APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 17
HCA/2024/304/XC

Lord Matthews
Lord Beckett
Lord Clark

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

an application under section 107(8) of the 1995 Act

by

DAVID GRIFFITHS LITTLE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: N Shand, advocate; Burnett Criminal Defence, Aberdeen
Respondent: Harvey AD; Crown Agent.

17 January 2025

[1] On 22 April 2024, the appellant was convicted in the sheriff court of a charge of sexual assault, contrary to section 3 of the Sexual Offences (Scotland) Act 2009.

[2] He appealed against his conviction on the basis that the sheriff was in error in directing the jury that they should disregard the question of reasonable belief, since it did not arise in the case

[3] Leave to appeal was refused at first sift but granted at the second on the basis that it was arguable that the matter did arise on the evidence. We say no more about it.

[4] However, the appellant was refused leave to argue a wider point. It is to the effect that in terms of section 3(1) of the Act, the absence of reasonable belief is an essential element of the offence itself, and in every case the jury required to be satisfied of it before they could return a verdict of guilt. Removing the issue from the jury's consideration offended against the presumption of innocence, in breach of the common law and Article 6.2 ECHR. Further, it is contrary to the enactment and offends against the separation of powers.

[5] In any case the jury could reject some parts of the evidence and accept others. It was not all or nothing. An accused could have been wrong in saying that a complainer consented but nonetheless he could still have a reasonable belief that she had.

[6] It was submitted that none of the authorities, whose correctness was not conceded, had approached the matter through this prism. Neither *Maqsood* v *HM Advocate* 2019 JC 45 nor *LW* v HM *Advocate* 2023 JC 184 had addressed the issue that the presumption of innocence required the Crown to address reasonable belief in every case. The effect was that an evidential burden had been placed on an accused. If there were no evidence the Crown had in reality failed to prove a necessary element of the offence but the placing of an evidential burden on the accused meant that a constituent part of the crime could be proved with no evidence being led about it at all.

[7] This differed from a defence such as self-defence where the absence of self-defence was not a constituent part of the crime of assault. An evidential burden was justified in such a case.

[8] The judges at second sift dealt with this by saying that it is clear that there was only an evidential onus on the appellant to raise the issue of reasonable belief and it is not arguable that the existence of such an onus contravenes Article 6.2.

[9] The appellant sought to reinstate this wider ground. We refused the application on 17 January 2024 and indicated that we would give our reasons in writing, which we now do.

[10] The ground has, of course to be arguable and it is accepted that the appellant has to pass the tests set out in *Beggs* v *HM Advocate* 2006 SCCR 25, and *Birnie* v *HM Advocate* 2015 SLT 460.

[11] In the latter case, the Lord Justice Clerk (Carloway), at paragraph 8, explained the position thus:

> "An application under section 107(8) of the 1995 Act to argue a ground, for which not only has leave not been granted but has actually been refused at sift, is not to be seen as a form of appeal against the decision taken at sift. The sift decision is final at that stage of the proceedings. It is not simply a matter of asking the court to reconsider the question of the arguability of the ground of appeal. The appellant must show that there is 'good reason' for reinstating the ground, such as some change in circumstances, or a patent error or misunderstanding of the grounds of appeal by the sifting judge or court, or, indeed, that the point is of such significance that it would not be in the interests of justice to exclude it".

[12] It is argued that these tests have been met. The judges at second sift misunderstood the point which was being made and the issue was important because it arose in just about every case under the 2009' Act where the absence of reasonable belief was a constituent element of the crime.

[13] We do not agree that the judges at second sift misunderstood the point. They met it head on and said it was unarguable.

[14] We are not satisfied that the point is of such significance that it would not be in the interests of justice to exclude it.

[15] There is no doubt that a decision that the sort of direction complained of was a breach of Article 6 would have considerable ramifications.

[16] However, the point is unarguable.

[17] There is a consistent line of authority since *Meek* v *HM Advocate* 1982 SCCR 613 to the effect that whilst, at common law, the absence of an honest belief that the complainer consented was an essential element in the crime of rape, in many cases there would be no part for such a direction to play; Lord Justice General (Emslie), at p 618, in delivering the opinion of the court. He noted the absence of any evidence to suggest it, that there was no halfway-house between the complainer's account and that of the various accused, and concluded that such a direction was not necessary. The appeal was refused.

[18] *Meek* was applied in *Doris* v *HM Advocate* 1996 SCCR 854 where the Lord Justice General (Hope) explained, at p 857, that the questions of fact which the jury will have to resolve depend in rape cases, just as in any other case, on the state of the evidence and also determine the directions a judge must give. He concluded that a direction about honest belief in rape cases should only be given where it was raised in the evidence.

[19] From 30 November 2010, the common law definitions of sexual offences no longer applied, being replaced by provisions of the Sexual Offences (Scotland) Act 2009. The 2009 Act followed a report by the Scottish Law Commission, "SLC 209 Report on rape and other sexual offences." The report identified respect for sexual autonomy as a fundamental principle, explaining at paragraph 1.25:

> "…Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime…"

[20] This passage was noted in *Buchan* v *Aziz* 2023 JC 51 at paragraphs 22-23, where the court confirmed that respecting sexual autonomy underpins the 2009 Act. *Buchan* followed the court's approval in *GW* v *HM Advocate* 2019 JC 109, at paragraph 31, of a dictum by Lady Hale in *R* v *Cooper* [2009] UKHL 42, where she linked the need for consent to any sexual act to: "….the respect for autonomy in matters of private life which is guaranteed by Article 8 of the European Convention."

[21] The SLC had made the following observation on Convention rights at paragraph 1.31:

> "…The effect of Article 3 (prohibition of degrading treatment) and Article 8 (right to respect for private life) is that a State must provide for the penalisation of non-consensual sexual activity, including where there was no evidence of physical resistance by the victim, in order to secure protection of the individual's sexual autonomy."

[22] Section 3 of the 2009 Act, provides:

> "3 Sexual assault
> (1) If a person ('A')—
> (a) without another person ('B') consenting, and
> (b) without any reasonable belief that B consents,
> does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.
> (2) Those things are, that A—
> (a) …
> (b) intentionally or recklessly touches B sexually,
> (c) …
> (d) …
> (e) …
> …"

[23] It can be seen that the absence of an accused person's reasonable belief is an ingredient of the offence but matters do not stop there. Section 16 of the 2009 Act provides:

> "16 Reasonable belief
>
> In determining, … whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain

> whether there was consent or, as the case may be, knowledge; and if so, to what those steps were."

[24] Requirements for notice of a defence of consent or belief in consent are found in the Criminal Procedure (Scotland) Act 1995, section 78 (2), (2A) inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 section 6(1)(a) and (b). Accordingly, since 1 November 2002, an accused person who wishes to adduce evidence in a sexual offence case that the complainer consented, or that he believed that she did, required to give notice per section 78. Both the presence of consent and belief are treated as defences in section 78.

> "(2) Subsection (1) above shall apply to a plea of diminished responsibility or to a defence of automatism, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent as if it were a special defence.
>
> (2A) In subsection (2) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer's consent to the act which is the subject matter of the charge or the accused's belief as to that consent."

[25] In 2002, an accused charged with rape or indecent (sexual) assault at common law, could secure acquittal on the basis of his honest belief that the complainer consented. This changed from 1 December 2010 with the introduction of reasonable belief in the definition of the offences in part 1 of the 2009 Act, including section 3.

[26] In enacting the 2009 Act, Parliament did not remove the requirement for notice. Accordingly, the question of an accused person's belief regarding consent as an element in sexual offences under the 2009 Act is hedged in by section 78(2) and (2A) of the 1995 Act and section 16 of the 2009 Act. Viewed in this light, it becomes impossible to conceive that there is a breach of Article 6 rights, specifically the presumption of innocence, in taking the approach which Scots law does. It is not difficult to understand why this should be so. Borrowing the words of Lord Bingham in *Sheldrake* v *DPP* [2005} AC 264 at paragraph 37, what a particular person believed, and on what basis he believed it, when he had sexual

contact with a woman who was not consenting appears to be particularly within his own knowledge and difficult for the prosecution to counter unless there was at least some burden on him to put forward his case.

[27] A person being subjected to sexual conduct to which the person did not consent is a breach of at least the Convention rights under Article 8. How easy or otherwise it should be for a person to be relieved of criminal responsibility for doing so on the basis of his belief is a matter for this court to determine according to long-standing principles. Scots law does not explicitly impose a burden on an accused person charged with an offence under section 3 of the 2009 Act, but it does require that the question of the accused's belief is a live issue. In considering the 2009 Act in *Graham* v *HM Advocate* 2017 SCCR 497, the Lord Justice General (Carloway) explained at paragraph 23 that the reference to the absence of reasonable belief in section 1 (rape) did not add a new requirement which would need to be proved by corroborated testimony, it simply changed that part of the mental element from absence of honest belief to absence of reasonable belief. In *Maqsood* v *HM Advocate*, at paragraph 17, he explained that beyond giving the statutory definition of an offence under section 1, no further direction was required on reasonable belief unless it was a live issue in the trial. That 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.

[28] It is not entirely clear that there is always an evidential burden placed on the accused in cases such as this. Evidence as to reasonable belief can come from any source and is not confined to the accused. For example, evidence as to the steps taken by an accused to ascertain whether there was consent could come from the complainer.

[29] That having been said, very often a matter will only be known to an accused person and evidential burdens are not unusual. They do not subvert the onus of proof. Even if there is such a burden it is only to the effect of requiring an issue to be raised on the evidence. It is then for the Crown to disprove it, usually by means of inference.

[30] Clear and high authority for this can be found in *Sheldrake*. Amongst the arguments presented to the House of Lords was that any burden of proof imposed on a defendant, whether legal or evidential, was an interference with the right under Article 6.2. However, in paragraph 1 of his speech, Lord Bingham said that

> "An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant".

[31] This is just another attempt to reargue, through a different lens, a point which must now be regarded as settled by authority which is binding on us.

[32] Reference has been made to *Maqsood* and *LW,* it being said that they involved sleeping or intoxicated complainers, but consideration should be given to other authorities.

[33] In *Nyiam* v *HM Advocate* 2022 JC 57 it was submitted that in every 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. Reliance was placed on *Winton* v *HM Advocate* [2016] HCJAC 19. The point in *Winton*, however, was whether the old defence of honest belief was still available, and, in any event, reasonable belief had been a live issue. *Winton* was explained in *Graham* v *HM Advocate* where amongst other things, the court said that 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 was

required unless it was a live issue. In *Nyiam*, the court agreed and considered this point to be settled.

[34] In *Maqsood*, an argument that *Graham* was wrongly decided was rejected and a similar argument about *Maqsood* and *Graham* was also rejected in *RKS* v *HM Advocate* 2020 JC 235.

[35] An even more recent discussion is to be found in *Thomson* v *HM Advocate* 2024 SCCR 294. In that case, at paragraph [44], the Lord Justice General said the following:

> "The matter was explained in *Maqsood* v *HM Advocate* 2016 JC 45 as follows (LJG (Carloway) delivering the Opinion of the Court, at para [17]:
>
> '…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. That 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, for example, where an accused described a situation in which the complainer is clearly consenting and there is no room for a misunderstanding'.
>
> A reasonable person would not think that a woman who says 'No', 'Not tonight' and 'I'm tired' was instead consenting to intercourse. On this basis, the trial judge was correct to direct the jury that no issue of honest or reasonable belief arose. Insofar as the appellant denied the instances of rape described by the complainers occurred at all, again no issue of reasonable belief arose …"

[36] *Thomson* was not a case involving a sleeping or intoxicated complainer.

[37] It is part of the function of a domestic court to interpret domestic legislation and the Appeal Court has done just that in relation to the 2009 Act. There is nothing unconstitutional about that. There has been no arguable breach of Article 6.2.

[38] The application is refused.