg *R* v *White* [2010] EWCA Crim 1929; *R* v *Ciccarelli* (*supra*); *R* v *Cooper* [2010] 1 Cr App R 7).

[19] Alternatively, if the legislation was ambiguous, regard should be had to the Parliamentary materials (*Pepper* v *Hart* 1993 AC 593). In particular, the comments by the

Cabinet Secretary (*supra*) had made it clear that, whereas section 14 restated that a person who was asleep could not give consent whilst "in that state", it did not exclude prior consent or a defence of reasonable belief when the complainer was asleep. The appellant had drawn the PH judge's attention to the comments in Gordon: *Criminal Law* (4th ed, at para 38.13) that section 14(2) was "unclear". It had two possible meanings, *viz*. either that: (1) any conduct which took place when a complainer was asleep was necessarily non-consensual, thereby criminalising the waking kiss; or (2) although a person who was asleep could not consent whilst in that state, she may have done so earlier (see also Chalmers: *Two Problems with the Sexual Offences (Scotland) Bill* 2009 SCL 553; Renton & Brown: *Statutory Offences* para B-166.1, citing *Rodgers* v *Hamilton* 1994 SLT 822). The second meaning, which was preferred in Gordon and by Chalmers, ought to be adopted. The approach of the Crown, to the opposite effect, was a totalitarian one.

Respondent

[20] The advocate depute maintained that the PH judge had been correct in determining that section 14 of the 2009 Act was not ambiguous. The provisions of the Act did not permit free agreement in advance. A person did not consent to sex in general. Consent had to be at the specific time and place of the conduct and with the specific person (*R* v *Cooper* (*supra*) at para 27). There could be no consensual conduct with a sleeping person. If consent could be given prior to the complainer falling asleep, it would not be capable of being withdrawn. Consent to conduct on one occasion did not mean that consent was given to conduct on a later occasion (*L* v *HM Advocate* [2018] HCJAC 35). It was not possible to consent to an assault (*Smart* v *HM Advocate* 1975 JC 30) and there were limits to what could be consented to (*Laskey* v *United Kingdom* (1997) 24 EHRR 39).

[21] Consent had to continue throughout the conduct. The four difficulties of proceeding otherwise were set out in *R* v *JA* (*supra* at paras 59-62). There could be no reasonable belief that a sleeping person was consenting to any sexual activity. The accused would thereby necessarily have the requisite *mens rea*.

[22] Parliament had not said that consent could be given in advance. It had not left open a defence of prior consent. The PH judge had come to the correct conclusion in that regard.

Decision

[23] At common law, rape is defined as a man having sexual intercourse with a woman by overcoming her will by force (see *Graham* v *HM Advocate* 2017 SCCR 497, LJG (Carloway) at para [20]). The requisite intent was to have intercourse by overcoming the woman's will in this way. Thus, where that intent was absent, and the intention was to have intercourse in a situation in which the woman was unaware that it was happening, the crime was not rape but clandestine injury (see eg *Rodgers* v *Hamilton* 1994 SLT 822). Where rape was alleged, if the woman had consented in the absence of force, as that term was loosely defined, the man would not be guilty; but an absence of "consent" did not feature in the definition of the crime. It was, rather, regarded as a defence; albeit one that, if raised, the Crown would require to rebut to the appropriate standard of beyond reasonable doubt.

[24] In due course, the Full Bench determined, by a majority, (*Lord Advocate's Reference No. 1 of 2001* 2002 SLT 466) to correct the definition of rape whereby force would no longer be required. Thenceforth, the Crown would need "only" to prove that the woman had not consented. The requisite intent became that the man had intercourse knowing that the woman was not consenting or was reckless to that fact (*ibid* LJG (Cullen) at paras [28] and [44]). An honest belief that the woman was consenting, or a reasonable doubt on that issue,

would necessitate an acquittal. In *Spendiff* v *HM Advocate* 2005 JC 338, it was made clear (at para [32]) that intent was not something which required formal proof; rather it was to be inferred from proven fact.

[25] When the Scottish Law Commission came to examine the state of the law in the wake of *Lord Advocate's Reference No. 1 of 2001* (*supra*) and the cases which followed, notably *McKearney* v *HM Advocate* 2004 JC 87, they recognised (Report No. 209: *Rape and Sexual Offences* at para 2.6(v)), in proposing the consent model, which had been foreshadowed in *Lord Advocate's Reference*, the difference from the original common law which such a model would constitute. Henceforth, as has proved to be the case, the focus of the trial would become the actions of the complainer rather than those of the accused. "[T]he focus of attention is not on what the accused did to the victim but on what the victim did with the accused" (para 2.13). The SLC acknowledged (at para 2.7) the problems which the model might introduce, in that sexual conduct of a consensual nature often proceeded "without there being a discussion or negotiation about consent, for example where parties have a long-standing relationship and regularly engage in a particular type of sexuality". Nevertheless, in recommending the model and departing from the notion that consent ought to be seen as a defence rather than its absence being a constituent element of the crime itself, the SLC expressed the view (para 2.18) that "By placing consent as a defence the criminal law would fail to express what is wrong about the conduct in question".

[26] Thus, following the SLC's recommendation and draft Bill, section 1 of the Sexual Offences (Scotland) Act 2009 defines rape as, *inter alia*, occurring when a person's penis penetrates the vagina of another "without [the other] … consenting" and without any belief that the person "consents". The intention of the accused, other than in relation to penetration, ceases to be of direct relevance. The crime is committed if the act occurs

without the complainer's consent. The mental element in the crime, if it arises at all, is restricted to reasonable belief.

[27] The court agrees with the decision and reasoning of the PH judge, that consent which is expressed at a point materially remote from the conduct said to constitute the crime, cannot provide a defence in terms of the statutory provisions. It agrees also with the Sheriff Appeal Court in *KT* v *Procurator Fiscal, Falkirk* [2018] SAC (Crim) 15 (at para [4]) that it is axiomatic that, if the law provides that a person is incapable, whilst asleep or unconscious, of consenting to any conduct, there can never be a reasonable belief of consent in such circumstances.

[28] The terms of the Act are, as the PH judge determined, clear. What is required by section 1(1)(b) is that the act is committed without the other person "consenting" and without a reasonable belief that she "consents". The former is a present participle and the latter use of the verb is in the present tense. This is indicative of a need for the consent to be given, in whatever form, at the time of the sexual act and not at a point remote from it. Such an interpretation is consistent with the general notion of the need, expressed in the Act, for there to be continuing consent throughout the conduct. It is consistent also with the terms of section 274(1)(c) of the 1995 Act the relevant time of consent. Section 15 is clear that consent to conduct does not of itself imply consent to any other conduct. Thus, the fact that consensual conduct of the same type has happened before will not, at least on its own, constitute consent to the same conduct occurring at a different time. The contrary was, in large measure, what the appellant's argument was.

[29] Section 14 is equally clear in its statement that a person cannot consent to conduct whilst she is asleep or unconscious. This too is unambiguous. It means what it says. A sleeping person is not capable of consenting. Therefore, given that the consent must be

given at the time, sexual conduct which occurs when the person is in that state is criminal. It cannot be consented to at a remote point in advance. In this regard, the court agrees in essence with the majority of the Supreme Court of Canada in *R* v *JA* [2011] 2 SCR 440. The Canadian legislation is similar, but by no means identical. If anything, the Scottish legislation provides a sounder base for the interpretation which this court has adopted.

[30] The Canadian provisions stated that: "No consent is obtained … where … the complainant is incapable of consenting to the activity"; and that "It is not a defence … that the accused believed that the complainant consented … where the accused did not take reasonable steps ... to ascertain that the complainant was consenting". As McLachlin CJ, expressing the opinion of the majority, said (at para 43):

> "The question … is whether Parliament defined consent in a way that extends to advance consent to sexual acts committed while the complainant is unconscious. In my view, it did not. [The respondent's] contention that advance consent can be given to sexual acts taking place during unconsciousness is not in harmony with the provisions of the Code and their underlying policies. These provisions indicate that Parliament viewed consent as requiring a 'capable' or operating mind, able to evaluate each and every sexual act committed. To hold otherwise runs counter to Parliament's clear intent that a person has the right to consent to particular acts and to revoke her consent at any time. Reading these provisions together, I cannot accept the respondent's contention that an individual may consent in advance to sexual activity taking place while she is unconscious."

This approach (see also *R* v *Todorov* [2014] QCCQ 3027, Healey JCQ at para [27]) is entirely consistent with that in the Scottish legislation. It is of some note that at least one other Commonwealth jurisdiction, which has recently examined their legislation, follows the same model. Thus the Crimes Amendment (Consent-Sexual Offences) Act 2007 amended the Crimes Act 1900 to read:

> "61HA(4) Negation of consent
>
> A person does not consent to sexual intercourse:
>
> > ... (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep ...".

[31] The legislation in England and Wales is materially different in its reference to an evidential burden. The court has not therefore felt able to rely upon the *dicta* in *R* v *White* [2010] EWCA Crim 1929 or *R* v *Ciccarelli* [2012] 1 Cr App R 15. *R* v *Cooper* [2010] 1 Cr App R 7 was dealing with the mental state of the complainer, but Lady Hale's remarks (at para 27) are of some assistance on the importance of autonomy:

> "… [I]t is difficult to think of an activity which is more person - and situation - specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place, autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention …".

[32] If the matter were at all ambiguous, it is resolved by the fact that Parliament did not accept the draft section proposed by the Scottish Law Commission, which would have expressly permitted advance consent. Nothing which the Cabinet Secretary said suggested that such consent, as a defence, was to remain a possibility, even if his phraseology was cautious. It is, of course, possible to employ as a test the *reductio ad absurdum* to suggest that the waking embrace could constitute a crime. This consequence may be one that technically follows as a result of removing the element of intent on the part of the accused, which is such a critical feature in common law crimes, from the new statutory definition. However, the problem, if it arises at all, is not one which is likely to occur in practice. It would be surprising if the Crown prosecuted such conduct. If they did, and convictions followed, it may be that the legislature would require to amend the Act. As matters stand, there is no challenge that the provisions of the 2009 Act breach the right to respect for a private or family life under Article 8 of the European Convention of the type envisaged by some of those who responded to the SLC's consultation (*supra*). Any such challenge, if made, would

require to be analysed on its merits, including those arising in the context of Lady Hale's remarks in *R* v *Cooper* (*supra*).

[33] The appeal is accordingly refused.

Postscript

[34] A subsidiary question concerning the form of the defence (Criminal Procedure (Scotland) Act 1995, s 78), was raised before the PH judge. The court agrees with the PH judge's observations upon that issue. All that should be stated in such a defence is that the complainer consented to the conduct libelled or that the accused had a reasonable belief that she had consented to that conduct. The defence, which is intended only to provide notice to the Crown, should not be used as a vehicle in which to provide the jury with a narrative of the accused's account of events in advance of, and potentially in the absence of, testimony to that effect from the accused or other witnesses.