APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 44
HCA/2021/000123/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

RAYMOND NYIAM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C M Mitchell QC, Findlater; Adams Whyte, Edinburgh
Respondent: Charteris QC, Solicitor General for Scotland; J Keenan (sol adv); Crown Agent

19 October 2021

Introduction

[1] The appellant was found guilty by majority verdicts of two charges of rape against separate complainers whilst they were intoxicated and incapable of giving or withholding consent. In both charges the jury deleted the words "and asleep or unconscious".

[2] The appellant had met each complainer after nights out where both complainers had been drinking heavily. On each occasion he returned to their homes with their friends. There was evidence that he had conversed and drunk with the complainer in charge 1 (EH); however, he had no real prior interaction with the complainer in charge 2 (SP). In each case, the appellant went into the complainers' bedrooms and had sexual intercourse with them. EH's evidence was that she remembered only being very drunk, and then waking up in her bed naked with the appellant beside her. She felt confused and disorientated, still a bit drunk and tipsy. She went to the toilet and became aware of a substance like lubricant or semen about her person, which made her assume she had had sex. SP described herself as being "blackout drunk" and going to bed early. She had a memory of lying down in her bed with her hands at her sides and someone on top of her. She woke alone, but did not recognise the photograph in the appellant's passport which he had left at her bedside. She put her hand to her vagina as she felt uncomfortable. She had a pulsating feeling as if someone had penetrated her and she noticed a wet discharge. There was evidence that people had been in the living room drinking when SP went to bed herself. The appellant later asked to use the toilet and was directed to the ensuite in SP's room. Some time later two of her flatmates went to check on her and knocked on the door to ask if she was ok. They thought the appellant was also in the room. SP said that she was ok. The flatmates were discussing the situation when the appellant came out of the room, having heard the commotion. He was asked to leave and he did so.

[3] It was the appellant's position that both complainers had been active and willing participants, with mutual kissing and cuddling leading to intercourse. In connection with EH, they were both "quite drunk" but she was able to hold a conversation, was not slurring her words and had no difficulty walking. She invited him into her bedroom. In the

bedroom they chatted, she got into bed, so did he, they chatted, kissed and cuddled and had consensual sex. With SP, after using the ensuite in her room, he asked her why she was in bed and teased her for flagging. He got her a glass of water and asked if she wanted him to put out the light and again she said yes. She was fine and lying on the bed. Before turning out the light he asked her if she wanted him to stay there and she said yes. He lay on the bed next to her and they cuddled and kissed. She put her hand around his neck and was straddling him. They kissed and had sex, he having removed her underwear and jeans. They were interrupted by someone opening the bedroom door and a flatmate asked SP if she was ok, and she said she was fine.

[4] The trial judge directed the jury that there was no live issue of reasonable belief in consent. The sole ground of appeal granted leave is that this was a misdirection, on the basis that if the jury had been entitled on the evidence to return the verdict it did, the issue of reasonable belief would still have been a live one, upon which the jury ought to have been directed.

Analysis and discussion

[5] It is not easy to follow the logic of the ground of appeal. It is true that the libel which went to the jury did assert that the complainers were intoxicated and asleep or unconscious and incapable of giving or withholding consent, but it was clearly open to the jury on the evidence in the case to find that they were not asleep or unconscious but that nevertheless they were so intoxicated as to be incapable of giving or withholding consent. Such a verdict is a perfectly competent one, as seen in *Van Der Schyff* v *HMA* [2015] HCJAC 67 . In that case the libel of being asleep was also deleted by the jury. The court considered that on the evidence it had been open to the jury, having not been satisfied that the complainer was

asleep at the point of the sexual activity libelled, to return a verdict of guilty based on the more general averment that she was, at that time, incapable of giving her consent. The same applies in the present case. There was evidence from the complainers that they had little or no recollection of the incidents other than as narrated above; that neither of them would willingly have had intercourse with the appellant; and that they were extremely intoxicated, to a degree which would have entitled the jury, if unable to conclude that they were actually asleep or unconscious, to conclude that they nevertheless did not have the capacity to give free agreement to intercourse with the appellant. Their level of intoxication was confirmed by others. In these circumstances, it is not surprising that leave to appeal on the basis of unreasonable verdicts was refused.

[6] The single ground of appeal asserts that, on the assumption that the jury were entitled to return the verdicts in question, the issue of reasonable belief would have been a live one, and as such the jury ought to have been directed on it. This is difficult to understand: on the position adopted by the appellant at trial, no issue of reasonable belief arose. The appellant's position was that each of the complainers was not only a willing, but an active, participant. The nub of the defence was summarised thus, in the defence speech:

> "Mr Nyiam told you that he recalled having consensual sex with them, that he had their clear consent, that they were active and willing participants. … with regards to [SP] you'll remember him telling you that, in the course of them both being in bed at the same time they were engaging in kissing, foreplay, and that he undressed, in other words, he took off his jeans in her bed. … His position to you in respect of both complainers [EH and SP] was that at the time, at the time they were having sex, there was no issue between them over what had happened."

[7] None of this raised the issue of reasonable belief. As the court noted in *Maqsood* v *HMA* 2019 JC 59 (para [19]), the issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was

consenting. That does not normally arise where, as here, an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding. It was not suggested during the trial that there was room for such a misunderstanding. The appellant said nothing in his evidence to lend any support to this theory and nor did any other witness.

[8] It is clear that the issue of reasonable belief does not arise merely because the assertion is that the complainer was so intoxicated as to be unable to consent (rather than being asleep or unconscious), since that is precisely the basis upon which *Maqsood* proceeded. The court considered it to be primarily a case in which the Crown maintained that the complainer was so intoxicated that she could not consent, whereas the appellant's version of events was that the sexual conduct had been entirely consensual (see para 15). If the position of the defence is that the circumstances were such, and the apparent degree of intoxication and how it manifested itself at the time were such, as to give rise to a reasonable belief in consent, it is for them to put that into issue in the trial. The defence did not do so. The appellant himself gave no such evidence, and did not assert, even on an *esto* basis, that there were circumstances pointing towards a reasonable belief in consent, or creating room for misunderstanding. It was not suggested to either complainer that the circumstances were such as to leave room for a misunderstanding on the part of the appellant. The submissions to the jury did not suggest that there was room for such a misunderstanding or for the jury to consider that the appellant had a reasonable belief in consent.

[9] It is maintained in the case and argument for the appellant that in a discussion between counsel and the bench prior to the judge's charge, the Crown pinned its colours to the mast by stating that the Crown case hinged upon the complainers being asleep or unconscious, and did not present the case on the basis that intoxication alone might have

rendered the complainers incapable of consent. It is further asserted that this "reflected the submissions they had made to the jury"; and informed the defence address to the jury, and "that is why reasonable belief was not addressed in the defence speech to the jury". Neither of these statements is accurate. In the first place, the advocate depute's submissions to the jury had in fact focused, almost entirely, on the issue of intoxication as preventing the forming of free agreement to intercourse, in the case of both complainers. Secondly, whilst the Advocate Depute at one point during the discussion did assent to the judge's proposition that proving the complainers to be asleep or unconscious was a central part of the Crown case, that reply was made after the defence had addressed the jury, so the content was incapable of influencing the content of the speech which had already been given. The real, and obvious, reason why reasonable belief was not addressed in the defence speech was that it did not arise. It is disappointing that the appellant's case and argument contains these inaccuracies in regard to important aspects of the appeal.

[10] The issue of whether intoxication alone might have been of such a degree to rob the complainers of the capacity to consent was very much a live one at the trial. It was the entire focus of the Crown speech. Moreover, the defence speech addressed not only the issue of sleep/unconsciousness but the issue of the degree, and effect, of intoxication alone. The following passages from the AD's speech may be highlighted:

"(i) Quite simply, ladies and gentlemen, if a complainer is asleep OR unconscious, intoxicated, then she is incapable of consenting to any conduct, and if you find that to be the case, then there can be no question of an accused having a reasonable belief that consent is present. And, of course, that is what is alleged in this case. It is alleged by the Crown that each complainer was so intoxicated as to be incapable of providing consent;

(ii) Secondly, the Crown require to establish that the complainer was not consenting, in this case, as a consequence of being so intoxicated as to be incapable of consent;

(iii) The simple question is whether, in each case, the complainer was so intoxicated as to be incapable of consent. The issue is not how they got into that state in the first place. …. The issue here is completely about the level of intoxication of each complainer and whether that led to them being incapable of consenting;

(iv) [re complainer SP] So where do you find corroboration of her account, corroboration that she was so intoxicated as to be incapable of consent? Effectively, ladies and gentlemen, in this context what we are looking for is evidence that provides some support that at the time when the penetration occurred she was so intoxicated that she could not consent;

(v) [re complainer SP] if you take these pieces of evidence together, it provides a compelling picture of a young woman who had gone off to bed in a highly intoxicated state and you can reasonably infer that at the time of penetration was in no fit state to consent;

(vi) so I suggest to you that [SP}] was raped by the accused …and that that sexual intercourse, that penetration occurred when she was so intoxicated as to be unable to consent;

(vii) each of the complainers was significantly under the influence of alcohol and, of course, in [SP's] case, drugs as well, but each was significantly … they were each significantly intoxicated;

(viii) a compelling picture of a course of conduct pursued by the accused to take advantage, sexually abuse and rape two female complainers whilst they were in a position that they were incapable of providing consent to that conduct."

[11] It is equally clear that although the defence speech majored on whether sleep or unconsciousness had been established, it also addressed the question of whether there was

intoxication so extreme that the complainers were incapable of consent. This can be seen in particular in the parts of the speech dealing with (i) SP walking "with purpose and at speed" towards the flat; and the suggestion that she was moving and acting perfectly normally; (ii) the suggestion that SP had spoken to a flatmate to say she was alright, when he knocked on her door during the time when the incident must have occurred; (iii) the assertion that there was no compelling evidence that SP was too drunk to consent at the critical time; and that people may have alcoholic amnesia about what happened the night before yet have had capacity to consent at the relevant time; (iv) the submission re EH that no matter how drunk she was she was able to consent. These points were made to assert that although drunk the complainers had capacity to consent, as the appellant maintained that they had done. If the position of the defence is that there were circumstances suggestive of reasonable belief which might result in an acquittal then it is for the defence to put that in issue. It is not open to an accused not to raise the issue at trial, or put it to the jury, but then seek to argue on appeal that it was nevertheless a live issue at trial.

[12] Returning to the discussion in which the advocate depute agreed with the judge's proposition that "the Crown's case depends on the complainer either not being awake or being unconscious" by replying "yes", how this came about is not clear. At the commencement of the discussion, having heard the speeches, the trial judge seems fully to have understood the Crown approach and been alert to this issue, the following exchange taking place regarding charge 1:

> "AD: ..what requires to be corroborated … is the fact that the complainer was, well, effectively, in a position where she was unconscious or asleep …
>
> JUDGE : Or intoxicated. Or intoxicated.
>
> AD: Or intoxicated, sorry.

JUDGE : Yes."

[13] That understanding seems to have continued in the context in which she first raised the issue of reasonable belief with counsel (emphasis added):

> "I just want to be absolutely clear, is that because this is a case where the Crown are trying to prove that there was a lack of consent due to intoxication **OR** lack of consciousness **OR** being asleep, then it's either a case of the complainer consented or did not consent, and that reasonable belief doesn't really arise".

[14] That is an accurate statement of the position; on the evidence led in the case, whether lack of consent existed as a consequence of sleep, unconsciousness or intoxication alone, no issue of reasonable belief arose. The trial judge correctly stated the position in the discussion when stating:

> "I think this is a case where reasonable belief doesn't really arise because nobody's saying that there's a situation where she's not consenting but the accused reasonably believes that she is."

[15] It was submitted that the discussion, and the advocate depute's agreement with the proposition stated by the trial judge, led the judge to direct the jury in a particular way, reliance being placed on the passage:

> "Now, in respect of both these charges, the Crown case is that the complainers were incapable of consenting because they were intoxicated and asleep, or unconscious. You will remember what the advocate depute said in his speech about the evidence you could rely upon to reach that conclusion."

[16] That does not reflect what was quite clearly the Crown position in submissions to the jury. As ever, however, a judge's charge must be looked at as a whole. Doing so we find the following pertinent directions:

> "The complainer must be in a position to give or withhold consent. So, to have intercourse with a person who is intoxicated and asleep or unconscious is rape. The law says there is no free agreement if the complainer, at the time of the incident, was incapable of consenting because of the effect of alcohol or drugs.

[17] In addition, the passage in the charge which is criticised was followed with these directions:

> "On the other hand, the accused says in respect of both charges that, at the time of the incident, the complainer was not so badly affected by drink or drugs that she couldn't have ... she could not give consent, and that she did consent to sexual intercourse. Mr Roy, in his speech, set out a series of reasons why you should have a reasonable doubt that the complainers did not consent.
>
> Now, intoxication can result in loss of consciousness and, clearly, in that situation, there could be no capacity to consent. But it may only produce a lack of inhibition, where people freely agree to do things that they would not agree to do when sober.
>
> So, you'll have to judge that question, ladies and gentlemen, by looking objectively at all the facts and circumstances you find proved, and forming a view on the degree of the intoxication. If you thought the complainer was intoxicated and asleep or unconscious, there would be no free agreement and no consent. If, however, you thought that the complainer was still capable of making a decision, you could not conclude that she was incapable of consent."

These directions are adequate to cover the situation and to address the real issues at the trial: the jury would have understood that if they found the complainer to be so intoxicated as to be incapable of making a decision, there would be no free agreement and no consent.

[18] The situation is remarkably similar to that in *Van Der Schyff*. The Crown's position during the trial had been that the complainer was asleep at the time of the assault and therefore incapable of consenting. However, in his address to the jury, the procurator fiscal depute modified the position by stating to the jury that they could delete the reference to the complainer being asleep. The central issue was whether, at the material time, the complainer had been incapable of giving her consent, for whatever reason (see para 6). The sheriff, in directing the jury appears to have failed to appreciate the nuances of the Crown approach, and in his charge summarised the Crown case as being that the complainer "was asleep and therefore was incapable". In the appeal the court commented that

> "It may be that the sheriff misstated the Crown case to the effect that it relied solely on the complainer being asleep to demonstrate a lack of consent, but the jury were entitled to proceed on the evidence which they had heard in light of the submissions made and the sheriff's directions in law. The sheriff could have given a specific direction that the jury could have deleted the whole element of the libel in relation to capability of giving consent, but his general direction on that matter was sufficient".

In the present case the same applies.

[19] There are two further matters to note, both relating to a disconnect between the case and argument and the only ground of appeal which passed the sift, which was of course that reasonable belief being a live issue, appropriate directions on the issue were required. First, the case and argument seeks to argue that *Maqsood* was wrongly decided and that in all cases, at least where consent is in issue, reasonable belief is a matter which inevitably arises and requires to be corroborated. That is not a proposition which features in the grounds of appeal, and no leave has been given to pursue the point. Senior counsel for the appellant submitted that the issue had featured in her opinion submitted to the second sift which had satisfied the court that there was an arguable point. In fact, that opinion does not refer to any authorities, never mind *Maqsood,* and there is no suggestion that a larger court required to be convened to address the issue. The highest the matter was stated was to assert that sections 1(1)(a) and (b) of the Sexual Offences (Scotland) Act 1995 had to be addressed together, and in exactly the same way. We doubt very much that in stating that an appeal on misdirection on reasonable belief was "just arguable" the second sift judges had in mind the argument which has now been developed. However, lest there be any dubiety about the matter and in fairness to the appellant we proceeded to hear the argument.

[20] The submission was that in every single case of rape in which consent is pled, an absence of reasonable belief was an essential part of the case, always an issue, and required to be proved by corroborated evidence. This followed from the terms of section 1(1) of the Sexual Offences (Scotland) Act 2009 under which absence of consent and absence of reasonable belief are both conjunctively required as elements for proof of the crime of rape. A reasonable belief was said to be an implicit factor in a defence of consent. Reliance was

placed on *Winton* v *HMA* [2016] HCJAC 19 in which, agreeing with the trial judge that there was no longer room to consider the question of honest belief in consent, the court stated (para 8)

> "The terms of sections 1-9 do not provide for a defence of reasonable belief in consent, which would raise an evidential burden on the defence, rather they provide that an absence of reasonable belief in consent is an essential part of the offence to be proved by the Crown."

This passage was of course discussed in *Graham* v *HMA* 2017 SCCR 497 which explained that whilst this was correct, that proof arose by inference drawn from other facts in the case, themselves proved by corroborated evidence. Separate formal proof is not required. This was confirmed in *Maqsood* which made it clear that (i) whether an accused had, or did not have, a reasonable belief, was an inference to be drawn from proven fact, for example, as in that case, signs of obvious intoxication (para 16); (ii) it is only intentional penetration and lack of consent that require to be proved by corroborated evidence; (iii) although a judge ought to continue to direct a jury that the definition of rape includes an absence of reasonable belief, no further direction on reasonable belief is required unless that is a live issue at trial (para 17); (iv) where an accused describes a situation in which the complainer is clearly consenting there is no room for a misunderstanding.

[21] In *Maqsood* the argument that *Graham* was wrongly decided and that a fuller bench should be convened to address the matter was advanced and rejected. A similar argument regarding *Maqsood* itself was rejected in *RKS* v *HMA* 2020 JC 235. The argument is neither changed nor strengthened by reference to a case (*Winton*) in which (a) the point of the appeal was whether the old defence of honest belief was still available and (b) reasonable belief had been a live issue. In *RKS* the court stated (para 30)

> "We do not accept the contention that reasonable belief is a live issue in every prosecution under sec 1of the 2009 Act, regardless of the nature of the evidence led."

The court went on to point out that in *Graham* the court had noted (para 34) that:

> "The purpose of this part of s.1 [of the 2009 Act] was not to add a new requirement which would need to be proved by corroborated testimony, but simply to change that part of the mental element from an absence of an honest belief to an absence of a reasonable one.".

It added (para 35):

> "Nothing which has been advanced on the appellant's behalf causes us to think that what the court said in either of the cases of *Graham* or *Maqsood* ought to be reconsidered.

In *AA* v *HMA* [2021] HCJAC 9 the court said that the law continues to be as stated clearly in *Maqsood* paragraph 16. In the light of this consistent line of authority it is entirely clear that the submission advanced to the effect that *Maqsood* was wrongly decided is untenable. There is no justification for remitting the point to a larger court. The law on reasonable belief must now be regarded as conclusively settled.

[22] The case and argument also sought to present an additional argument that a compatibility issue arises from the way in which the legislation has been interpreted, without a compatibility minute having been lodged and without a ground of appeal addressing the point (see section 110(3)(b) and (4) of the Criminal Procedure (Scotland) Act 1995; and the Act of Adjournal Criminal Procedure Rules 1996, Rule 40.2(4); 40.6). We have not been presented with an explanation for this, nor has cause been shown to justify allowing this matter to be raised in such a way and at such a late stage of proceedings. The issue was not elaborated upon in the case and argument and was not addressed in submissions. We decline to consider the matter.

[23] For the reasons given above, the appeal will be refused.