APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 39
HCA/2019/265/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF

LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 107A(1)(a) AND 110(1)(e) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

SM

Respondent

Appellant: A Prentice QC (sol adv) AD, KS Maguire AD; the Crown Agent
Respondent: McCall QC, Findlater; Lindsays, Dumfries

29 May 2019

[1] The respondent is charged with the abduction, assault and rape of SP, his then partner, on an occasion between 1 and 31 March 2007, at addresses in Dumfries, the roads from Dumfries to Dalbeattie and an industrial area near Dalbeattie. The precise libel includes the following:

> "... abduct and assault [SP] ... drag her from a taxi rank into the street, follow her into an alleyway, push her against a wall, slap her on the face and cause her to strike her head against a wall, strike her on the face, cause her to fall to the ground, throw her onto a cobbled path, drag her from the alleyway to a motor car, drive said car when you were under the influence of alcohol to the industrial area near Dalbeattie, penetrate her vagina with your penis while you were both in said car, compel her to bend over the bonnet of said car and penetrate her vagina with your penis and you did thus rape her, to her severe injury;".

[2] Appended to the indictment is a docket, which states that the Crown intend to lead evidence of an incident on 20 September 2014 in Romford, Essex, where the respondent:

> "assaulted [TJ] ... repeatedly punched her on the head, carried her over your shoulder, threw her mobile phone to the ground, pulled down her lower clothing, licked her vagina, seized hold of her, penetrated her mouth with your penis and penetrated her vagina with your penis and you raped her".

[3] Evidence had been given by the complainer in the docket of an incident when she was walking home from a nightclub at about 4.00am and found herself alone on Crow Lane, Romford. She became aware of running footsteps behind her. She turned and was suddenly punched on the face. She fell over and was faced with a man in a "hoody". This man was a stranger to her. He simply picked her up, threw her over his shoulder and carried her off. She was taken into the area of a rugby club, where the events libelled took place. He had made her perform oral sex on him before becoming upset and saying "Look what I've done, I've traumatised you for life". However, he then proceeded to have sexual intercourse with her. The complainer had managed to get away.

[4] The complainer in the charge spoke about an incident which had occurred some 7 years earlier. The complainer had been in a relationship with the respondent. They lived together in Lochmaben. One night they had been at a nightclub in Dumfries when, for reasons which need not be explored, the complainer decided to leave and take a taxi to her mother's house in Dalbeattie. The intention of the couple had been to go there anyway and

stay the night. As the complainer, who was 5'3" and 7 stone, was standing at a taxi tank, the respondent, who is 6' tall, approached and dragged her away. She managed to escape and hid in a doorway. When she emerged, she was struck by the respondent. Her head hit a wall. She retaliated, but he threw her to the ground, as a result of which her nose and chin were badly hurt. She was bleeding. She thought she had a broken nose. She was in excruciating pain.

[5] The respondent apologised for this incident. The complainer was then dragged towards the car. The respondent "put [her] into the car". He "forced [her] in". He then drove off, taking a lengthy route to reach Dalbeattie, by driving along the coast. The complainer was crying and shouting for him to let her go. She was attempting to grab the steering wheel and the handbrake. She had never seen the respondent in this state before. She was worried and did not know what would happen next. She decided that she needed to calm the situation down. She told the respondent that she loved him. The respondent stopped some distance short of Dalbeattie in agricultural premises. The respondent asked her "what next?" The complainer said that she had "agreed to sleep with him". This was an attempt by her to reassure the respondent that all was fine. She "probably started it". She was not going to disagree with the respondent. She needed to defuse the situation and to get home. She told the respondent that she had forgiven him. The respondent pushed the passenger seat back and got on top of her. The complainer then said that the respondent had initiated "it".

[6] When asked why she had had intercourse, she referred to the Dumfries incident. The Crown version is that she replied "because I didn't know what was gonna happen ... I had already been dragged through Dumfries ... I was nowhere near my mum's. I couldn't walk home. I wasn't going to poke a bear with a stick". She didn't do it because she wanted

to but to defuse the situation. The respondent had helped her out of the car, bent her over the bonnet and had sex with her again. She "just let him".

[7] In cross-examination, the complainer's statement, which had been given to the police some 7 years later, was put to her. She agreed that she would have said "Right come on let's have sex"; again doing it to reassure him and to enable her to go home. She "agreed to sleep with him in the car because I just wanted to go home, so I slept with him". "I consented not because I wanted sex ... but just to calm him down".

[8] The respondent made a no case to answer submission which was based, first, on a contention that the complainer's testimony did not amount to a description of rape. She had said that she had consented to intercourse. The trial judge agreed. She did not consider that this testimony demonstrated a lack of consent. There was no evidence of force or that the complainer feared violence once in the car. She had said that she had consented. The Crown's position appeared to be that, although the complainer had said that she had consented, she was "not really" consenting. There was no evidence from her of any fear of violence after the car had stopped near Dalbeattie. The appellant had intended to make a second submission to the effect that mutual corroboration could not operate to provide a sufficiency, presumably because of differences between the evidence relating to the charge and that relating to the docket. The trial judge decided not to deal with this submission, given her decision on consent.

[9] I am grateful to Lord Brodie for his careful analysis of the authorities in Scotland, England and New Zealand on what amounts to consent. I agree with that analysis. The issue is whether, taking the evidence of the complainer at its highest, the jury could infer a lack of consent as a matter of fact (*Marr* v *HM Advocate* 1996 SCCRC 696, LJC (Ross), delivering the opinion of the court, at 699). There is enough from the complainer's

description of the whole circumstances for that inference to be drawn. It is important to look at the events in Dumfries, the car and at the premises in Dalbeattie as a continuing crime involving assault, abduction and rape. Although the alleged assault and alleged rape happened at different locations, they are directly linked. The indictment libels abduction and that libel is sufficient to cover the capture of the complainer (which is separately libelled) and her continued abduction in the car, from which she was unable to escape at least whilst the respondent drove it on a circuitous journey to Dalbeattie.

[10] The episode, looked at as a whole, started with a significant assault on the complainer, which left her in excruciating pain. She was crying. The respondent was behaving in an unaccustomed manner. The complainer did not know what was going to happen next. She could not leave the car when it stopped and walk to her mother's house. It was too far away and no doubt it was dark. She was effectively being held captive. The complainer explained that she agreed to have intercourse, not because she wanted to, but because, not unreasonably, she felt that she had to agree in order to defuse the situation. In this atmosphere of assault and abduction, she took such action as she thought was appropriate to avoid further trouble and to get home. It is a matter for the jury to decide whether a captive having intercourse with her captor in such circumstances is to be classified as consensual intercourse or not. There is ample scope for holding that it is not, and that what occurred constituted the crime of rape. That is so, even if the respondent has a basis for arguing that he had an honest belief that the complainer was consenting.

[11] In these circumstances, the appeal should be allowed and the case remitted to proceed as accords. It is unfortunate that the secondary submission was not determined. Had it been decided in favour of the respondent, it too could have been dealt with in this

appeal. As matters stand, it may now require to be argued and perhaps form the subject of a separate appeal.

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[12] As at the date of the date of what is libelled in the only remaining charge in the indictment the crime of rape was as it had been explained by the Lord Justice General (Cullen) in *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466. At para 44 of his opinion the Lord Justice General, with whom four of the court of seven judges agreed, said this:

> [44] In my view this court should hold that: (i) the general rule is that the *actus reus* of rape is constituted by the man having sexual intercourse with the woman without her consent; (ii) in the case of females who are under the age of 12 or who for any other reason are incapable of giving such consent, the absence of consent should, as at present, be presumed; and (iii) *mens rea* on the part of the man is present where he knows that the woman is not consenting or at any rate is reckless as to whether she is consenting."

[13] It is therefore for the Crown to prove in this case (by corroborated evidence) that the accused had sexual intercourse with the complainer "without her consent". As the principal source of evidence the Crown relies on the testimony of the complainer. If her evidence is insufficient to support the proposition that intercourse took place without her consent then the Crown cannot succeed. In upholding the submission made on behalf of the respondent in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 that the respondent had no case to answer in relation to that part of the libel, the trial judge has determined that the complainer's evidence, taken at its highest, was indeed insufficient to support the charge of rape. In presenting her conclusion in her report the trial judge says this:

> "34. Having regard to the whole tenor of her evidence it seemed to me that the evidence of lack of consent, was simply not enough in this particular case. There was evidence from her own words that she consented and may have instigated it. I appreciate that she said that she wanted to defuse a situation and that she wanted to go home but there was no evidence that she did so for fear of further violence.
>
> 35. ... My concern in this case is that the Crown approach appeared to be that this is a complainer, who despite her evidence that she did consent, was not really consenting. She would not consent because of her obvious injuries and she stated that the accused was bound to know that she was not consenting because of the prior assault and those obvious resultant and visible injuries. I find it difficult to understand how the Crown can take such an approach where there is Crown evidence which, not only does not only support the complainer, it contradicts her."

The trial judge does not identify a source of evidence, other than the complainer, which "contradicts her". What I understand by that reference is that, in the opinion of the trial

judge, the complainer had herself given evidence contradictory of the proposition that she did not consent.

[14] There would appear to have been little judicial consideration in Scotland of just what is meant by "without [the woman's] consent". The Scottish Law Commission's Discussion Paper on Rape and Other Sexual Offences, no 131 of 2006 observes, at para 3.4, that under the then current Scots law there was no specific definition of consent. Indeed it had been held that a judge should not provide the jury with a definition. This was a reference to *Marr* v *HMA* 1996 SCCR 696 where a jury in a trial involving a charge of indecent assault had asked for guidance on the meaning of consent. The sheriff's response had been that the:

> "definition of consent is a common, straightforward definition of consent. It's the common English word given its normal meaning. And that I am afraid is it. Consent is consent."

The Appeal Court approved the sheriff's approach. At p 699 the Lord Justice Clerk (Ross) said:

> "We recognise that the sheriff might have decided in the face of this request to use some synonym for consent and, for example, tell the jury that they must look for agreement, but we are not persuaded that it was necessary for her to do so. What was important was that she made it plain to the jury that the word 'consent' had no special meaning in law but required to be given its normal meaning."

A possible difficulty about that is that "consent" has no single "normal meaning". Rather, as was observed by Dillon LJ giving the judgment of the Court of Appeal in *R* v *Olugboja* [1982] QB 320 at 331H, "it covers a wide range of states of mind in the context of intercourse between a man and a woman ranging from actual desire on the one hand to reluctant acquiescence on the other."

[15] It is uncontroversial that where acquiescence in an act of sexual intercourse has been procured by violence or the threat of violence or the woman having been abducted and held against her will this falls to be regarded as an instance where the act is "without consent".

In so far as it is possible to describe the woman as having consented in such situations, her consent has been vitiated by the pressure applied by the man. The decision in *Olugboja* was to the effect that there is a point on the spectrum of states of mind where consent may not have been entirely vitiated but nevertheless acquiescence in intercourse is so reluctant by reason of the force or external circumstances that it does not amount to consent in any real sense. Dillon LJ put the matter this way:

> "... the jury will probably be helped by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we have earlier referred and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other will not be easy to draw."

Thus, "mere submission", although lying on the spectrum of states of mind that, as matter of the normal meaning of language can be described as "consent" does not amount to "real consent" for the purposes of the (English) law of rape. Similar reasoning was applied by the New Zealand Court of Appeal in the case of *R* v *Daniels* [1986] 2 NZLR 106 at 110, refusing an appeal against conviction where the evidence was that the complainant, a 17-year-old baby sitter who was importuned by two men, had facilitated an act of intercourse by positioning the man's penis in her vagina:

> "Submission to the inevitable or out of despair when trapped is not real consent, even if the submission involves the degree of physical assistance given here by the girl."

[16] I do not consider that it can be suggested that the law of Scotland as to what was meant by "consent" in the context of the law of rape post *Lord Advocate's Reference (No 1 of 2001)* was any different from what was understood by consent by the courts in *Olugboja* and *Daniels*. As the sheriff said in *Marr*, with the approval of the Appeal Court: "Consent is consent." Such a meaning is consistent with definition of "consent" as "free agreement" which is now provided by section 12 of the Sexual Offences (Scotland) Act 2009. In making

their proposals which led to the enactment of the 2009 Act the Scottish Law Commission saw a need to provide a definition for consent but there is no suggestion that in what they described as refining the law that they were departing from what was understood to be meant by consent as a matter of the pre-existing common law. An agreement is not free if it only arises as the result of very pressing circumstances brought about by the acts of the other party, just as consent is not real if it is only the result of such circumstances.

[17] Your Lordship in the chair has reviewed the relevant passages in the complainer's evidence. I respectfully agree with your Lordship's conclusions. The trial judge may be right to say that the Crown were maintaining that, despite her evidence that she did consent (in the sense of the way in which she formulated certain of her answers and perhaps that, in a certain sense "she started it"), the complainer was not really consenting. If that were simply a matter of inference it might be different but, as your Lordship has demonstrated, the complainer's direct evidence was such that it would be open to the jury to conclude on the basis of what she said that she did not wish to have intercourse and that she acquiesced only by reason of very pressing circumstances brought about by the respondent. I would see the passage referred to by the trial judge at paragraph 18 of her report to be particularly telling:

> "She repeated that she did it to defuse the situation. She was asked whether the accused would be aware of this and she said that she did not think anyone would want to have sex in the car after she had been injured."

[18] I would allow the appeal. As I see it, it is for the jury to determine whether the evidence of the complainer is such that the Crown has established that the relevant acts of intercourse were without consent.

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[19] I have had the benefit of reading the opinions prepared by your Lordship in the chair and by Lord Brodie. I entirely agree with all that your Lordships have said. I have nothing further to add.