APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 18
HCA/2024/304/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

DAVID LITTLE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Shand; Burnett Criminal Defence, Aberdeen
Respondent: Harvey AD; the Crown Agent

25 March 2025

[1] On 22 April 2024, a jury at Aberdeen Sheriff Court convicted the appellant of a single charge of sexual assault contrary to section 3 of the Sexual Offences (Scotland) Act 2009. At an adjourned diet on 6 June 2024, the sheriff imposed a community payback order with a requirement of 100 hours of unpaid work and a supervision requirement for 12 months. The jury's verdict of guilty was unanimous. The appellant had given notice in the form of a

special defence of consent and reasonable belief in consent in advance of trial. The sole ground of appeal before this court is whether the sheriff erred in concluding, and then directing the jury, that the issue of the appellant having reasonable belief that the complainer consented did not arise on charge 2 if, as the appellant maintains, it was properly a question of fact for the jury.

[2] The Crown withdrew charge 3, a drugs offence, at the close of its case and the sheriff acquitted the appellant. Charge 1 was a serious offence averring sexual assault by penetration of the complainer. The jury found it not proven, by majority. It is apparent from the sheriff's report that the events founding charge 1 occurred after the complainer and appellant had left the apartment in Aberdeen forming part of the locus of charge 2 for the last time that night.

[3] The appellant's note of appeal included grounds of appeal challenging the settled law on reasonable belief of consent more generally as being contrary to the presumption of innocence under Scots law and under ECHR Article 6(2). Leave to appeal on those grounds was refused at first and second sift. The appellant made an application under section 107(8) of the Criminal Procedure (Scotland) Act 1995 to reinstate those parts of his grounds of appeal. On 17 January 2025 this court refused the application and a written Opinion with reasons for refusal has now been published with reference [2025] HCJAC 17.

The evidence

The complainer

[4] The appellant and complainer studied on the same course at university and became close friends during the COVID pandemic. Their friendship was like a sibling relationship. In the evening of 26 November 2021, the appellant and complainer attended a "movie night"

at a friend's flat. The group spent the evening there playing a computer game rather than watching films. Both the complainer and appellant were drinking alcohol and played a drinking game alongside the computer game but the other two were not drinking. As the evening progressed, the appellant's behaviour became progressively weirder. He repeatedly tried to cuddle the complainer and kiss her on the neck. She felt uncomfortable and said as much to the appellant. She said it politely as she does not like confrontation but he did not take it seriously, he did not listen to her. He managed to kiss her neck once at the flat. It was as if they were playing musical chairs, with her getting up to get away from him and him then sitting next to her wherever she went. She tried to distance herself from the appellant by moving away from him but he would simply move closer to her, grab her arm and pull her closer towards him. She tried standing to get away from him but he persisted, grabbing her arm and pulling her closer to him. Whilst she was feeling the effects of the alcohol, her impression of the appellant was that he was acting as though more drunk than he actually was. The complainer and her two female friends, AC and LT, went to the bathroom together where they discussed the appellant's strange behaviour and that it was making the complainer feel uncomfortable.

[5] The appellant and the complainer then travelled together by taxi to collect ketamine. Whilst in the taxi, the appellant was persistent and weird. He attempted to hold her hand and kiss her neck. He succeeded only in kissing her shoulder. The complainer relayed this information to AC and LT via group-chat messaging. She wrote, "He's just tried to kiss me" to which AC replied, "OMG, you're kidding". The complainer sent further messages:

> "No, it's getting pretty awkward. He keeps putting his arm over me and leaning or kissing me. He's off to pick up then we're coming back and I'm sitting on the sofa with you two. Fuck that, we are friends."

The complainer messaged the appellant on 28 November 2021:

> "I told you throughout all of the night that I was extremely uncomfortable with you kissing my neck etc and confronted you in front of [LT] and [AC] when you did it again."

The complainer spoke to the content of these messages during the course of her evidence with reference to production 11. Once back at the flat she took some ketamine and felt really bad under its effect. She again went to the bathroom with her two friends and repeatedly said to them "home". The appellant was saying she could stay on a sofa at his place but she said she did not want to do that. It felt uncomfortable. It is apparent that she did end up with him later on and the events giving rise to charge 1 occurred. Most of the examination-in-chief and cross-examination of the complainer focused on charge 1 and does not bear on charge 2.

AC

[6] AC was a student and was friends with both complainer and appellant. She confirmed hosting a "movie night" at her flat for her partner LT, the complainer and the appellant during the evening of 26 November 2021. The group spent the evening drinking and talking, although AC did not drink much. The complainer became intoxicated quite quickly. At some point in the evening the complainer and appellant decided to get ketamine. They left the flat and returned 20-30 minutes later with the drugs. During that time, the complainer had written in a group chat that the appellant had attempted to kiss her. On their return, the complainer fluctuated between lucidity and extreme intoxication. At some point during the evening the complainer had presented as upset. The complainer told AC that the appellant had tried to kiss her on the neck.

LT

[7] LT described the group spending the evening socialising together in the living room. LT did not drink much at all and, as the evening went on, felt the atmosphere was turning awkward. She saw the appellant trying to kiss the complainer on the neck on several occasions. The complainer repeatedly told the appellant to stop and pulled herself away from him.

The appellant

[8] He was in the same academic year as the complainer. They came to know each other through working at the same place and became close but platonic friends during the pandemic. He attended the movie night with his friends. The four of them spent the evening drinking alcohol, laughing and talking. Everyone had a similar amount to drink. During the evening, the complainer started to sit very close to him in the living room. She placed her arm around him and leant her head on his shoulder. They kissed at one point. This all happened when AC and LT were in a different room. When they returned to the living room, the complainer would jump away from him and the atmosphere became awkward.

[9] He and the complainer arranged to collect drugs together by taxi. During the course of the journey there, the complainer was sitting very close to him. They were holding hands. She told him that she really liked what was happening between them that evening and that she liked them being so close. He and the complainer kissed in the taxi. On their return to the flat, he consumed two lines of ketamine, as did the complainer. Their two friends had less. He entered a comatose state, or a "k-hole", during which he lay on the sofa, put in his earphones to listen to music and closed his eyes.

[10] The appellant maintained generally in his evidence that the acts in charge 2 were "totally consensual" and that "[she] was often the one that was actually sitting close to me". During cross-examination, when asked about his trying repeatedly to kiss and cuddle the complainer and kissing her on the neck at the flat before the taxi journey for ketamine, he replied that it did not happen.

Jury directions

[11] The sheriff considered the evidence heard during the trial together with the issue of reasonable belief and discussed it with parties before speeches. She concluded and advised them that whether the appellant had a reasonable belief in consent was not a live issue on the evidence. The appellant's position was that the complainer was clearly consenting and there was no room for misunderstanding. Accordingly, she directed the jury:

> "But what I would say here in relation to [the special defence] is that you can disregard the part of it that refers to the accused having a reasonable belief in consent, because that's not been a live issue in this case because the accused's position here is that the complainer did not consent."

[12] The sheriff immediately acknowledged in her report that she had erred in stating, "the accused's position here is that the complainer did <u>not</u> consent". There is no doubt that his evidence was that complainer <u>did</u> consent. As counsel for the appellant properly acknowledged, the jury would have readily understood that this was a slip of the tongue. We need say no more about it. In response to the grounds of appeal, she explained:

> "… so far as charge 2 is concerned, the appellant's position in evidence was that there was no attempted and actual kissing / cuddling instigated by him as described by the complainer, at the flat or in the taxi. Any contact relevant to that charge occurred with her consent, indeed was at her instigation and she verbalised this in the taxi…. He simply denied the complainer's version of events that he was the instigator.…"

Submissions

Appellant

[13] The sheriff erred in her direction to the jury by removing from their consideration the question of the appellant's reasonable belief that the complainer consented. He had testified that the behaviour was consensual, the complainer had been sitting close to him, placing her arm around him, holding his hand and consensually kissing him throughout the evening. The jury were entitled to find his explanation why he considered the complainer to be consenting was reasonable, even if wrong.

[14] This was not a case where there had been violence or force used by the appellant, nor was it a case where the complainer was asleep during the offending. In those circumstances, it is easier to conclude that reasonable belief of consent is not a live issue. Whilst the complainer's evidence was that she had verbally communicated to the appellant that she was uncomfortable with his advances, there was still scope for uncertainty over what was said, how it was said and, indeed, whether it was said. There was evidence that all of the witnesses had been drinking alcohol and had taken ketamine. There were inconsistencies between the testimony of different witnesses. These were reasons for the jury to proceed with caution when reaching definitive conclusions. A jury is entitled to pick and choose amongst the evidence as they see fit and does not require to accept or reject the evidence of a witness in its entirety. Although the jury's verdict signals their acceptance of the complainer's evidence that she did not consent, the jury might nevertheless have found that they were not able to reach clear conclusions on the appellant's state of knowledge such that they could exclude a reasonable, albeit mistaken, belief on the part of the appellant that she was consenting.

[15] Whilst the authorities are mostly against the appellant, they are wrong. The Lord Justice Clerk (Dorrian) explained the correct approach in *Winton* v *HM Advocate* 2017 SCCR 320 in accepting that:

> "…Whilst the absence of reasonable belief is an essential element of rape under s.1, which the Crown must prove in every case, it is only where the accused's belief in consent was a reasonable one where his conduct would not amount to rape…"

Crown

[16] The present case was a straightforward one where the complainer's evidence was that she was not consenting and the appellant's evidence was that she was. There was no room for misunderstanding between them.

[17] The law on reasonable belief is settled. Whether an accused person had, or did not have, a reasonable belief was an inference to be drawn from proven facts, and a direction by a trial judge on reasonable belief is not required unless the issue is live; *Graham* v *HM Advocate* 2017 SCCR 497, *Maqsood* v *HM Advocate* 2019 JC 45. For an issue about reasonable belief in consent to be live in any trial, such an issue must arise on the evidence; *Nyiam* v *HM Advocate* 2022 JC 57; *AW* v *HM Advocate* 2022 JC 164. If a complainer said that she did not consent and the accused said that she did, it was not for defence counsel to invent a middle, speculative ground, *Thompson* v *HM Advocate* 2024 SCCR 294. Reasonable belief in consent would not arise in any situation where the complainer communicates her lack of consent.

[18] The complainer's evidence was that she did not consent to the appellant's actions. She had moved away from him and had told him that his actions were making her feel uncomfortable. By doing and saying those things, she communicated to the appellant that she was not consenting to his advances. There was no basis for him to believe, reasonably, that she was consenting. The appellant's evidence was in sharp contrast to the complainer's account. His evidence was that the sexual conduct between himself and the complainer was

"totally consensual" and that she had initiated it. The case was straightforward and the issue for the jury was whether the complainer consented or not. There was no room for a middle, speculative ground of reasonable belief. It was not a live issue and it followed that the sheriff was correct not to direct the jury on it.

Decision

[19] So far as relevant in this case, section 3 of the 2009 Act provides:

> "(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—
> …
> (b) intentionally or recklessly touches B sexually,…"

Section 16 of the 2009 Act provides:

> "In determining, for the purposes of Part 1, 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."

[20] There is no evidence that the appellant took any such steps. At best for him, it might be that he assumed there was consent on the basis of his account that the complainer was indicating enthusiasm for his advances, was reciprocating and consenting. The difficulty with that is that the jury rejected his evidence that the complainer consented. They accepted her evidence that she did not consent. Her evidence was that she told him that he was making her uncomfortable and that she kept moving away from him but he persisted in his advances. LT's evidence was stronger still. She saw the appellant trying to kiss the complainer on the neck several times and she kept telling him to stop and pulled herself away.

[21] Scots law has long taken the view that a direction on the question of an accused's belief that a complainer consented is only needed if it is a live issue on the evidence; *Meek* v *HM Advocate* 1982 SCCR 613. In *Maqsood*, the Lord Justice General (Carloway) explained that beyond giving the statutory definition of an offence under part 1 of the 2009 Act (section 1 in that case), no further direction is required on reasonable belief unless it is 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.

[22] So far as *Winton* is concerned, we note that the words at paragraph 7 of the opinion of the court are the words of the trial judge in her report and not the words of Lord Justice Clerk (Dorrian). Whilst it is true that in paragraph 8 she expressed agreement with the whole passage quoted at paragraph 7, the Lord Justice Clerk continued:

> "The law in relation to rape and other sexual offences was completely re-drawn by the 2009 Act. S.52 not only abolishes the old common law offences of rape and the like, it specifies that where provisions of the 2009 Act regulate conduct, those provisions have the effect of replacing any former rule of law regulating conduct. The terms of ss.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."

We consider that the true *ratio decidendi* of *Winton* is, first that section 17 of the 2009 Act does not create an offence but provides that a person within the scope of that section is not capable of giving consent and that where the requirements of section 17 are met, the Crown need not prove the lack of consent. Secondly, it is that there was no basis for introducing a concept of honest but unreasonable belief in a sexual offence brought under the 2009 Act.

[23] The Lord Justice Clerk (Dorrian) presided in *RKS* v *HM Advocate* 2020 JC 235. The court considered *Winton*. In delivering its opinion Lord Turnbull explained, at

paragraph 30, that the court did not accept a contention that reasonable belief is a live issue in every prosecution under section 1 of the 2009 Act, regardless of the nature of the evidence led. The court refused to remit *Maqsood* for consideration by a full bench, noting the consistent approach of many benches since *Meek*.

[24] In *Nyiam*, where the appellant sought to argue that *Maqsood* was wrongly decided, in delivering the opinion of a court comprising also Lord Pentland and Lord Matthews, the Lord Justice Clerk (Dorrian) explained at paragraph 21:

> "[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 HM Advocate* . 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 1 of the 2009 Act , regardless of the nature of the evidence led.'
>
> The court went on to point out (para 34) that in *Graham* (para 23) the court had noted 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 HM Advocate* the court said that the law continues to be as stated clearly in *Maqsood* (para 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."

[25] Counsel sought to distinguish a case such as *Maqsood* on the basis it, and *LW* v HM *Advocate* 2023 JC 184, involved an intoxicated or sleeping complainer. He acknowledged that the decision of this court in *Thomson* v *HM Advocate* 2024 SCCR 294 was against him. It did not involve a sleeping or intoxicated complainer. The Lord Justice General (Carloway) said the following in delivering the opinion of the court, at paragraph 44:

> "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.…"

[26] In the case we are considering, the complainer said that she told the appellant that he was making her uncomfortable and kept moving away from him to another seat or stood to avoid him sitting next to her. LT spoke of a change in atmosphere caused by the appellant repeatedly trying to kiss the complainer's neck and of the complainer repeatedly telling the appellant to stop. LT saw her pulling herself away from him.

[27] The application of the law to the evidence is clear in this case. As in *Thomson*, at paragraph 45, since the complainer's evidence was that she did not consent, made that plain to the appellant whose evidence was only that she did consent, there was no basis for a middle, speculative ground not spoken to by the appellant that he had believed on reasonable grounds that there was consent. To the extent that the appellant denied in his evidence that the conduct in charge 2 occurred, reasonable belief in consent was not a live

issue; *Thomson* at paragraph 44; *Briggs v HM Advocate* 2019 SCCR 323, Lord Glennie delivering the opinion of the court at paragraph 19.

[28] It follows that the sheriff was entirely correct to proceed as she did. There was no misdirection, far less a miscarriage of justice. The appeal is refused.

A necessary correction of an entry in the Sheriff Court's records

[29] The sheriff reports that the minute for 6 June 2024 records, erroneously, that a community payback order for 100 hours (level 1) was imposed as an alternative to a prison sentence (section 227A(1)) when it was truly imposed as an alternative to a fine (section 227A(4)). Accordingly, we remit the proceedings under section 299(4) to the Sheriff Court at Aberdeen for correction under section 299(2)(c).