APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 35
HCA/2023/624/XC

Lord Justice General
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

NOTE OF APPEAL AGAINST CONVICTION

by

MICHAEL COWAN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Jones KC; Faculty Appeals Unit for Dewar Spence, Leven
Respondent: Harper AD; the Crown Agent

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31 July 2024

Introduction

[1] On 1 September 2023 the appellant was convicted of rape and was in due course sentenced to imprisonment for 4 years. The charge was in the following terms:

> "(002) on 22 February 2020 at … you MICHAEL COWAN did assault JP … and did, whilst she was [intoxicated] asleep or unconscious and incapable of giving or withholding consent, remove her lower clothing, [touch her vagina], press your penis against her buttocks and penetrate her vagina with your penis and you did thus rape her: CONTRARY to section 1 of the Sexual Offences (Scotland) Act 2009."

[2] The words shown in square brackets were deleted by the Advocate depute in response to a submission made under section 97A of the 1995 Act after the close of all the evidence in the case.

[3] Despite what was said in cases such as *HM Advocate* v *Bilaal Afzal* [2019] HCJAC 37 and *Van Der Schyff* v *HM Advocate* [2015] HCJAC 67, the Crown periled its case on it being established that the complainer was asleep when her vagina was first penetrated. The judge directed the jury in accordance with the Crown's stance.

[4] The grounds of appeal in respect of which leave has been granted were that there was insufficient evidence that the complainer was in fact asleep at the material time and that the verdict was, in any event, unreasonable.

[5] On 31 July 2024 we refused the appeal and indicated that we would give our reasons in writing. This we now do.

The circumstances

[6] The complainer knew the appellant from a bar where she worked. Her impression was that he was about the same age as her father. On the day in question, she had been in a club with some friends and the appellant was also there. She was drinking wine and took a line of cocaine. They all went to the appellant's flat and she had another glass of wine, but did not feel drunk. The others eventually drifted off and she stayed chatting with the appellant. Her next memory was of waking up in his bedroom. She could not explain how she got there. The appellant was next to her. Her dress was pulled up above her waist and her tights were pulled down to her feet. The appellant was behind her and she could feel his erect penis in the area of her buttocks, but she did not feel it enter her. She was dizzy when

she awoke. She then passed out again. According to a transcript of her evidence, the next set of questions and answers in evidence-in-chief were in the following terms:

> "Now, I think you've told the ladies and gentlemen that the first incident when you became conscious, that Mr Cowan had his erect penis against your bottom, but after that you passed out again. When you regained consciousness, did Mr Cowan … where was Mr Cowan when you came round the second time? – When I came round, he was still … he was next to me still.
>
> And what was he doing when you came round? – He's, um … sorry, I'm just … sorry, I'm not … I'm just trying to get my head round it all at the moment, sorry.
>
> Well, Ms P, when you came round after falling unconscious, was your clothing still up round your waist and were your tights still down at your knee level? – Yes.
>
> And were you still on your side? – Yes.
>
> I think you told us you were lying on your right side at the time of the first incident? – Yeah, on my right side, yeah.
>
> So, when you regained consciousness, you were still in bed, lying on your right side, with your hinder parts exposed. Is that correct? – Yes.
>
> And was Mr … where was Mr Cowan at that point? – He was next to me still, he was next to me, like, his body was still pressed up against my back.
>
> So he was touching you; which bits of his body were touching you, Ms P? – I felt his belly, his belly and his hands were around the waist, and I felt his penis.
> What was his penis doing? – Um, his penis was next to me; I felt it at the tip.
> And where was the tip? – It was just, like, round, just at the start of the vagina bit there I felt it.
>
> Did any part of that penis enter to any extent your vagina? – Yeah, I do remember a bit; it was … I do remember part of it was, yeah.
>
> Now, I'm old-fashioned and talk in inches; are you more comfortable talking in inches or centimetres, Ms P? – Inches: it was just a bit in.
>
> How many inches of his penis were inside your vagina? – It wasn't the full amount, it was just … I would say it was the tip part.
>
> So, if it's the tip, can you help the jury a little bit: how much of his penis was inside your vagina? – I'm not sure the exact amount; it was just the tip part. I don't remember, I can't recall …

> Do you think it was more than an inch or less than an inch inside? – I'd say just about an inch inside.
>
> And was he lying still or was he thrusting and moving the penis? – Um, he was just still at the moment when he was there. He was moving it back … he was moving closer, like, putting his arms round.
>
> I wanted to ask you about his arms. Where were his arms when he did this? – His arm was on my side, and it was round, like, holding my leg as well.
>
> I'm obliged. And were you able to see what he was wearing at that point? – I don't remember.
>
> Now, you said the first incident you felt, I think you said, his sweat on his belly. Is that right? – Yeah.
>
> The second time, were you able to detect anything on the surface of his skin? – Um, it was still sweaty: it was just heat and sweat still, but I don't recall anything on his top end, just his belly still.
>
> Was he wearing … was he using any lubrication on his penis? – I wouldn't know; I didn't …
>
> Was he wearing a condom? – I don't know.
>
> So, when you woke to find this happening, what did you do? – Um, I did say, 'What are you doing?', and I do remember … and I got up and I grabbed my phone, because my phone was at the side of the bed, I seen that was there, and I grabbed my phone and got up, and then I did want to get a taxi home, get a taxi, but I was still … I just didn't feel like myself; I felt really weird, because I was in shock, and I just wanted away."

[7] The complainer's evidence thereafter was that she tried, without success, to get a taxi and to have a friend, Mr Mitchell, come to get her. The appellant offered her a lift home and she asked him to drop her off near the bus station, because she did not want him to see where she lived.

[8] Mr Mitchell and the complainer's mother both gave evidence as to the complainer's distress that morning.

[9] There was evidence of the appellant's DNA on the inside and outside of the complainer's pants. A forensic scientist expressed the opinion that one explanation for that

could be that the appellant had had vaginal intercourse with the complainer without ejaculation.

[10] The appellant did not give evidence, but his position was set out in two police interviews. In summary, in the early hours of 22 February, he had wanted the complainer to leave and had offered to call her a taxi. He went to the toilet and when he returned the complainer was in his bed, fully clothed. He had then undressed and climbed into the bed on the other side and gone to sleep with his back to her. There had been no sexual contact of any kind.

Submissions

Appellant

[11] Although the contrary had been conceded during a submission at the trial, it was submitted that there was no basis in the evidence for the jury to draw an inference that the complainer was asleep or unconscious at the time penile penetration commenced.

[12] The concession, at trial, was wrongly made and was not binding.

[13] In any event, the evidence of the complainer was so vague that the jury's verdict was unreasonable

Crown

[14] It was accepted that the concession was not binding, but it was maintained that there was sufficient evidence that the complainer was asleep or unconscious at the material time. There was a clear basis for the jury's verdict.

Analysis

[15] The Advocate depute at the trial conceded that he had to prove that the complainer was asleep when penetration began and that was his approach in addressing the jury. He was wrong. The real issue was whether the Crown had proved that she was penetrated without consent. *Bilaal Afzal* and *Van der Schyff* make that plain. The reason for the Advocate depute's approach seems to be that, because he had not asked the complainer in terms whether she consented, he thought that there could be no question of proving the case except by showing that she was incapable of so doing. Complainers are routinely asked if they wanted sexual activity to happen but, in the circumstances of this case at least, such a question was not necessary. It was open to the jury, despite the Crown's approach, to infer from all of her evidence that she was not consenting, even if they were not satisfied that she was asleep or unconscious. The jury should have been given directions in that regard as well as directions about her capacity or incapacity to consent. It was an obvious and fair route to verdict, of which the jury were deprived. The parties could have been alerted to this by the trial judge during the discussion on the submission under section 97A.

[16] Be all that as it may, we are satisfied that there was evidence which entitled the jury to come to the conclusion that the complainer was asleep or unconscious at the material time. As indicated above, she said that when she came round for the second time the appellant was next to her. Her dress was up and her tights were still down. She felt the tip of his penis just at the start of her vagina. As the Advocate depute pointed out in her submissions, section 1(4)(a) of the Sexual Offences (Scotland) Act 2009 defines vagina as including the vulva. For the tip of the penis to have been at the start of the vagina there must therefore have been penetration to some extent. The matter does not end there, however. The complainer was asked: "Did any part of that penis enter to any extent your

vagina?" to which she replied "Yeah, I do remember a bit: it was … I do remember part of it was, yeah". The use of the past tense suggests it was already inside her vagina. She went on to say that "it was just a bit in. It was just the tip part". Later in her evidence she was questioned as to whether the appellant was using any lubrication on his penis and then whether he was wearing a condom. Having answered these questions, she was asked: "So, when you woke to find this happening, what did you do?" In answer she went on to explain what she did, implying that the premise of the question was correct. It was open to the jury to infer that what was happening when she woke was that the accused's penis was inside her vagina

[17] Senior counsel's concession at trial was well made.

[18] The alternative ground of appeal is based on the contention, under section 106(3)(b) of the 1995 Act, that the verdict was one which "no reasonable jury, properly directed, could have returned". It is only in the most exceptional circumstances that an appeal on this ground will succeed: *Geddes* v *HM Advocate* 2015 JC 229; *Harris* v *HM Advocate* 2012 SCCR 234. If on the evidence there was a rational basis for a properly directed jury to find the appellant guilty, the statutory test is not met: *Harper* v *HM Advocate* 2005 SCCR 545 at para [35]. The only basis on which the verdict in this case was said to be unreasonable was that it was not clear precisely what the complainer's position was as to what was happening when she awoke. She had not been asked direct questions which would have cleared the matter up. It is true that the Advocate depute could have explored the issue more precisely but we are satisfied that there was ample basis in the evidence for the verdict, even if it could have been interpreted in more than one way. As we have explained at para [15] above, there were two, not one, rational bases by which a properly directed jury could

return a verdict of guilty. The high test imposed by s 106(3)(b) is not met and there was nothing unreasonable about the verdict.

[19] The appeal is refused.