



Neutral Citation Number: [2019] EWCA 557 (Crim)

Case No: 201802252 B2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2019

Before:
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)

MRS JUSTICE SIMLER DBE

and

MRS JUSTICE YIP DBE

Between:

REGINA

- and -

OZAN MELIN

Ms A Power appeared on behalf of Appellant
Mr S Jones on behalf of the Respondent

Hearing dates: 23 January 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE SIMLER DBE

MRS JUSTICE SIMLER DBE

Introduction

1. On 3 May 2018 at Bournemouth Crown Court, following a re-trial before His Honour Judge Forster QC and a jury, the Appellant was convicted on two counts of causing grievous bodily harm contrary to s.20 of the Offences against the Person Act 1861, on two different female complainants (counts 1 and 3). He was acquitted by the jury of a similar allegation relating to a different woman (JS) on count 2. He was also acquitted on the direction of the Judge on three counts of dishonestly making a false representation.

2. The Appellant was sentenced to 4 years' imprisonment on each count concurrently.

3. He appeals against conviction by leave of the Single Judge.

4. During the course of the hearing on 23 January 2019, it became increasingly apparent that reference to the transcripts of the evidence of the two complainants in respect of counts 1 and 3 (Marcelle King and Carol Kingscott) was necessary, but we had not been provided with them. We therefore adjourned consideration of this appeal until the relevant transcripts had been obtained. We made directions for the service of additional written submissions from the parties in light of that material and its effect on the conviction appeal. We also permitted consequential submissions on sentence. We have now been provided with and have considered the transcripts and the further submissions we have received from the parties.

5. In outline, the Crown's case was that the Appellant, who is not a doctor or medically qualified, administered what purported to be Botox injections for cosmetic purposes to three women, each on two occasions. Both suffered really serious harm following the second injection. The Crown's case was that the Appellant lied about his medical qualifications and training and that each woman only consented to the treatment because she believed the Appellant to be medically qualified.

6. The defence case was that, even if false statements as to medical qualification were made, each complainant agreed to treatment before any such statements or representations were made and, in any event, each individual complainant did not rely on anything that was said by the Appellant as a basis for embarking upon or continuing with the treatment.

7. The issue for the jury was accordingly, whether the Appellant told the relevant complainant that he was medically qualified before he injected the substance and whether the complainant relied on the statement and only consented to the procedure on the basis that the Appellant was medically qualified.

8. A submission of no case to answer was made on behalf of the Appellant at the close of the Crown's case. There were two grounds. First it was argued that a deception as to qualification is insufficient to vitiate consent and does not, as a matter of law, amount to a deception as to identity. Since there was also no evidence of any deception as to the nature, purpose or quality of the act, consent could not have been vitiated. Secondly, it was argued that the evidence taken at its highest was not sufficient for a jury properly directed to convict in this case. The grounds for the submission, which was rejected by the Judge, are repeated in this Court on the Appellant's behalf by Ms Alexia Power and the question on this appeal is whether or not the submission was well-founded and the Appellant's convictions are therefore unsafe.

9. Before returning to the arguments advanced by Ms Power, we set out the evidence in relation to the two counts on which the Appellant was convicted in a little more detail.

The evidence

10. The treatment for Marcelle King (count 1) was arranged by Suzanne Johnston, a beautician and hairdresser who advertised the availability of Botox treatments to be provided at her home. Suzanne Johnston gave evidence that the Appellant arrived at her home on 3 July 2013. She had not met him before. She spoke to him briefly and said: *“I think he said he was a cosmetic surgeon and trained in the United States”*. When Mrs King arrived, she had the treatment and paid. She attended for the second top up treatment on 22 July 2013 at Ms Johnston’s home. Ms Johnston was present and the Appellant administered the treatment. Ms Johnston gave evidence that she would not have allowed the Appellant to use her home address to administer the treatments if she had not understood him to be medically qualified. She was challenged in cross-examination about the way in which the arrangements were made and what was said. She maintained she was told the Appellant was a doctor. She said she did not hear that from Marcelle King. However she accepted, *“the best recollection I have is that the conversation about his qualification was with me and that that was afterwards.”*

11. In her evidence in chief, Marcelle King said she made the appointment for a Botox treatment through a beauty salon in Poole on Facebook. She spoke to a person called Suzanne at the beauty salon by phone and was told that a nurse called Ozan Melin would administer the treatment. She had no contact with him. She attended the beauty salon as arranged with Suzanne, and during her first Botox treatment on 3 July the Appellant said he was a cosmetic surgeon trained in America. She explained this was said, *“Before he did the injections ... He put the rubber gloves on and held the needle up and then told me that.”* She said there was about half a minute between him saying that and *“the first injection going in”*.

12. Before she left the salon, she said the Appellant told her if the treatment did not work she could return after two weeks for a free top-up. She waited the two weeks indicated, and made contact with Suzanne to arrange the free top-up. This was arranged for 22 July and she returned to the salon. The Appellant administered the second treatment. She gave evidence about the adverse consequences of the second set of injections.

13. At the end of her evidence in chief Mrs King was asked,

“Mr Jones: And the final question, would you have allowed any of these injections to have been administered if you had known that Ozan Melin was not medically qualified?”

Mrs King: Absolutely not”

14. In cross-examination, Mrs King confirmed:

- i) She made the appointment for the first treatment through an advertisement from a beautician, Suzanne Johnstone, which she saw on Facebook.
- ii) She knew that Suzanne was no longer working for a salon and that the treatment would be at Suzanne’s home.
- iii) She spoke only to Suzanne prior to the treatment.

- iv) She thought initially that it would be Suzanne Johnstone (not medically qualified) who would be doing the treatment.
- v) When Mrs King arrived at Ms Johnstone's home she was told that the injections would be done by the Appellant, a nurse. He was not yet present at that time.
- vi) Mrs King was cross-examined about the timing of the representation said to have been made and the evidence she gave at the first trial. At the close of cross-examination she confirmed:

“Mrs King: Well, I'm trying to remember, as I say, it was five years ago but I think the first time then he was introduced as a nurse and the second time he said he was a cosmetic surgeon.

Ms Power: So the second time was when he said he was a doctor?

Mrs King: Yes

Ms Power: In your, on your evidence?

Mrs King: Yes.”

....

“Ms Power: And it was suggested to you he certainly didn't say to you about those medical qualifications on 3rd and your reply was:

“He told me later, it was Suzanne who told me he was a nurse.”

Mrs King: Yes

Ms Power: So do you agree there you're saying again that prior to the second appointment you'd been told nothing from Mr Melin about his alleged qualifications?

Mrs King: Yes, I'm confusing the dates.”

....

“Ms Power: So, in fact, is that the correct position, Mrs King, to the best of your recollection –

Mrs King: Yes

Ms Power: If anything was said about his qualifications it was the second time?

Mrs King: Yes.”

....

“Ms Power: I think, are we agreed that, in fact, you say that there, any reference to Mr Melin being a doctor happened on the second occasion?”

Mrs King: Yes.”

- vii) When Mrs King booked the top-up appointment in a text message to Lisa Bolster she referred to the Appellant as, “The guy who did it said I’d get a free top up if it didn’t work after two weeks”.

15. In relation to Carol Kingscott, her evidence can be summarised as follows. She attended a Botox party arranged through the beauty salon run by her friend, Jozette Shepherd, a beautician. The Botox treatments were arranged through Jozette Shepherd (or somebody else) on her behalf and Ms Kingscott had no dealings with the Appellant before 5 November 2011 (the date of the first treatment).

16. When the Appellant arrived on 5 November, he set up his equipment in one of the treatment rooms at the salon. She went into the treatment room. During that first treatment the Appellant said that he had trained to be a doctor in the Turkish army and had specialised in facial surgery. This was said in the context of general conversation as the treatment was taking place. She was told at the end of the treatment that there would be a free top up if there was a problem.

17. She took this up because in her view, the treatment had not worked. The arrangements were made by Ms Shepherd. She had no contact with the Appellant. She attended at the beauty salon on 22 November. She gave evidence about the adverse symptoms she experienced following that treatment.

18. Ms Kingscott maintained in evidence that she would not have allowed injections if she had known the Appellant was not medically qualified:

“Mr Jones: And the final question is this, would you have allowed any of these injections to have been administered if you had known that Ozan Melin was not medically qualified?”

Ms Kingscott: Absolutely not. I’ve only ever had Botox injected previously by qualified clinicians.”

19. The expert, Mr Rayner, gave evidence among other things that there was no evidence of what he described as Botox effect in relation to these three treatments. He said “I can’t say whether a botulinum toxin A was present in the products used, there may have been. It may not have been at the correct concentration or the substance may have been rendered inactive as a result of handling.”

20. The Judge summarised the position at the end of his evidence to this effect: “We ended up in the situation where he couldn’t say precisely what had been used, he couldn’t exclude the fact that botulinum toxin A had been present, but all he could say was that there was no effect and that what was used, whatever it was, brought about this chemical type of burning.”

21. In his summing up to the jury the Judge made clear that the indictment concerned the second set of injections in each case and that the issue of consent was to be considered in relation to the second treatment. As to consent, he directed the jury as follows:

“During our life we may consent to treatments such as medical procedures, dental procedures, and now cosmetic procedures. Where there has been a consent the treatment or procedure is lawful. When considering each count the Prosecution, who have the burden of proof, must make you sure that the act of the Defendant was unlawful, that is without consent. So here each complainant has told you they did agree to Mr Melin carrying out the procedure, but only because he said he was medically qualified. The Defence case is that each complainant agreed to the treatment before any representation was made, and in, and in any event the individual complainant did not rely upon anything that was said.

So, when considering each count the Prosecution must make you sure firstly Mr Melin did say to the relevant complainant that he was medically qualified before he injected the substance, and secondly the complainant relied on the statement and only consented, and I repeat, and only consented to the procedure on the basis that Mr Melin was medically qualified. If you are sure, if the Prosecution have made you sure you would then go on to consider the next stage which is considering the issue of recklessness. If you are not sure, and you are not sure that it was unlawful, then you must find the Defendant not guilty of the count you are considering.”

22. Understandably in light of the evidence, the Judge did not refer to representations as to the nature and quality of the treatment administered as even arguably vitiating consent to the treatment received by the complainants.

The appeal

23. The safety of the Appellant’s convictions is challenged by Ms Power. First, she submits that the Judge was wrong in law to reject the submission made to him on the issue of consent. She submits that there was no case to go to the jury as a matter of law.

24. In his ruling on the submission of no case to answer at the close of the Crown’s case, the Judge held as follows:

“I have considered the decision in *R v Richardson* [1998] 2 Cr App R 200 where a restricted view was taken as to the meaning of identity. The footnote in *Smith & Hogan* [publication] states that the case must be read with the decision of the Court of Appeal in *Tabassum* [2000] 2 Cr App R 328. At page 336 Rose LJ, Vice President, commented that in *Richardson* [case] the

focus had been upon identity and the Prosecution had not relied upon the nature or quality of the act.

The Prosecution draw attention to the fact that the word ‘identity’ is an ordinary English word. It had been defined as:

“The fact of being who or what a person is.”

In my judgment there can be situations in which the qualification of a person is an integral part of their identity. A person attending an Accident & Emergency department is not just interested in knowing the name of the surgeon or doctor. The matter of real concern and importance is that the person is a qualified doctor. I also consider that the nature and quality of an act can be dependent upon the qualification of the person carrying out the act.

I find that a positive misrepresentation as to medical qualification is sufficient to vitiate apparent consent where the circumstances involve a consent to a medical or cosmetic operation or procedure where the Complainant has relied upon the representation and would not have consented if they had known the true position. In *Tabassum* [case] and this is reflected in the commentary in *Smith & Hogan* [publication].

The submission is also maintained on evidential grounds. It is necessary to consider consent in respect of each Complainant at the time of the second procedure. Each said they would not have consented if they had known that the Defendant was not medically qualified. I immediately recognise that the Defence have established many valid points. Treatment was arranged through a third party. There was no stipulation that the treatment was to be by a doctor. The Defendant was not specifically asked by any Complainant as to his qualification. There are also other points that can be made.

I have carefully monitored the evidence, the Defence have a number of good jury points. It is a matter for the Jury to consider the evidence in the light of submissions and decide whether an individual Complainant relied upon any misrepresentation of which they are sure. The case must properly be left to the Jury. A properly directed jury would be entitled to convict. As part of my summing up I will highlight the main points made by each side. Accordingly, I refuse the submission.”

25. In challenging that ruling, Ms Power submits that *R v Richardson* [1998] 2Cr App R 200 remains good law and clearly states where a deception as to identity is concerned, the “identity” of the person cannot extend to cover the “qualifications or attributes” of the person. To hold otherwise would be to strain or distort the everyday meaning of the word identity, the dictionary definition of which is “the condition of being the same” (Otton LJ at 206). *R v Richardson* should have been followed by the Judge given that it was neither distinguishable on the facts

nor did the Judge seek to distinguish it. Ms Power is critical of the example given by the Judge of a person attending A & E who is more concerned that the treating person is a qualified doctor, than with that person's name. She submits that is no different from *R v Richardson* which was itself concerned with treatment required to be delivered by a qualified dentist, in the same way that treatment delivered in A & E requires a qualified doctor; yet this was held to be insufficient to vitiate consent to the treatment. In fact, she submits, the qualifications of the dentist were more integral to the identity of the dentist than this case where, the Appellant was not in fact required by law to have any qualifications to administer Botox under the Human Medicines Regulations 2012, provided he was acting in accordance with the directions of an appropriate practitioner. In the absence of any legal requirement to possess qualifications in order to administer Botox, she submits that it cannot be said that such a qualification is "integral" to the identity of the person carrying out the procedure, and any deception by the Appellant was a deception relating to a collateral issue that could not vitiate consent.

26. Despite the clarity with which Ms Power advanced her submissions, we do not accept them. Our reasons follow.

27. At common law it is generally well established that for offences against the person a defendant's fraud as to conduct will not negate the victim's consent unless it deceives the victim either as to the defendant's identity or as to the nature of the act. So if a victim agrees to a medical or cosmetic procedure conducted by X, consent is prima facie vitiated if the defendant conducting the procedure is not X but is impersonating X. Likewise, in relation to the nature of the act.

28. In *R v Richardson* the defendant was a registered dental practitioner who had been suspended from practice by the regulatory body, but continued to practise dentistry on patients. The Crown's case was that the patients would not have consented to the treatment had they known of the suspension and the defendant was convicted of assault occasioning actual bodily harm following a ruling by the trial judge that the mistake was equivalent to a mistake of identity and vitiated consent. The defendant appealed. In resisting the appeal, the Crown contended that the concept of "identity of the person" should extend to cover qualifications or attributes of a professional on the basis that the victims consented to treatment by a qualified dentist and not by a suspended dentist. This Court disagreed, holding that this extended definition strained and distorted the everyday meaning of the word "identity": either there is consent to actions on the part of a person in the mistaken belief that they are other than they truly are, in which case it is assault or, short of this, there is no assault. In other words, it is the nature of the mistake as to consent that is relevant and not the reason why the mistake has been made.

29. On the facts of that case, we have no doubt that is correct. Plainly it would be undesirable for the law to treat all false or fraudulent representations as vitiating consent because that would lead to, at least potentially, trivial lies about the person or the conduct, treatment or activity as giving rise to criminal liability.

30. However, it seems to us that there may be cases where a person's identity is inextricably linked to his or her professional status. As the authors of Smith and Hogan's Criminal Law (15th edition) argue (at 672):

"It could be argued that there are some situations in which the status or attribute of the individual is inextricably bound up with his identity for the purposes of the specific activity he is performing. Indeed, it could be that the attribute is

actually *more* important than the identity. For example, would a patient visiting a general practitioner and being told that a new doctor is taking the surgery be more concerned as to the “status” of the person or his “identity”? The same argument might apply to the attribute of being a police officer.”

31. We agree with that as a general principle, and Ms Power also accepted it as such in the course of argument. The word ‘identity’ is an ordinary English word, defined as “the fact of being who or what a person is”. Depending on the facts, it seems to us that deception as to a person’s identity as a doctor where that is integral to his or her identity, can as a matter of law vitiate consent. That is different to what happened in *R v Richardson* and does not amount to including qualifications within this definition in the sense referred to in *R v Richardson*.

32. Ms Power maintained that this general principle cannot apply as a matter of law in the circumstances of this case because Botox is not required to be administered by a doctor and so being a doctor cannot be integral to the identity of the person administering the injection.

33. We disagree that this raises an argument of law. Rather, it seems to us that this is a challenge to the application of the principles to the facts of this case. Here, unlike in *R v Richardson*, where the fraud was not as to whether the defendant was a qualified dentist but as to whether she remained licensed by her regulatory body, the treatment was said to have been given by a person impersonating a medically qualified practitioner. Whether the fact of being medically qualified was operative in the minds of the complainants in giving consent cannot be determined solely by reference to the regulatory requirements for the administration of Botox injections, though that might play a part in the factual matrix depending on what was known and understood by the complainants concerned. If as a matter of fact, administration of the injection by a medically qualified practitioner was for each complainant a condition of giving her consent and without it, consent would not have been given or would have been withdrawn, it seems to us that this would go to the question of the appellant’s identity and the legal validity of their consent. Accordingly, in our judgment there was at least potentially a deception as to identity rather than merely qualifications or attributes in this case. We also consider, as Mr Jones submitted, that whereas in *R v Richardson* there was a failure to inform, here there were, on the Crown’s case, positive false representations that the Appellant was a doctor.

34. In the circumstances we do not consider that the holding in *R v Richardson* meant that there was no case to answer as a matter of law. The Judge accordingly made no error in that regard and the first ground of appeal therefore fails. It is unnecessary in these circumstances to consider the arguments advanced by reference to *R v Tabassum* [2000] 2 Cr App R 328 and the question whether true consent was vitiated in consequence of false representations about the nature, quality or purpose of the procedure administered.

35. It seems to us that the real question on this appeal is whether, as Ms Power submits on ground two, the Judge erred in holding that, on the evidence, a jury properly directed could convict. It was and remains her case that the Crown’s evidence, taken at its highest, was insufficient to establish a case against the Appellant that consent was dependent in each case on the Appellant’s identity as a doctor and was therefore vitiated by the deception.

36. We have summarised the relevant evidence above.

37. Ms Power submits that Mrs King consented to the first treatment without any representation having been made to her by the Appellant as to his qualifications. Given that

Mrs King underwent the first procedure without any representation made by the Appellant, any representation made by him during the second occasion cannot have been formative to consent. In relation to Ms Kingscott, the representation took place after she had decided to undergo treatment. She had already attended the address where the appointment was due to take place, and was already in the treatment room, at the time of the representation.

38. She therefore submits that taking the evidence as to timing of the representations made by the Appellant to the complainants at its highest, representations that he was a doctor could not have formed the basis on which consent to the Botox injections was given. A reasonable jury, properly directed, was not therefore entitled to convict on this basis.

39. We see the force of those submissions in the case of Mrs King and have concluded that Ms Power is correct: there was insufficient evidence to leave the case relating to her treatment to the jury. In her case, there was no representation by the Appellant as to his medical qualifications before she attended for the first treatment, and Mrs King initially thought the injections would be administered by a beautician. Whatever Suzanne Johnstone told her about the Appellant at the first treatment, she was already in the treatment room poised for the second treatment before any representation was made by the Appellant as to his medical qualifications, even taking her evidence at its highest. It is difficult to see how the statement he made 30 seconds before the injection went in on the second treatment can have had any operative effect on her decision to take up the second treatment. The conviction on this count cannot therefore stand and must be set aside.

40. In Ms Kingscott's case we take a different view. In her case, the representation was made in the treatment room immediately before the first set of injections. The harm was caused by the second set of injections. We consider that the Jury would have been entitled to accept her evidence as a whole, and conclude that Ms Kingscott took up the offer of a second set of injections believing that the Appellant was medically qualified, and would not have taken the free top-up from the Appellant had she not understood him to be medically qualified. The conviction on this count is not unsafe accordingly.

Review of sentence

41. In light of our conclusion in relation to count 1, the Appellant's sentence falls to be reviewed.

42. As we have already stated, on 8 June 2018 HHJ Forster QC sentenced the Appellant to a total term of 4 years' imprisonment on each count concurrent, having adjusted the sentences for totality. The Appellant had been released on bail prior to sentence and the court had a pre-sentence report and a psychiatric report available.

43. Ms Power accepts that the level and lasting nature of Ms Kingscott's injuries places them within "greater harm" for the purposes of the Sentencing Council Definitive Guideline on Assault. So far as culpability is concerned, she submits that the facts do not fit easily within any bracket as the Crown's case was that the Appellant did not intend deliberately to injure any of the complainants and that his conduct was reckless. She submits that as a matter of logic, if the Appellant's business model was attracting customers to repeat procedures and by word of mouth, any deliberate premeditation to cause injury would make no business sense. Therefore, a lack of premeditation is arguably present; a factor indicating lower culpability.

44. We agree that this offence does not fit easily within the culpability factors identified in the Guideline. We do not, however, accept there was any lack of premeditation. To the contrary, this was well-planned but reckless conduct. We consider that greater harm and greater culpability was present and places this single offence within category 1 (not category 2 as Ms Power submitted) with a starting point of 3 years' custody and a range of 2½ to 4 years' custody.

45. We accept that the aggravating feature identified by the Judge, namely that the Appellant knew in 2011 about Carol Kingscott's extreme reaction to the injections but nevertheless continued to give Botox injections including to Marcelle King in 2013, is no longer present in light of our decision. There are no other aggravating factors.

46. So far as mitigation is concerned, we accept that there are mitigating factors available to the Appellant. He is 42 years old with no relevant previous convictions. His actions were reckless and not designed to harm. There was a lengthy delay between his arrest in August 2013 and his charge in 2017 which was not his fault.

47. Ms Power also relies on the opinion of Dr Gary Jenkins that the Appellant was suffering from anxiety and depression to a greater degree than has been recognised to date as a result of these circumstances. We have read and considered his report. We accept that the Appellant expressed genuine remorse to both the author of the PSR (which we have read) and to Dr Jenkins.

48. We take a starting point of 3 years. We reflect the mitigating features summarised above by reducing that to 2 years' imprisonment. Accordingly, the sentence of 4 years concurrent on counts 1 and 3 is quashed and we substitute a sentence of 2 years' imprisonment on count 3. To that extent the appeal is allowed.