HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 42

on appeal from:[2008] EWCA Crim 1155

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R *v* C (Respondent) (On Appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Mance

Counsel

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LORD HOPE OF CRAIGHEAD

My Lords,

1. The issue in this case is as to the scope of the words "unable to communicate" in section 30(2)(b) of the Sexual Offences Act 2003. The defendant was charged with intentionally touching the complainant by penetrating her mouth with his penis in circumstances where the touching was sexual, the complainant was unable to refuse because of or for a reason related to a mental disorder and the defendant knew or could reasonably have been expected to know that she had a mental disorder and that because of it or for a reason related to it she would be likely to be unable to refuse. Section 30(2)(b), read together with section 30(2)(a), provides that a complainant is unable to refuse if she is unable to communicate to the defendant a choice whether to agree to the touching, whether because she lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason.

2. The judge allowed the case to go to the jury on the basis that they would be entitled to reach the conclusion that, because of her mental capacity, the complainant was unable to refuse due to an irrational fear of what was happening to her. They found the defendant guilty of the offence. The Court of Appeal said that the complainant's irrational fear due to her mental disorder could not be equated with a lack of capacity to choose, and there was no evidence that she was physically unable to communicate any choice that she had made: [2008] EWCA Crim 1155; [2009] 1 Cr App R 211, paras 53-55. The defendant's conviction was set aside. The Crown has appealed against this decision on the ground that, due to a misreading of the section in general and of the words "for any other reason" in particular, it wrongly

narrows the protection for persons suffering from a mental disorder that impedes their choice as to whether or not to engage in a sexual activity.

3. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I am in full agreement with her careful analysis of the issue and with the conclusion that she has reached. I also agree with the observations of my noble and learned friend Lord Rodger of Earlsferry. For the reasons they give I would answer each of the certified questions in the affirmative and allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

4. I have had the great advantage of considering in draft the speech to be delivered by my noble and learned friend, Baroness Hale of Richmond. I agree with it and, for the reasons which she gives, I too would allow the appeal. I add one comment.

5. The Court of Appeal appear to have interpreted section 30(2)(b) of the 2003 Act as applying to a physical inability of a complainant to communicate her choice to the defendant. That interpretation is unsound. The offence is created by section 30(1). One of the essential elements is that "B [the complainant] is unable to refuse because of or for a reason related to a mental disorder." The function of subsection (2) is merely to fill out the meaning of the words "B is unable to refuse" in subsection (1). So, as Baroness Hale points out, subsection (2)(b) must refer to B's inability, "*because of or for a reason related to a mental disorder*", to communicate her choice to A..

6. If, by contrast, B, having the capacity to choose whether to agree to the sexual touching, chooses not to consent, but is unable to communicate her choice to A because of a "physical disability", and A does not reasonably believe that she consents, then A is guilty of rape. See section 1 and section 75(2)(e).

7. In short, where the complainant's inability to communicate her choice not to consent to the sexual act is due to a physical disability, the

ordinary offences in sections 1 to 4 apply; where her inability to communicate her choice is due to a mental disorder, the special offences in sections 30 to 33 apply.

BARONESS HALE OF RICHMOND

My Lords,

8. The second half of the twentieth century saw a revolution in the law's attitudes towards people with a mental disorder or disability. Previously they had been segregated from the rest of society, detained in large institutions on the outskirts of town or deep in the countryside, and denied the benefits of close personal relationships. The Mental Health Act 1959 introduced a new policy. As much as possible, people with mental disorders and disabilities should be integrated into society, treated as much like anyone else as it was possible to do and enjoying the same rights as other people.

9. One of the rights which other people take for granted is the right to have sexual relationships with the partners of their choice. But the 1959 Act (and its successor, the Mental Health Act 1983) did not change the old attitudes in one respect. Section 7 of the Sexual Offences Act 1956 made it an offence for any man to have extra-marital sexual intercourse with a "defective", defined as any woman who suffered from "a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning" (1956 Act, s 45, as substituted by s 127(1) of the 1959 Act). Nor could such a woman or such a man give a valid consent to an indecent assault (1956 Act, ss 14(4) and (15(3)). It was also an offence for a man to commit homosexual acts with a severely impaired man (Sexual Offences Act 1967, s 1(3) and (4)).

10. This approach was both under- and over-inclusive. It included some severely handicapped women and men who might be quite capable of making a genuine choice about their sexual partners and would not be harmed by their sexual relationships. It denied them the sexual fulfilment which most people take for granted these days, simply on the basis of a status or diagnosis. On the other hand, it did not include people with other mental disorders which might well mean that they

lacked the capacity to make a genuine choice about their sexual relationships.

11. This problem formed a small part of two separate law reform projects which gathered momentum during the 1990s. In 1989, the Law Commission began a project on decision-making on behalf of people who lacked the capacity to make decisions for themselves. This culminated in their Report on Mental Incapacity (1995, Law Com No 231). The proposals in that Report were taken forward by the Government in a Consultation Paper, *Who Decides?* (1997, Cm 3803) and their Report, *Making Decisions* (1999, Cm 4465). After further pre-legislative scrutiny of a draft Bill, the Mental Capacity Act was passed in 2005 and came into force in 2007.

12. Nothing in that Act, of course, allows a decision about sexual relations to be taken on behalf of anyone else (s 27(1)(b)). That is a decision which only the person concerned can take. But the project was important because it discussed the essential ingredients of the capacity to make a decision for oneself. Three broad approaches could be discerned in the existing law and literature: the "status", the "outcome" and the "functional" approaches. The status approach excluded all people with a particular characteristic from a particular decision, irrespective of their actual capacity to make it at the time: this, of course, was the approach of the Sexual Offences Act 1956 to sexual relations with mental "defectives". The Commission pointed out that "the status approach is quite out of tune with the policy aim of enabling and encouraging people to take for themselves any decision which they have capacity to take" (Law Com No 231, para 3.3).

13. The "outcome" approach focused on the final content of the decision: a decision which is inconsistent with conventional values or with which the assessor disagreed might be classified as incompetent. This approach "penalises individuality and demands conformity at the expense of personal autonomy" (Law Com No 231, para 3.4). The Commission therefore recommended the functional approach: this asked whether, at the time the decision had to be made, the person could understand its nature and effects. "Importantly, both partial and fluctuating capacity can be recognised" (Law Com No 231, para 3.5). However, the Commission went on to accept that understanding might not be enough. There were cases where people could understand the nature and effects of the decision to be made but the effects of their mental disability prevented them from using that information in the decision-making process. The examples given were an anorexic who

always decides not to eat or a person whose mental disability meant that he or she was "unable to exert their will against some stronger person who wishes to influence their decisions or against some *force majeure* of circumstances" (Law Com No 231, para 3.17).

14. In 1999, the Home Office embarked upon a Review of Sex Offences. The meaning of consent and capacity to consent were obviously important parts of that. The Law Commission had already done a considerable amount of work on Consent in the Criminal Law ((1995) Consultation Paper No 139) and was asked for its help. The resulting Report on Consent in Sex Offences was published as an Appendix to the Home Office Report, Setting the Boundaries: Reforming the Law on Sex Offences (Home Office, 2000).

15. This adopted essentially the same "functional" approach as had the earlier Report on Mental Incapacity, but using simplified language "more apt to describe the process of deciding to consent to sexual activity, as opposed to deciding upon a course of conduct with civil legal consequences. Essentially this is because it is perceived to be a visceral, rather than a cerebral, process of decision-making" (para 4.59). Quite so. But the same two elements remained – inability to understand or inability to decide (para 4.84). The Commission also stressed that their proposed test "would require assessment of capacity on the material occasion" (para 4.48). Their whole concern was to protect sexual autonomy, which "includes a right to refuse unwanted sexual attention (a negative aspect of this concept) as well as the right to choose to engage in sexual activity (a positive aspect)" (para 4.69). Any particular choice to engage in sexual activity is, of course, both person-specific and occasion-specific: with you here and now, or not with you, (although possibly with some-one else), or not here, or not now.

16. The Sexual Offences Act 2003 provides a number of offences against persons "with a mental disorder impeding choice" in sections 30 to 33, and a number of offences involving inducements, threats or deception to procure sexual activity with a person with a mental disorder, in sections 34 to 37. Relevant for our purposes is the offence in section 30:

"(1) A person (A) commits an offence if –
(a) he intentionally touches another person (B),
(b) the touching is sexual,

(c) B is unable to refuse because of or for a reason related to a mental disorder, and

(d) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.

(2) B is unable to refuse if –

(a) he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or

(b) he is unable to communicate such a choice to A."

(3) and (4) deal with penalties, distinguishing between penetration of anus or vagina and penetration of mouth with penis, which carry up to life imprisonment, and other sexual touchings, which carry up to 14 years' imprisonment on indictment but may be tried summarily.

17. The defendant was charged with this offence, as was a co-accused with whom we are not concerned. The complainant was a 28 year old woman with an established diagnosis of schizo-affective disorder, an emotionally unstable personality disorder, an IQ of less than 75, and a history of harmful use of alcohol. Schizo-affective disorder is a mental illness, the effects of which may come and go. When unwell, a sufferer may experience delusions, hallucinations and severe disturbances of mood. An emotionally unstable personality disorder is an intrinsic abnormality of mood, ability to interact with other people, thought processes and thinking style. A sufferer has a tendency to become upset without rational cause, act impulsively, develop unstable relationships and repeatedly self-harm.

18. The complainant had had at least four admissions to hospital, including three periods of detention under the Mental Health Act 1983. She was discharged to a hostel in Croydon on 13 June 2006. On 27 June 2006 she visited the community mental health team resource centre where she saw her care co-ordinator, Mrs Hannan, who was concerned because she kept on repeating that she wanted to leave Croydon, people were after her and she did not want to die. She was seen by a consultant forensic psychiatrist, Dr Picchoni, but walked out of the interview dramatically in a distressed and agitated state. He completed a form recommending her compulsory admission to hospital. Later that day, the complainant met the defendant (also a user of the mental health resource centre) in the car park outside the centre. She told him that she had been in hospital for 9 years and had recently left. She said that she wanted to

leave Croydon because she believed that people were after her. The defendant offered to help. She went with him to his friend's house. He sold her mobile telephone and bicycle and gave her crack. She went to the bathroom but the defendant came in and asked her to give him a "blow job". Her evidence was that she was really panicky and afraid and wanted to get out of there. She was saying to herself "these crack heads . . . they do worse to you". She did not want to die so she just stayed there and just took it all.

19. Dr Picchoni assessed the complainant again two days later. He said that it was likely that her symptoms had persisted after the morning of 27 June. Her capacity was likely to be affected by her relapsed mental state, because of her diminished ability to take in information and weigh it up to make a decision. The complainant's treating psychiatrist, Dr Harty, gave evidence that given the deterioration in her mental state before the alleged events, her presentation during the interview with Dr Picchoni, her learning disability and impaired intellectual functioning, and highly aroused state, she would not have had the ability to consent to sexual contact at the time of the alleged offence.

20. After the alleged offence, the complainant made a 999 call and around midnight she was found by police officers running about the street, screaming and saying "they're going to kill me. They're going to kill me." They thought she might have mental health problems and discovered that she was missing from the hostel. She was taken back there, although she kept saying that she did not want to go back. The next day social workers from the centre visited and found her distressed and withdrawn, lying on the bed in a foetal position. She told them something of what had happened and the police were called.

21. The only passage in the judge's summing up which was directed towards the complainant's capacity was this:

> "Now [the complainant] would be unable to refuse if she lacked the capacity to choose whether to agree to the touching, in other words the sexual activity, for any reason, for example, an irrational fear arising from her mental disorder or such confusion of mind arising from her mental disorder, that she felt that she was unable to refuse any request the defendants made for sex. Alternatively, [she] would be unable to refuse if through her mental disorder she was unable to communicate such a choice to

> the defendants even though she was physically able to communicate with them."

22. The defendant was convicted but his conviction was set aside on appeal. The Court of Appeal [2008] EWCA Crim 1155; [2009] 1 Cr App R 211 relied heavily upon the observations of Munby J when exercising the inherent jurisdiction of the High Court in *Re MAB* [2006] EWHC (Fam) 168 and *Re MM* [2007] EWHC (Fam) 2003, both decided before the Mental Capacity Act 2005 came into force. He expressed the view that the test for capacity to consent to sexual relations must be the same in its essentials as the test in the criminal law; more importantly "a woman either has capacity, for example, to consent to 'normal' penetrative vaginal intercourse, or she does not. . . . Put shortly, capacity to consent to sexual relations is issue specific; it is not person (partner) specific" (*MM*, para 87). The Court of Appeal agreed: "Irrational fear that prevents the exercise of choice cannot be equated with lack of capacity to choose. We agree with Munby J's conclusion that a lack of capacity to choose to agree to sexual activity cannot be 'person specific' or, we would add, 'situation specific'" (para 53). They also disagreed with the judge's direction that if the complainant were unable to say no because of an irrational fear, this was capable of amounting to an inability to communicate her choice (paras 54, 55). Hence the judge's directions about inability to communicate and irrational fear were inadequate (paras 61, 62); his direction about "confusion of mind" came closer to an adequate direction but "the problem with it was that it was 'person specific'" (para 63). Hence the conviction was unsafe.

23. The questions certified for us by the Court of Appeal have been summarised for us by the parties as follows:

> "Whether the decision of the Court of Appeal . . . has unduly limited the scope of section 30(1) of the Sexual Offences Act beyond that which Parliament intended. Specifically
>
> > (a) in holding that a lack of capacity to choose cannot be person or situation specific
> >
> > (b) in holding that an irrational fear that prevents the exercise of choice cannot be equated with a lack of capacity to choose

> (c) in holding that to fall within section 30(2)(b) a complainant must be physically unable to communicate by reason of his mental disorder."

24. My Lords, I have no doubt that the answer to questions (a) and (b) is "yes". The Court of Appeal acknowledged that this was a difficult area and they were, in my view, unduly influenced by the views of Munby J in another context. I am far from persuaded that those views were correct, because the case law on capacity has for some time recognised that, to be able to make a decision, the person concerned must not only be able to understand the information relevant to making it but also be able to "weigh [that information] in the balance to arrive at [a] choice": see *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, 295, approved in *Re MB (Medical Treatment)* [1997] 2 FLR 426. In *Re C*, the patient's persecutory delusions might have prevented him from weighing the information relevant to having his leg amputated because of gangrene, which he was perfectly capable of understanding, but they did not. But in *NHS Trust v T (adult patient: refusal of medical treatment)* [2004] EWHC 1279 (Fam), [2005] 1 All ER 387, the patient had a history of self harming leading to dangerously low haemoglobin levels. She knew that if she refused a blood transfusion she might die; nevertheless she believed that her blood was evil and that the healthy blood given her in a transfusion became contaminated and thus increased the volume of evil blood in her body and "likewise the danger of my committing acts of evil". Charles J concluded that she was unable to use and weigh the relevant information, and thus the competing factors, in the process of arriving at her decision to refuse a transfusion (para 63). In the same way, a person's delusions that she was being commanded by God to have sexual intercourse, an act which she was perfectly capable of understanding, might make her incapable of exercising an autonomous choice in the matter.

25. However, it is not for us to decide whether Munby J was right or wrong about the common law. The 2003 Act puts the matter beyond doubt. A person is unable to refuse if he lacks the capacity to choose whether to agree to the touching "whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason" (s 30(2)(a)). Provided that the inability to refuse is "because of or for a reason related to a mental disorder" (s 30(1)(c)), and the other ingredients of the offence are made out, the perpetrator is guilty. The words "for any other reason" are clearly capable of encompassing a wide range of circumstances in which a person's mental disorder may rob them of the ability to make an autonomous choice, even though they may have sufficient

understanding of the information relevant to making it. These could include the kind of compulsion which drives a person with anorexia to refuse food, the delusions which drive a person with schizophrenia to believe that she must do something, or the phobia (or irrational fear) which drives a person to refuse a life-saving injection (as in *Re MB*) or a blood transfusion (as in *NHS Trust v T*).

26. The 2003 Act also makes it clear that the question is whether the complainant has the capacity to choose whether to agree to "the touching", that is, the specific act of sexual touching of which the defendant is accused. It is, perhaps, easier to understand how the test of capacity might be "act specific" but not "person specific" or "situation specific" if intellectual understanding were all that was required. The complainant here did know what a "blow job" was. Even then, it is well accepted that capacity can fluctuate, so that a person may have the required degree of understanding one day but not another. But that is because of a fluctuation in the mental disorder rather than a fluctuation in the circumstances. Once it is accepted that choice is an exercise of free will, and that mental disorder may rob a person of free will in a number of different ways and in a number of different situations, then a mentally disordered person may be quite capable of exercising choice in one situation but not in another. The complainant here, even in her agitated and aroused state, might have been quite capable of deciding whether or not to have sexual intercourse with a person who had not put her in the vulnerable and terrifying situation in which she found herself on 27 June 2007. The question is whether, in the state that she was in that day, she was capable of choosing whether to agree to the touching demanded of her by the defendant.

27. My Lords, it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention on Human Rights. The object of the 2003 Act was to get away from the previous "status" based approach which assumed that all "defectives" lacked capacity, and thus denied them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in other ways.

28. My Lords, I believe that the Court of Appeal were led astray by their understandable reliance upon the contrary view, that capacity could not be situation specific, and it was for this reason that they found the matter so difficult. Mr Richard Wormald, for the defendant, has not seriously tried to uphold their reasoning on the questions which we have been asked. He accepts that an irrational fear plainly is *capable* of depriving a person of capacity. The question is whether it does. He has, understandably, pointed to all the features in the evidence which suggest that the complainant was indeed exercising a choice, a choice reluctantly to go along with what was being asked of her because of her fear of the consequences if she did not. But if the judge's direction on lack of capacity is upheld, as I consider it should be, it is difficult to suggest that the jury were not entitled to reach the verdict they did on the evidence they heard.

29. Alison Foster QC, for the Crown, does not place so much reliance on the inability to communicate the choice to refuse. But in my opinion the judge was also correct on this point. Indeed. Mr Wormald accepts that it may be that the complainant's description of herself was closer in kind to an inability to communicate than to any lack of understanding. There is a significant difference between the approaches of the 2003 and 2005 Acts on this subject. The Mental Capacity Act 2005 provides that "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain" (s 2(1)). For this purpose, a person is unable to make a decision for himself if he is unable, *inter alia*, "to communicate his decision (whether by talking, using sign language or any other means)" (s 3(1)(d)). This clearly covers people with physical disorders of the brain, for example head injuries or strokes, which prevent them communicating as well as people with disorders of the mind which have the same effect.

30. Section 30 of the 2003 Act, however, is only concerned with people who are "unable to refuse because of or for a reason related to a mental disorder" (s 30(1)(c)). This inability may involve either the inability to choose (s 30(2)(a)) or the inability to communicate the choice made (s 30(2)(b)). "Mental disorder" for this purpose has the same meaning as in section 1 of the Mental Health Act 1983 (s 79(1)). At the material time (before the amendments made by the Mental Health Act 2007 came into force) "mental disorder" meant "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"; since the 2007 amendments, it means "any disorder or disability of the mind" (s 1(2)). There are, of

course, some physical disorders of the brain which lead to disorders of the mind. But it is quite clear that in the 2003 Act Parliament had in mind an inability to communicate which was the result of or associated with a disorder of the mind. There is no warrant at all for limiting it to a physical inability to communicate. It must include a person with such a degree of learning difficulty that they have never acquired the gift of speech, so that it is impossible to discover whether or not they can understand or make a choice. (For what it is worth, the Act deals with people who because of a physical disability are not able to communicate whether or not they have consented by placing an evidential burden on the defendant; see s 75(1), (2)(e).)

31. For these reasons, I would answer each of the certified questions in the affirmative and allow this appeal.

32. It may be worth observing that there were at least three offences which might have been charged on the evidence available. We are told that the defendants were originally charged with rape, but that charges under section 30 were substituted at a late stage. The view may have been taken that the offence under section 30 is somewhat easier to prove. The prosecution has only to prove the inability to refuse rather than that the complainant actually did not consent. This may not make much difference (although the Law Commission apparently thought that it did), given that both offences relate to a specific sexual act, and the Act provides that "a person consents if he agrees by choice, and has the freedom and capacity to make that choice" (s 74). But the mens rea under section 30 is that the defendant knows or could reasonably be expected to know that the complainant has a mental disorder and that because of it or for a reason related to it she is likely to be unable to refuse (s 30(1)(d)). The mens rea for rape is that the defendant does not reasonably believe that the complainant consents (s 1(1)(c)). This puts a greater burden of restraint upon people who know or ought to know that a person's mental disorder is likely to affect her ability to choose. This may explain why the decision was made to charge the section 30 offence in this case. Less easy to understand is why the offence under section 34 was not charged in the alternative. This involves the same range of sexual acts as does the offence under section 30 and attracts the same levels of punishment. It covers intentional sexual touching with the agreement of the person touched (s 34(1)(a), (b)), where the defendant has obtained that agreement by means of an inducement offered or given, a threat made or a deception practised for that purpose (s 34(1)(c)), and the defendant knows or could reasonably be expected to know that the complainant has a mental disorder (s 34(1)(d)(e)). Perhaps the view was taken that the evidence of lack of capacity was more

robust than the evidence of any inducement, threat or deception. This is pure speculation. But the alternative charges would have enabled the judge to explain the various concepts by distinguishing them from one another and relating them to the evidence: a lack of consent arising from the lack of either the freedom or the capacity to make that choice; a lack of capacity to make that choice arising from or related to a mental disorder; and a choice procured by threats, inducement or deception of a person with a mental disorder. One difficulty which the jury might have had with the judge's reference to "irrational fear" is that some of this complainant's fears may have been all too rational. But on the evidence and on the judge's direction they were entitled to conclude that she lacked the capacity either to choose or to communicate within the meaning of the Act and the conviction must therefore stand.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

33. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I am in full agreement with it and for the reasons she gives I too would answer 'yes' to each of the 3 certified questions and in the result allow the appeal and restore the respondent's conviction.

LORD MANCE

My Lords,

34. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I am in full agreement with it and for the reasons she gives I too would answer 'yes' to each of the 3 certified questions and in the result allow the appeal and restore the respondent's conviction.