**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2018] HCJAC 11**
**HCA/2017/212/XC**

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

AMIR BAKHJAM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: CM Mitchell; John Pryde & Co (for Livingston Brown, Glasgow)**
**Respondent: McSporran QC (sol adv) AD; the Crown Agent**

23 January 2018

**Introduction**

[1] Between 23 and 30 January 2017, at the High Court in Glasgow, the appellant went to trial on a charge which libelled that:

> "on 21 ... and 22 July 2015 at ... Ashton Lane, ... Night Club ... Bath Street, Flat ..., Greenlaw Court, all Glasgow ... you ... did intentionally administer to, or cause a substance to be taken by, [FK] for the purpose of stupefying or overpowering her so as to enable you to engage in sexual activity involving her and thereafter you did

> assault [FK] ... while she was heavily under the influence of alcohol, a drug or similar intoxicating substance, unconscious or asleep and incapable of giving or withholding consent and while she was awake and without her consent, seize hold of her body, touch her on the body, kiss her on the body, remove her clothing, repeatedly kiss her on the face, kiss her on the breasts and on the body, sexually penetrate her vagina with your tongue, perform oral sex on her and penetrate her vagina with your penis and you did thus rape her to her injury: CONTRARY to Sections 1 and 11 of the Sexual Offences (Scotland) Act 2009."

[2] At the close of the Crown case the advocate depute moved to amend the charge in order to delete those parts of the libel which related to the administration of the substance for the purpose set out in section 11 of the 2009 Act. The appellant was subsequently convicted of rape and sentenced to 5 years imprisonment. The case concerns the actions of the Crown in libelling and then withdrawing the section 11 offence and thereafter addressing the jury on the basis that a suspicion lingered in that regard. The trial judge did not give a specific direction to the jury to disregard any such suspicion. It also raises issues concerning the circumstances in which it is proper for the defence to assert that an accused has a defence of consent, and for the judge to direct the jury in similar terms, where no such defence has emerged in the evidence.

**Pre-trial**

[3] The rape of the complainer was alleged to have occurred in the appellant's flat in the early hours of 22 July 2015. On 23 July 2015, the complainer reported the rape to the police. Blood and urine samples were taken from her on the following day at about 6.00pm. Subsequent examination of the urine sample revealed the presence of a psychoactive substance, commonly known as "Ivory Wave". The forensic report stated that this indicated that the drug had been ingested and that it might have been administered by dissolving it in water. Although little was known about the combined effects of Ivory Wave and alcohol, it

was possible that the sedative powers of alcohol could have overcome the stimulant properties of the drug, or that the drug might have increased the intoxicating effect of the alcohol. At precognition, the complainer maintained that she had never taken recreational drugs. Her partner (CK), stated that there had been an opportunity for the appellant to have "spiked" the complainer's drink, if he had wanted to do so in the course of the evening.

[4] The respondent decided to libel that the appellant had administered the drug to the complainer in order to engage in sexual activity with her because:

> "... there was a reasonable apprehension, based on the combined evidence of the complainer and [CK] at precognition, that their evidence would tend to show that the appellant was the person who had administered the Ivory Wave to the complainer. ... [T]he appellant was the only other person buying them drinks ... and therefore it was an inference that could be drawn that the appellant was the only person who could have administered it to the complainer if she had not voluntarily ingested it and [CK] had not given it to her. ... Fair notice required that this reasonably anticipated evidence be addressed by inclusion of the section 11 libel."

It was accepted by the respondent that this may have been an "overly cautious approach".

[5] At no stage does there appear to have been any information about the length of time the drug might have been in the complainer's system or even whether its presence was consistent with ingestion at the relevant time (ie on the evening of 21 July or the morning of 22 July).

**Evidence**

[6] It was not disputed that, on the evening of 21 July 2015, the complainer and CK had gone out for dinner in the west end of Glasgow with the appellant. The appellant was a close and long-standing friend of CK and the complainer had known him for about 18 months. All three were drinking throughout the evening, which ended up at a night club in Bath Street. The complainer had a pre-prandial Cosmopolitan and 3 glasses of prosecco

with dinner, followed by 2 or 3 rums and coke and a "Jammy Dodger" (Bailey's and Chambord) cocktail before she reached the night club. She probably had a further 3 rums and coke there. There was no evidence from the complainer or CK about the likely effect of this quantity of alcohol on the complainer in comparison with her observed behaviour that night.

[7] At about 1.30am CK decided that it was time to go home. He had realised that the complainer was, according to CK, "really, really drunk" and that it was not sensible to prolong their night out any further. There was, however, an argument between the complainer and CK in the street. The complainer had run off for a short distance. In order to avoid a scene, CK put the complaint into a taxi with the appellant and asked him to ensure that the complainer was all right. The appellant was to take the complainer back to the home in Anniesland which she shared with CK. CK then took a taxi on his own; anticipating that he would reach home shortly after the complainer.

[8] The appellant did not take the complainer home. He took her to his own flat in Greenlaw Court, Yoker. At about 2.07am he telephoned CK to tell him where she was. There appears to have been a record of an earlier call from the appellant to CK at 1.50am, but this may not have been answered. According to CK, in the later call, the appellant had told him that the complainer had said that she had not wanted to go home (hence the unexpected diversion). The appellant told him that the complainer was significantly under the influence of alcohol. She had collapsed in the street. The appellant had had to carry her up the stairs to his flat. A neighbour had come out to ask about her welfare. The appellant had put her on a bed. She had been sick. He asked if CK was going to come to his flat, but CK had declined, saying that the best thing would be for the complainer to remain at the appellant's flat to sleep it off.

[9] The complainer was unable to recall leaving the night club. She remembered having collapsed in the street (Greenlaw Court), where she had been sick. Her next recollection was having her head in the toilet and being sick in the appellant's flat. She remembered lying in a bed and being sick down the side. She was naked, but had no recollection of having removed her clothing. The appellant was in the bed beside her touching her, rubbing her back and kissing her shoulders as she was being sick. She could feel his skin against her body. When she woke up later, and was lying on her back, the appellant was on top of her, making his way down her body and performing oral sex on her. She was confused and asked him to stop. He continued to behave in this manner until she pulled his head away. He had said, "I'm sorry". She passed out "again". The next thing she became aware of was waking up with the appellant on top of her, having sexual intercourse with her. She passed out again.

[10] The complainer woke up when it was daylight and realised that she was in the appellant's spare bedroom. There was vomit down the side of the bed. There was a used condom lying on the floor. She went, apparently still naked, to the appellant's bedroom and asked him if they had had sex. The trial judge reports that she could not recall what he had said, but there is reference in the defence speech to him saying "Do you not remember". The appellant had said that she had run away from CK, who had left in another taxi. The appellant told her that she had been paralytic and that he had had to carry her up the stairs to the flat. He had required to put her in the shower in order to sober her up.

[11] Later that morning, the complainer borrowed a top and shoes from the appellant, asked him for a lift home and waited until he had had a shower before going in his car back to Anniesland.

[12] The complainer's sister gave evidence of the complainer's distress, observable some time in the evening after the incident. The complainer seems to have phoned the appellant twice and, in what is described in the defence speech as an unpleasant conversation, the complainer asks the appellant not to tell others about what had occurred, the nature of which is not clear. The sister (or possibly the complainer) may have given evidence that her impression from the conversation was that, whilst the complainer was telling the appellant that she had been asleep, the appellant was saying, according to the defence speech, that "it was consensual". It is not clear whether the sister actually heard anything that the appellant said. Although in the defence speech it is said that the appellant had said on the phone "It was consensual", this is not reported by the trial judge and he did not treat it, as would be expected, as any form of mixed statement by the appellant. The sister appears to have told the police that the complainer had told her something along the lines of "I just lay there and pretended to enjoy it". The sister denied in evidence that the complainer had told her that. It was also denied by the complainer and would, at best, have been double hearsay available only to test the sister's evidence.

[13] When the appellant was detained and interviewed by the police he made no comment. He did not give evidence.

[14] In terms of a joint minute, it was agreed that the drug Ivory Wave had been found in the complainer's urine. This was a drug used recreationally for its stimulant properties, with the side effects of similar drugs being euphoria, anxiety, insomnia, hallucinations, agitation and neuro-psychiatric symptoms. It was not possible to determine the likely effect of the drug, when combined with large quantities of alcohol. The presence of any drug in the urine was indicative of ingestion.

[15] The trial judge reports that, since the appellant and CK had been good friends for a long time, it would seem unlikely that the appellant had anticipated circumstances in which there could possibly have been any advantage to him in drugging the complainer with a view to having sexual relations with her. His impression was that matters developed in an unexpected way and it was not until the appellant took the complainer back to his own flat, when she was in a paralytic state, that the opportunity arose to take advantage of the situation.

**Speeches**

[16] In relation to the withdrawal of the section of the libel dealing with the administration of the drug, the advocate depute, near the start of his speech, said this:

> "Now you know that I have deleted the allegation that he was the one that administered the drug, that's because there wasn't really any evidence to support that, but I was always going to lead in evidence the fact that she had a drug in her system. That she herself didn't take it, that her boyfriend didn't give it to her, so there's a suspicion that the accused might have given her it. But, of course, a suspicion is not good enough in this court ladies and gentlemen. I am not entitled to come to you and say that you need to find someone guilty because there's a suspicion and, in any event, there wasn't any evidence to support that he had done that. But it's still relevant because there's a drug in her system which, according to the joint minute of agreement, may have had some sort of additional effect on her and that helps you assess the level of her intoxication."

[17] The advocate depute accepted that the appellant's "straightforward position" was that the complainer had "consensually engaged in sexual intercourse" and that there was a reasonable doubt that he had believed that she was consenting. Although the speech deals with many matters which might have affected the jury's decision on the credibility and reliability of the witnesses, and which might undermine "the defence case", it has very little focus on the critical issue in the case; *viz*. whether the jury were satisfied beyond reasonable

doubt that, in the early hours of 22 July, the complainer was incapable of consent because of the effects of alcohol and/or the drug (Sexual Offences (Scotland) Act 2009, s 13(1) and (2)(a)).

[18] At an early part in the defence speech, counsel had said that there was no evidence that the appellant had given the complainer any drugs and that, in any event, there would be no point in giving a potential rape victim a stimulant. She continued:

> "There's no ... you cannot ... speculate so don't even think about that. There's nothing supportive of that, and see when you look at the joint minute, the drug the Crown are talking about is one called Ivory Wave. It's known to be used recreationally for its stimulant properties, it's an upper, it's taking her up it's not taking her down. What would be the point in that if you are going to rape someone?
> ... the reality of the situation is she's got a drug in her system. There's no evidence he [? the appellant] gave it to her, and what would be the point because it was making her high, and what would be the point because he didn't know she was going back to his house, and when he did know she was back at his house if he's on the phone to her boyfriend saying 'You want to come over her?' So how does all that sit?"

[19] The appellant's counsel did not comment on the advocate depute's use of the word "suspicion". Rather, she went on to say that, although the matter had been deleted from the indictment, it remained relevant to the question of credibility and reliability. Reference was made to the report of a forensic medical examiner, which had stated that, when asked whether she had been given drugs the complainer had said "no". The complainer had testified that she had said that she did not know whether she had been given drugs: "How could I possibly have known if I was given drugs". The FME, when giving evidence, had said that there had been no option for a "don't know" reply in the report form. He was unable to say what the complainer had said, but if she had said "Don't know", then he would have recorded that.

[20] The speech continues with a reference to the testimony of the complainer that in the morning she had gone into the appellant's bedroom "naked" and asked if they had had sex, to which he had replied, "Do you not remember?" Counsel then said this:

> "Now's (*sic*) there's a special defence of consent here ... and basically that means that [the appellant] is giving advance notice to the Crown of what he's saying happened. He is saying that she consented, or he reasonably believed she consented. That [a reference to the appellant's question] is a piece of evidence that is entirely consistent with that position ...".

Counsel later repeats that the remark "Do you not remember" is "eloquent of somebody who, at the very least, reasonably believed that she was consenting". She subsequently refers to the appellant saying on the phone that intercourse had been consensual and asserts: "Because that's what he understood it to be, consensual". Counsel later maintains that on the phone the appellant had actually said "It was consensual" and continued "There's plenty of evidence that he thought it was consensual ... because it was consensual, ladies and gentlemen, that's what happened".

**Charge**

[21] The trial judge gave the jury the following general preliminary direction:

> "It is very important that you should reach your verdict only upon the basis of the evidence which you have heard in court. You should not speculate or guess about matters in respect of which no evidence has been led. That is very important. You should not allow anything to distract you from proceeding on only the evidence."

The judge did explain to the jury that one of the elements of rape was lack of consent and that this meant free agreement. He said that "there is no free agreement if the person ... was incapable of consenting because of the effect of alcohol or drugs, or was asleep or unconscious". He continued:

> "Now, in this case the defence position is that at the time of the intercourse the complainer was not so badly affected by drink or drugs that she could not give consent."

Having emphasised that there could be no free agreement where the complainer was so intoxicated that she could not exercise a choice, the judge gave the jury a direction that they had to be satisfied that the accused "must have had no reasonable belief that the complainer consented". He continued by stating that the only purpose of the special defence was to give notice that a particular line of defence may be taken. "It does not constitute evidence and so it does not prove or have any part to play in proving that any conduct actually occurred". Having referred to proof of the absence of reasonable belief being dependent on the evidence of the complainer and that of CK relative to her intoxicated state, the trial judge said:

> "The position of the accused, of course, is that sexual intercourse was consensual and that the complainer had lied about the events at the [appellant's] house because she was worried about what might happen to her relationship with her partner, [CK], if he found out that she had had consensual sexual intercourse with his friend, [the appellant]."

**The judge's report**

[22] The grounds of appeal had raised the issue of whether the libelling of the section 11 charge and the advocate depute's remarks about suspicion had been oppressive and had remained uncorrected by the trial judge. The judge reports:

> "... if it was considered that the behaviour of the Crown was oppressive then at the point where the reference to section 11 was deleted from the indictment it would have been open to the appellant to make a motion to desert the proceedings upon the basis that a fair trial had become impossible. No such motion was made. Additionally, if it was thought that anything said by the advocate depute in his speech to the jury had created unfairness such that a fair trial was impossible a motion to desert could have been made at the end of his speech. Again, no such motion was made.

> ... there were a number of reasons why I decided not to give a direction ... Firstly, there was simply no question whatsoever that the appellant was guilty of any offence under section 11 of the Act because the part of the charge relating to that particular offence had been deleted on the motion of the Crown and the jury had been informed of that development which amounted to an acquittal of the appellant in relation to that part of the charge.
>
> ... It would have been obvious to the jury that this was no longer part of the Crown case against the appellant and it is in that context, I think, that the remarks of the advocate depute in his speech ought to be considered. ... he was not inviting the jury to take account of any suspicion they might have in considering whether or not the appellant was guilty of rape. On the contrary he was saying that suspicion is not good enough and he repeated that there wasn't any evidence to support any suggestion that the appellant had drugged the complainer. These remarks were made very early in the advocate depute's speech ...
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> ... If it were thought that anything which the advocate depute had said was improper then Ms Arrol dealt with it very effectively indeed in her speech to the jury. ... She also repeated what the advocate depute had said that there was simply no evidence of the appellant having administered any drug to the complainer. ...
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> ... the position after speeches was that both the advocate depute and defence counsel had gone out of their way to make it clear to the jury that any supposed drugging of the complainer by the appellant was simply not an issue in the case and that the crucial live issue was the credibility and reliability of the complainer's evidence.
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> ... Given the manner ... in which both the advocate depute and Ms Arrol had dealt with it, and in light of the fact that the alleged contravention of section 11 had been withdrawn, a fact which would have been obvious to the jury, ... a general direction to avoid speculation about matters in respect of which no evidence had been given would be appropriate and sufficient. ... further detailed reference to the specific matter raised in the ground of appeal, or a direction of the kind suggested, ran the risk of simply highlighting in the minds of the jury a matter which was plainly no longer a live issue in the trial and which could distract the jury from its proper task of analysing and determining the issues, principally the credibility and reliability of the complainer's evidence, which they had been invited to decide by the parties."

**Submissions**

[23] The appellant maintained that the Crown had acted oppressively in libelling the section 11 elements and, having withdrawn that libel, addressing the jury on the existence of a continuing suspicion on the part of the Crown. The Crown had not had a proper evidential basis upon which it could have been asserted that the appellant had intentionally administered to, or caused a substance to be taken by, the complainer, for the purpose of

stupefying or overpowering her so as to enable him to engage in sexual activity with her. Even when the Crown had removed that part of the libel, the advocate depute had continued to present to the jury that he had a suspicion that the accused might have given her the drug. That had necessitated defence counsel meeting that in her speech.

[24] There had been no direction by the trial judge to disregard the issue of who had put the drugs into the complainer's system. It had been incumbent upon the judge to ensure that the jury were clear that it could be no part of the case against the appellant that he had drugged the complainer. The test in *Stuurman* v *HM Advocate* 1980 JC 111 (at 122) had been met. The appellant had not had a fair trial and a miscarriage of justice had occurred. The issue of whether the appellant had administered the drug reflected upon the appellant's intention. The advocate depute's conveyance of the idea, that there was a continuing suspicion on the part of the Crown, had the potential to influence the jury's thinking and had thus been prejudicial (see *HM Advocate* v *JRD* 2015 SCCR 413).

[25] When pressed by the court on where evidence could be found which the jury might have considered demonstrated that the complainer had consented or that the appellant had a reasonable belief in that regard, counsel was unable to assist.

[26] The respondent maintained that there had been an evidential basis for the inclusion of the section 11 libel. There was no oppression as a consequence, nor was the trial thereby rendered unfair. One anticipated explanation on the precognition was that the drug had been present because the appellant had administered it to her. It was therefore appropriate that fair notice be given. No preliminary objection had been taken to this. The appellant had been able to use the libel and the presence of the drug in the complainer's system, under reference to the FME's report. The line which had been taken by the advocate depute had been a reasonable one in informing the jury that suspicion was not sufficient and reminding

the jury that there was no evidence that the appellant had administered the drug, albeit that the presence of the drug in the complainer's system was relevant to the assessment of her condition.

[27] The trial judge had explained to the jury that they should reach their verdict only upon the basis of the evidence which they had heard in court. He told the jury that they should not speculate or guess about matters in respect of which no evidence had been led. That direction had been given in the context of what the jury had heard about the deletion of section 11 from the libel. The jury had been told to delete the relevant parts from their copy indictments. Thereafter the jury had heard two speeches in which they had been reminded that there was no evidence to prove the section 11 libel and that they were not to act on suspicions or speculation. There had been no misdirection by omission. The material complained of had not created any material prejudice on the critical issue at trial. There was no basis upon which to find that what the advocate depute had said could have resulted in a miscarriage of justice.

**Decision**

[28] The appellant's complaint was that the Crown had acted "oppressively". However, the utility of framing the argument in terms of oppression, given the usual meaning of that term in the context of criminal procedure, is questionable. The issue at this stage is whether there has been a miscarriage of justice. The plea of oppression is, in contrast, a preliminary one in bar of trial tabled, usually in advance of trial and certainly in advance of any verdict. The test in *Stuurman* v *HM Advocate* 1980 JC 111 (LJG (Emslie) at 122 is thus phrased:

> "The special circumstances must … be such as to satisfy the Court that, having regard to the principles of substantial justice and of fair trial, to require an accused *to face trial* would be oppressive. Each case will depend on its own merits, and where

> the alleged oppression is said to arise from events alleged to be prejudicial to *the prospects of a fair trial* the question for the court is whether the risk of prejudice is so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it" (emphases added).

Of course, improper conduct on the part of the Crown may be seen to have resulted in a miscarriage of justice, where it can be said, for example, that the impropriety has resulted in an unfair trial. In assessing that matter, regard must be had to the whole proceedings including earlier opportunities which the defence may have had to raise matters with the trial judge, even if a failure to do so will not necessarily be fatal to a post-conviction appeal.

[29] The libelling of a charge in respect of which, as matters turn out, insufficient or no evidence is led, is not, of itself, improper (*Donnell* v *HM Advocate* 2009 SCCR 918). A misjudgement on the part of crown counsel in approving the prosecution of a particular offence does not, *per se*, amount to impropriety, although instructing a libel which is known to have no evidential basis will almost certainly do so (eg *HM Advocate* v *JRD* 2015 SCCR 413, Lord Uist at para [10]). In this case, it was decided, in apparent good faith, that a combination of the testimony of the complainer and CK, as described on precognition, could lead to an inference that the drug had been administered deliberately by the appellant in the course of the evening with a view to stupefying the complainer. At least with hindsight, and perhaps before then, a more studied appreciation of the evidence would have led crown counsel to the view that that position was unsustainable. Not only was there no direct evidence that the appellant had given the complainer the drug, there was no toxicology to demonstrate that the drug might have been taken at or about the relevant time, when the complainer was in the appellant's company. Although, in addition, it was said that the circumstances militated against any premeditated plan and hence administration of the drug

in order to engage in sexual activity, that simply poses a question about when the drug may have been ingested relative to the departure from Bath Street.

[30] Although this did not appear to be the original position, it was ultimately conceded by the appellant that, had the section 11 libel been deleted and matters left with a statement that the Crown was not insisting on that part of the charge, no complaint could be made which could found an arguable ground of appeal. However, the remarks of the advocate depute, when seen in print, are at best careless and at worst dangerous in so far as they might be interpreted as meaning that, although he was withdrawing the relevant part of the libel, he (as the Crown's representative) retained a suspicion that the appellant had nevertheless administered the drug for the purposes of engaging in the sexual activity which followed. In so far as that is one interpretation of the advocate depute's speech, there can be no doubt that it was an improper statement. Once the libel had been withdrawn, although, as the advocate depute did say, the evidence of the drug's presence in the complainer's system remained relevant to the issue of the level of her functioning, no statement about any continuing suspicion could have been regarded as legitimate.

[31] The fact, that the terms of the advocate depute's speech may be faulted in this manner, does not carry with it an inevitability that a miscarriage of justice has occurred. That would depend upon the bearing of the remarks on the critical issues in the case. In order to have caused a miscarriage of justice, the remarks would have to have been capable of having a material bearing upon the jury's verdict. This requires a focus on what the critical issue actually was; something which, as noted above, was somewhat missing from the advocate depute's speech. Rather than simply phrasing it as one relating to the complainer's general credibility and reliability, in the context of this charge under section 1 of the Sexual Offences (Scotland) Act 2009, it was about whether the jury were satisfied that

complainer's state of intoxication was such that she was unable to consent to sexual intercourse. The complainer's testimony may have been an important part of that assessment, but there was sufficient evidence from her partner CK and, most important, from the appellant himself that, from at least the point when the complainer had fallen on the ground outside the appellant's flat, been sick on the ground and was in a paralytic state requiring her to be carried up the stairs and put to bed, the complainer was in a state in which the jury could not have any reasonable doubt other than that she was incapable of giving consent. This evidence was unchallenged and there was no reason for rejecting it. On this basis, the remarks of the advocate depute could have had no effect on the jury's inevitable verdict.

[32] The court also notes that, in assessing whether the remarks could have affected the outcome, defence counsel made no complaint about them by, for example, asking the jury to ignore them, requesting the judge for a specific direction about them or even seeking to introduce a plea in bar then and moving for the trial diet to be deserted. It observes also that the trial judge did not consider the remarks to be exceptional and treated them as meaning that the section 11 issue was not out of the picture and that the *only* relevance of the evidence about the drug was in relation to the complainer's state. If, however, that had been the advocate depute's intention, he ought to have made it clear. Nevertheless, it remains the case that whether the appellant had administered the drug had ceased to be an issue once that part of the libel had been deleted. The speeches and charge concentrated, albeit in an unnecessarily singular fashion, on the credibility and reliability of the complainer. The jury's verdict was that the appellant did have intercourse with the complainer when she was incapacitated. Whether the appellant had administered a drug to her had very little, if any, bearing on that central issue. In so far as the jury may have been given an impression of the

Crown's lingering suspicion, that could only have had a conceivable bearing, as reflecting on the appellant's character, if the appellant's own credibility and reliability had been put in issue. It was not. For all these reasons, the appeal against conviction is accordingly refused.

[33] There is, however, a general troubling aspect about the way in which the jury were asked to proceed both by counsel and the trial judge. The judge reports that:

> "… although the appellant had lodged a notice of consent, there was no contrary account of the events described by the complainer".

This appears to be the case, at least other than the oblique reference in the defence speech to a possible statement made, or possibly only an impression given, by the appellant in a phone call with the complainer. In that state of affairs, where there is no evidence: (a) that the complainer consented to intercourse; and (b) that the appellant had any reasonable belief that she had so consented, there ought to have been no room for any consideration of a special defence of consent. The only issue for the jury would be whether they accepted the evidence of the complainer's incapacity as credible and reliable and were thus satisfied that the charge had been proved beyond reasonable doubt.

[34] The statement by defence counsel that the appellant's special defence of consent was giving advance notice "of what he's saying happened" was improper as was the statement that the defence meant that "He is saying that she consented, or he reasonably believed she consented". The special defence was, as the trial judge correctly directed the jury, simply advance notice of a line which the defence *might* follow. It did not amount to any form of statement by the accused. If an accused wishes to state that a complainer consented, or that he reasonably believed that that was so, he has the opportunity of doing so in the witness box and may also have been able to do so in a pre-trial interview by the police. Any additional statement, as was made, that the appellant had understood that what had

happened had been consensual falls to be criticised in the same way in the absence of evidence to support that understanding.

[35] Regrettably, both the advocate depute and the trial judge appear to have fallen into the same error of thinking that the appellant's "position" was one of consent or reasonable belief. For example, the judge reports that:

> "the defence position, as indicated by his counsel and in cross-examination of the complainer, was that all sexual activity took place with the consent of the complainer and that, in particular, sexual intercourse took place whilst the complainer was awake and an active, willing participant."

Where no evidence is led of such a "position" or of facts from which it can reasonably be inferred, no amount of cross-examination or references to it in a speech to the jury or elsewhere make it so. Again, leaving aside the obscure conversation on the phone, there was no evidence that sexual intercourse had taken place whilst the complainer was awake and an active, willing participant. The jury ought not to have been given any other impression of the state of the proof.