



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 19  
HCA/2022/191/XC

Lord Justice General  
Lord Pentland  
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

CROWN APPEAL UNDER SECTION 107A  
OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

MMI

Respondent

**Appellant: Edwards QC AD; the Crown Agent**  
**Respondent: G Ross; MML Legal, Dundee**

19 May 2022

[1] On 13 May 2022, on the third day of a trial at the High Court in Edinburgh, the judge sustained a no case to answer submission and acquitted the respondent of the charge of rape which he had faced. This libelled a contravention of section 1 of the Sexual Offences (Scotland) Act 2009, in respect of an incident on 20 or 21 May 2019 at the Hotel Indigo in Dundee.

[2] The evidence came first from the complainer, who spoke to consuming a half bottle of vodka during the course of the day, four bottles of beer on a bus on the way into Dundee and then at least five more bottles of beer with a friend in the town. She had a gin and tonic in a pub before becoming separated from her friend at a sports hall at about 9.00pm. She was drunk. She wandered into a housing scheme where she met some teenagers who advised her to go home. She then remembered being in a bar (the Shotz Pool and Snooker Club) with the respondent, whom she had never met before. She had no recollection of what happened in the bar, or of leaving it. Her next memory was of being in a room at the Hotel Indigo and the police coming in. She had no memory of going to the hotel or what had happened in the room. She was wearing her jeans and a T-shirt which was inside out. She was not wearing underwear. She had no recollection of having had sexual intercourse, although it was agreed at the trial, as a consequence of scientific and medical evidence, that intercourse had occurred.

[3] GM, the barman at Shotz, spoke to the complainer and the respondent arriving. The respondent bought the complainer a neat vodka and a half pint of lager. The complainer was pale with a blank expression. She seemed disorientated. Although able to walk, she had to be guided by the respondent. She looked "really drunk". CCTV images showed the complainer and the respondent in the bar from 10.44 to 10.58pm. They were kissing and the complainer was talking to, and later walking with, the respondent without incident.

[4] JB was a taxi driver, who had returned home after finishing a shift. He saw the complainer when she was outside his house. The complainer was cuddling into the respondent, who seemed to be holding her up. The respondent asked the driver to take them to the Hotel Indigo. He refused. The complainer looked intoxicated. Something did

not “sit right” with the taxi driver. He was so concerned that he called the police because he had a “gut feeling” about the situation; notably the complainer’s intoxicated state.

[5] The hotel receptionist checked in the complainer and the respondent. The respondent appeared to be in a hurry. The complainer looked “a little bit drunk”. The police arrived some 10 minutes later and the receptionist took them to the bedroom. The CCTV images showed the respondent and complainer arriving at the hotel at 11.45pm. The images showed the complainer walking slowly and at some point stumbling slightly. She appeared unsteady on her feet and looked “blank” according to the police officer who spoke to the images.

[6] Two police officers arrived in response to the call from the taxi driver. They found the complainer in the bathroom of the hotel bedroom. PC Fitzpatrick described the complainer as “extremely” intoxicated. She was confused about why she was in the hotel and was unable to answer questions. Her top was on inside out and she was not wearing underwear. She said of the respondent, “I don’t really know him. He’s yuck. I don’t like him. He’s a weirdo. Not good memories. I feel like what he has done is not right” and other similar remarks. PC Findlay said that the complainer was “severely” intoxicated, unsteady on her feet and “mumbly” when talking. He noticed that her underwear was beside the bed.

[7] The complainer’s blood alcohol concentration was between 265 and 340mg per 100ml at the time of the incident. The forensic scientist was unable to say exactly what effect the alcohol may have had on the complainer’s recollection or her capacity to consent.

[8] The trial judge reports that she accepted that she had to take the Crown case at its highest. Her approach was to review the combined pieces of evidence which suggested incapacity and to consider whether they were sufficient to yield the inference that the result

of the complainer's intoxication was that she was incapable of consent. The judge has provided her observations on the evidence. It was not sufficient, in the view of the trial judge, that there was ample evidence of intoxication at a high level. It was the results of the intoxication as established in the evidence which bore upon capacity. The judge considered that there was insufficient evidence to yield the necessary inference. She did not agree that it was only where there was no evidence from which that inference could be drawn that a no case to answer submission should succeed.

[9] It is important to note at the outset that a judge does not have the power to direct a jury to return a not guilty verdict on the ground that no reasonable jury could convict (Criminal Procedure (Scotland) Act 1995, s 97D). This differs from the position in England and Wales (*R v Galbraith* [1981] 1 WLR 1039, Lane CJ at 1042). Where no issue of corroboration arises (and there is none in this case), it is only where there is no evidence from which a jury can infer that a fact in issue is proved that a no case to answer can be sustained. Where the issue is one of capacity to consent, that is to reach a "free agreement" (Sexual Offences (Scotland) Act 2009, s 12), it will rarely be open to a judge to sustain a submission where the evidence is of a young woman, "alone at night and vulnerable through drink, [who] is picked up by a stranger who has sex with her within minutes of meeting her". This is only a partial quotation from Hallett LJ in *R v H* [2007] EWCA Crim 2056 (at para 34), where the complainer was only 16 and had said that she would not have consented in the circumstances. However, the court agrees with Hallett LJ that issues of consent and capacity to consent should normally be left to the jury to determine. So it is the case here.

[10] The court is unable to agree with the trial judge's assessment of the evidence and the inferences which can be drawn therefrom. First, there was, as the trial judge recognised,

more than sufficient evidence to prove that the complainer was heavily intoxicated. The toxicology itself demonstrated very high levels of alcohol, sufficient in many people to induce a comatose state or even to cause death. A taxi driver was so concerned about the state of the complainer that he phoned the police and told them where she and the respondent were going. The only reason for doing this was because of his apprehension about what might happen to the complainer in her apparent state. When the police arrived at the hotel, the complainer was unable to recollect what had happened to her no more than a few minutes beforehand. She was confused and incoherent. All of this is sufficient for a jury to infer that at the time of the act of admitted sexual intercourse the complainer was not capable of consenting to that act.

[11] The court will accordingly allow the appeal and repel the no case to answer submission. The case will be remitted to the trial judge to proceed as accords.