APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 63
HCA/2018/000299/XC

Lord Menzies
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD GLENNIE

in

Appeal

by

DAVID BRIGGS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Scullion QC, Findlater; Paterson Bell
Respondent: A Prentice QC (sol adv) AD; Crown Agent

26 June 2019

Introduction

[1] On 3 May 2018 the appellant was convicted by a jury, by a majority, on two charges alleging sexual offences committed against members of his extended family in the period between 2002 and 2006. The relevant charge for the purposes of this appeal is charge 1 which, so far as is material, was in the following terms:

> "(001) on 27 October 2006 at [address] you … did indecently assault [name], your cousin, … and touch, kiss, lick and bite her breasts, touch her vagina, induce her to masturbate you, penetrate her mouth with your penis, penetrate her vagina with your fingers and penetrate her vagina with your tongue and penis and you did rape her;"

At an adjourned diet of sentence on 31 May 2018 the appellant was given a cumulo sentence in respect of both charges of 5 years and 6 months imprisonment. The appellant appeals against conviction. There is no appeal against sentence.

[2] The Note of Appeal originally advanced three separate grounds of appeal. The first ground, which questioned the impartiality of the jury, did not pass the sift. Leave to appeal was granted in respect of the second and third grounds. However, the third ground, which alleged a misdirection by the trial judge in his charge, was not insisted upon at the hearing of the appeal. In those circumstances the only ground of appeal which remained live at the hearing before us was Ground 2, which was concerned with the question of sufficiency of evidence on charge 1.

The relevant evidence

[3] The relevant evidence is summarised by the trial judge in his Report and in a Supplementary Report prepared at the request of this court. No issue was taken as to the accuracy or the adequacy of that summary.

[4] The evidence potentially relevant to the offence libelled in charge 1 was not confined to the description of the events alleged to have occurred on 27 October 2006. By a docket attached to the indictment the Crown gave notice that it intended to lead evidence that, on various occasions between October 1994 and October 2006, when the complainer was aged between 4 and 15 and the appellant was about 2½ years older than her, the appellant had used lewd, indecent and libidinous practices towards the complainer, had touched her chest,

removed her lower clothing, touched her buttocks, touched her vagina, kissed her vagina, placed her hand on his penis, induced her to masturbate him, penetrated her mouth with his penis, and held her against his body. In his report at paras [6] and [7] the trial Judge summarised the evidence given by the complainer in support of the matters set out in the docket. A feature of the conduct described by the complainer in that evidence was that she would often try to resist the appellant, for example by kicking him away or by making her body go rigid, or would try to discourage him by ignoring him, but the appellant would persist in the face of this and she would sometimes comply reluctantly in the face of his "incessant" attempts.

[5] The trial judge summarised the complainer's evidence about the events of 27 October 2006 in paras [8] to [18] of his Report. She had just turned 15 at this time while the appellant was 17. Her mother had just remarried and there was a reception at a nearby hotel on 27 October. The four children (the appellant and his brother, D, together with the complainer and her brother, J) were the first to return to the family home. They had all drunk alcohol at the reception and on their return the appellant bought more alcohol at a local off-licence. They all watched a DVD. J fell asleep on the couch. D appeared to be drunk so the complainer offered to look after him. She went to her bedroom and put on her pyjamas, expecting D to follow her. However, the appellant persuaded D to sleep elsewhere while he went into the complainer's room. She was "absolutely gutted" when she saw him. He smiled and commented on how great she had looked in her dress. He pointed towards his erect penis underneath his kilt and said words to the effect, "look what you've done to me". The complainer turned to face the wall and pretended to be asleep. The appellant got into bed beside her and tried unsuccessfully to put his hands under her top. He then rolled the complainer onto her back, took off her top, kissed her nipples and tried without success

to touch her vagina. He pulled her legs apart and took off her pyjama bottoms. At that stage she was naked. He inserted his fingers into her vagina, which she found "so, so sore". She was "disgusted" when he tried to get her to lick or smell his fingers. The appellant then said that it was her turn. He asked her to suck his penis, claiming that his girlfriend loved its size. The complainer acceded to his request and he ejaculated in her mouth. At this point the complainer thought that the episode was over. She felt sore and exhausted. Her nipples were painful from being bitten and pinched.

[6] The appellant started to make further sexual advances but the complainer "squirmed away or said no". The bed was squeaky and there was only a thin partition wall between that bedroom and the bedroom occupied by the other two children. The complainer was worried that they might hear something. She suggested that they should move out of the bed and lie on the floor. He agreed. She had mistakenly thought that "he wouldn't want to and would give up". She lay on her back on the floor, her head resting uncomfortably on the handles of the bedside table. The appellant positioned himself on top of her and teased her by pushing his penis against the entrance to her vagina. The complainer said that she did not have any condoms. He laughed and said "the last thing I want to do is get my little cousin pregnant". She pushed his shoulders away when he had his hands on her chest near the beginning of the incident. The appellant put his head between her legs and performed oral sex on her. At the same time he penetrated her vagina with his fingers. As she tried to push his head away, she felt gel on his hair. At that point the complainer described herself as exhausted, demoralised and in pain. The appellant was still energetic and erect. She tried to make an excuse by saying that there was a noise. He penetrated her vagina "a very small amount, like maybe the tip, just a few centimetres". Someone did then come to her bedroom door and the appellant withdrew his penis.

[7] The complainer said that she was a virgin at the time and very scared about being penetrated. Throughout the episode she was tense and rigid. She gritted her teeth and looked at the ceiling and the wall. She did not shout out, because the other two boys were not in a position to do anything. The appellant was bigger and stronger than them. She could not see who came to the door as the appellant's body blocked her view. She thought it was probably her younger brother, J.

[8] In para [18] of his Report the trial judge summarised J's evidence about this incident. He had heard whispering in his sister's bedroom and went to her bedroom door and looked in. He said that the complainer looked uneasy and the appellant lay topless on the bed. He had had suspicions before that date. That night he felt that something was not right between his sister and the appellant.

[9] Finally, we should note that J gave evidence of sexual abuse perpetrated against him by the appellant over a period of some 7 or 8 years when he was aged between about 5 and 14. That conduct was the subject of charge 2 on the indictment and a further docket attached thereto. It is unnecessary to describe that conduct in any detail. J's evidence about it is summarised by the trial judge at paras [19] to [24] of his Report.

Submission of no case to answer

[10] At the end of the Crown case, Mr Scullion QC, who appeared for the accused, made a submission of no case to answer in terms of section 97 of the Criminal Procedure (Scotland) Act 1995. He contended that there was insufficient evidence to entitle the jury to convict of the rape alleged in charge 1 on the indictment because: (a) the complainer did not say that she was not consenting, only that she did not want it to happen; (b) the complainer did not give evidence that the appellant would have known that she was not consenting,

and he had deliberately not cross-examined her on that point; (c) there was no independent evidence of distress; and (d) accordingly there was no sufficient evidence that the appellant had the necessary *mens rea*. Having heard the advocate depute in reply, the trial judge repelled that submission. In para [50] of his Report, the trial judge noted that Mr Scullion had accepted that the complainer's body language and demeanour could have been enough to indicate lack of consent. In those circumstances, he concluded, the question of whether the complainer had consented and, if not, whether the accused would have known that she was not consenting, were pre-eminently questions for the jury. There was, in his view, sufficient evidence to entitle them to determine whether the complainer had given her consent and, if not, whether the accused had nonetheless had an honest belief that she had consented.

The trial judge's Reports

[11] At the request of this court, the trial judge produced a Supplementary Report elucidating para [50] of his earlier Report so as to indicate what sources of evidence he had had in mind from which the jury could infer the necessary *mens rea* on the part of the appellant. At para [12] of his Supplementary Report, the trial judge identified in a series of bullet points a number of points in the complainer's evidence in chief bearing on the questions of consent and knowledge. We list them below:

- that evening the appellant had bought a four-pack of Bacardi Breezers for the complainer (who was only 15), of which she may have drunk three bottles;
- the complainer said that she would look after D as he appeared to be drunk;
- the appellant persuaded D to sleep in J's bedroom;

- when the appellant appeared at the door of her bedroom, and invited her to look at his erection under his kilt, the complainer turned around, faced the wall and pretended to be asleep;
- when the appellant came back from the bathroom, the complainer continued to pretend to be asleep, but the appellant nevertheless got into her bed and asked if she was asleep, if she was all right;
- the appellant attempted to insert his hands under her top, but was unable to do so as she was holding herself tight;
- the appellant rolled the complainer onto her back, took off her top, rubbed and kissed her chest, including her nipples - she pushed his shoulders away as he leaned over her;
- the appellant then tried to finger her vagina, but her shorts were in the way - he said "let's get them off", but her legs were close together and she was tensed up - he then used his fingers to pull apart her legs while she tensed up and grimaced;
- at this stage she felt sore and exhausted;
- when the appellant had his head between her legs performing oral sex and digitally penetrating her, the complainer was pushing his head - she recalled the gel on his hair;
- the appellant was very forceful, pinching and biting, and by that point she was sore, exhausted, demoralised and in pain;
- after the initial episode in the bed, the appellant was still energetic, still erect, still trying to touch her and obviously wanting more, so the complainer tried to make an excuse by saying that there was a noise;

- when the person came to the door, the complainer thought that she was saved - at that time she was pinned down by the appellant who was pushing his penis into her vagina;
- at that point, she "had a reaction of shock, think I pushed his shoulders";
- the whole time, she was tense, rigid, gritting her teeth and looking at the ceiling or the wall.

[12] The trial judge says in para [13] of his Supplementary Report that the defence case was put squarely to the complainer in cross-examination. The defence case was that the complainer had lied and that there had been no sexual contact between her and the appellant at all. The complainer denied fabricating her account. In the course of her answers in cross-examination she said:

- she had tried to avoid the appellant's company after the earlier incidents of abuse;
- she had been seated beside him at the wedding reception but did not recall being with him after that part of the event;
- at some point during that evening he came across to her, flicked her leg, asked her how she was, and positioned himself close to her in a manner that made it difficult for her to get away from him;
- during the lift home, the appellant tried to hold her hand in the back seat - she was "absolutely terrified" and pulled her hand away, but he moved into the middle, took her hand and put it between them so that the driver could not see;
- she felt tired, demoralised and utterly powerless;

- she did not sleep in the same room as the other two boys because her brother's room was very small, she thought one of them was already asleep, and she would have had to step over someone to get into the room;
- she just froze;
- it was her mum's wedding and she did not know what to do.

[13] In paras [14] to [17] of his Supplementary Report, the trial judge notes that in the course of her cross-examination, the complainer repeated two points she had made in her evidence in chief: first, that the appellant was laughing and making fun of her when he applied pressure on the outside of her vagina with his penis; and, second, that when the other person came into her bedroom, she was tensed up. In re-examination, the complainer adopted a sentence from her witness statement where she said: "I remember him saying to me not [to] tell anyone and [he] said he wouldn't tell anyone." The trial judge summarised the effect of the evidence in this way:

> "Many of the items of evidence are small and neutral in colour. But taken together, in my view they entitled the jury to see them as tiles of a mosaic from which they could reasonably infer that (i) [the complainer] had not given consent and (ii) the appellant had no honest belief that she was consenting."

The trial judge says that because the appellant denied that any of the events took place at all, Mr Scullion (rightly) did not ask any questions about consent. There was no evidence from the complainer that the appellant had enquired of her whether she consented to his conduct.

Submissions in the appeal

[14] For the appellant, Mr Scullion now accepted that there was sufficient evidence of lack of consent on the part of the complainer for that issue to be left to the jury. But he insisted in the argument that there was insufficient evidence of the absence of an honest

belief on the part of the appellant that the complainer was consenting to what he was doing. He gave a number of illustrations of his point under reference to the Written Submissions for the Crown and to the transcript of the complainer's evidence. Four examples will suffice. First, the complainer gave evidence that her motive for volunteering to look after D, the appellant's younger brother who seemed to be drunk, was to avoid giving the appellant the opportunity of sleeping in the same room as her - but, he submitted, that was never communicated to the appellant nor was there any evidence from which it could be inferred that he ought to have known that. Secondly, the complainer acceded to the appellant's request to perform oral sex on him - there was nothing in her evidence to suggest that she acted in such a way as to make known to the appellant any reservations which she might have had. Third, the complainer gave evidence that she suggested that they moved off the bed and onto the floor in the hope that he would not want to do that and would give up trying to have sex with her - but if that was what she was thinking, she never made that clear to the appellant nor could he have been expected to realise that that was what she wanted. And, fourth, when, during that last episode of penetrative sex, the complainer made some remark about not having any condoms, there was nothing to indicate that she was participating in sexual intercourse against her will. The submission, put short, was simply that there was no evidence that the complainer communicated a lack of consent to the appellant or that the appellant ought to have known that she was not consenting.

Mr Scullion submitted that the trial judge had misunderstood his "concession". He had not accepted that the complainer's body language and demeanour could have been enough to indicate lack of consent. He had accepted that body language and/or demeanour could in principle communicate a lack of consent and could therefore be relevant to the question of whether a person could have an honest belief that the other person was consenting. But he

did not accept that the complainer's account of what she had said and done in this case provided an evidential basis upon which the jury would have been entitled to conclude that the appellant did not have the requisite belief. There was no evidence available to demonstrate that the appellant did not have an honest belief in consent and, therefore, no evidence that he had the *mens rea* necessary for the crime of rape.

[15] For the respondent, the Advocate Depute submitted that the description by the complainer of the conduct perpetrated by the appellant upon her provided sufficient evidence from which it could be inferred that the complainer was not consenting and that the appellant would have been aware of that at the time, particularly in the context of his prior relationship with her. The complainer's evidence had to be taken as a whole. Her evidence showed a clear pattern of attempting to avoid the appellant. It also showed the appellant's persistence in seeking to control and/or abuse her despite her clearly expressed unwillingness. Her actions and her body language were sufficient to negate any honest belief on the part of the appellant that she was consenting. The context of her abuse at the hands of the appellant over a number of years was highly relevant. In that context any moments of apparent acquiescence could be seen to be so reluctant as not to amount to consent in any real sense: *HM Advocate* v *SM* [2019] HCJAC 39 (particularly per the Lord Justice General (Carloway) at para [10]). At the stage of a submission of no case to answer, the Crown case had to be taken at its highest. Taken at its highest the evidence permitted the inference to be drawn that not only was the complainer not consenting to sexual intercourse but that the appellant would, in the circumstances, have been aware of that fact. Whether such an inference should be drawn was a matter which the judge correctly left to the jury.

[16] The Advocate Depute noted that the appellant's case, as put in cross-examination, was not that he had had sexual relations with the complainer along the lines described by her but with her consent or at any rate in the honest belief that she was consenting. His case was that none of this had happened at all. That contrasted with the complainer's evidence that, on one view, this was a violent and painful sexual assault. In those circumstances the questions of consent and honest belief in consent did not arise. There was no "middle ground" (cf *Graham* v *HM Advocate* 2017 SCCR 497 at para [24]) in which the accused could be heard to say: it did not happen, but if it did happen you (the Crown) have to prove that I did not have an honest belief throughout that she was consenting. It would have been wrong in principle for the trial judge to have accepted a submission of no case to answer based on the absence of evidence that the appellant could not have had an honest belief that she was consenting when the questions of consent and honest belief were not issues in the case.

Discussion and decision

[17] We consider that the trial judge was correct in his decision that the submission should be repelled, and that for the reason which he gave, namely that on the complainer's evidence there was sufficient evidence from which a reasonable jury, properly instructed, could have inferred not only that the complainer was refusing her consent but also that the appellant must have realised that she was not consenting. At the stage of a no case to answer submission, the Crown case has to be taken at its highest. Although in the narrative of the evidence it is possible to point to certain actions by the complainer which might, on one view, have indicated that she was willing to participate in sexual activity with the appellant, and although there is force in the contention that her private thoughts and

reservations would not be known to the appellant, nonetheless there was sufficient in the evidence about her body language to entitle the jury to conclude not only that she was unwilling but that she made her unwillingness clear to the appellant. As the trial judge put it in his Supplementary Report, many of the indications in her behaviour were small, but taken together they could be seen as "tiles in a mosaic" from which the jury could draw the inference not only that the complainer was not willing to engage in sexual activity with the appellant but that the appellant must have known that she was not consenting.

[18] However, the matter does not stop there. The matters raised in the docket attached to the indictment, which was spoken to in evidence by the complainer, show a history of unwanted sexual advances by the appellant over a period of years (including the period of her early teens and immediately preceding the time of the incident narrated in charge 1), which advances were rebuffed by the complainer in a manner which must have made the appellant aware that his attentions were unwelcome. In those circumstances the jury would be entitled to ask how the appellant could have believed that the complainer was consenting to his advances on this occasion. Of course, it is possible that she had changed her mind, and this would be a matter for the jury; but the history of the appellant's conduct over the preceding years would have entitled the jury to ask this question, and also to ask whether, even if in some respects the complainer did appear at times to act as though she were consenting to a particular activity, that was "real" consent or simply acquiescence in the face of persistent pressing by the appellant, and whether the appellant ought to have been aware of this: cf *HM Advocate* v *SM* (supra) per Lord Brodie at para [17]. The trial judge does not appear to have taken this matter into account, but in our view it provides further material upon which the jury would have been entitled to conclude, as ultimately it did, not only that

the complainer was not consenting but that the appellant could not have had any honest belief that she was consenting.

[19] These reasons are sufficient to dispose of this appeal. However, we consider that there is force also in the point raised by the Advocate Depute that the trial judge would have been wrong to have accepted a submission of no case to answer based on the absence of evidence that the appellant had no honest belief that the complainer was consenting when the question of honest belief was not in issue in the case at all. The point was not taken as a discrete point before the trial judge and we do not have his views on it. Nor did we have the benefit of a full citation of the relevant authorities, the point being raised by the Advocate Depute under reference only to a passage in *Graham* v *HM Advocate* (supra), a case of rape prosecuted not at common law (as this case was) but under the Sexual Offences (Scotland) Act 2009. Nonetheless, the point is clear and provides another basis for refusing the appeal. Although, in general terms, a man cannot be convicted of rape at common law without it being shown that he had the requisite criminal intent (or *mens rea*), ie that he knew that the complainer was not consenting or that he was reckless as to whether she was consenting or not (*McKearney* v *HM Advocate* 2004 JC 87), that principle has no application where, for whatever reason - whether because the prosecution case depends on the use of force or the defence case is simply that no sexual intercourse took place at all - the question of honest belief is not a live issue: *McKearney* v *HM Advocate* (supra) at para [4] per the Lord Justice-Clerk (Gill) and para [35] per Lord McCluskey. Statements to this effect in *Jamieson* v *HM Advocate* 1994 JC 88 and *Doris* v *H M Advocate* 1996 SCCR 854 at 857 remain good law, as is made clear in post-*McKearney* decisions such as *Spendiff* v *HM Advocate* 2005 JC 1, *Blyth* v *HM Advocate* 2005 SCCR 710 and *Kim* v *HM Advocate* 2005 SLT 1119. We note too that in *Drummond* v *HM Advocate* 2015 SCCR 180, a case under the 2009 Act, where the question of

reasonable belief in consent was not raised by the defence, the court reserved its opinion on whether, in that state of the evidence, the Crown required to produce material to prove the absence of such belief, adding, under reference to *Blyth* v *HM Advocate* (supra) and *Doris* v *HM Advocate* (supra), that that "was not needed at common law": para [20] per the Lord Justice-Clerk (Carloway). In the present case the question of consent and honest belief in consent was not raised by the defence either in a special defence intimated and lodged in terms of section 78 of the Criminal Procedure (Scotland) Act 1995 or in the course of the trial in some other way. The point simply did not arise and there was no onus on the Crown to negative it.

[20] The appeal is refused.