APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 18
HCA/2022/535/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

LW

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg, Sol Adv; Martin Johnston & Socha, Dunfermline
Respondent: A Cameron, Sol Adv, AD; the Crown Agent

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2 June 2023

Introduction

[1] The appellant was convicted of one charge of rape, whilst the complainer was asleep and incapable of giving or withholding consent. The appeal asserts that the trial judge erred in directing the jury that the appellant could not have had a reasonable belief that the complainer was consenting. The Crown's written submissions conceded that the appeal had

merit, and should be allowed. The court indicated in advance that it wanted to be addressed in full on the issues arising in the appeal.

Evidence

[2] The appellant and the complainer were in a relationship between January and March 2020, and lived together at the locus. They separated the day after the incident.

[3] The complainer stated that she was sleeping on her side with her back towards the appellant who was spooning her. She woke up during the night to find the accused penetrating her vagina with his penis. She was clear that she was not awake when this penetration took place. She told him to stop which he did. In cross-examination it was put to her that she had been rubbing against the appellant in bed which she denied. Then: "If I suggest that LW thought you were awake due to the way you were moving about in bed?" to which she replied "I don't know I was still asleep"".

[4] The appellant gave evidence. He stated that whilst he was spooning the complainer she was grinding her bottom up and down on him, for quite a while and he thought she was awake as she was moving, saying also "I thought she was awake but obviously she wasn't". He accepted having sexual intercourse but his position was that he thought she must be awake, although he was not in a position to see her eyes.

[5] Shortly after the alleged incident, the following Facebook exchanges occurred between them:

> *Complainer*: I never want to wake up with someone shoving there fucking dick inside me or there fingers (*sic).* That is not fucking right! That's why I broke up with you!
>
> *Appellant*: I said I was sorry and I was really really sorry and it never happened again once you spoke to me about it.
>
> *Complainer*: Still I can't get over it., that is classed as rape you know that right?

> *Appellant*: I'm sorry when you said get off I did if you wanna class it as rape get me done for it I will admit what I did and tell them that as soon as you asked me to get off I did I was trying to wake u up in a nice way not fucking rape you"

[6] In cross-examination the appellant did not accept that to wake someone up must mean that the person was asleep.

The trial judge's directions

[7] The trial judge directed the jury:

> " …. in law there can be no consent when a person is asleep. I now need to give you a further direction in law based on existing case law. If you accept that there is corroborated evidence that [the complainer] was asleep when she was penetrated by the accused's penis, then the accused can have had no reasonable belief that the complainer consented. The law provides that if a person is incapable of consenting because they are asleep, it follows that an accused who has intercourse with that person can never have a reasonable belief that consent has been given. It follows from that legal direction, that the accused's evidence to the effect that he thought she was awake because she was grinding on him – evidence which the complainer did not accept – does not amount in law to 'a reasonable belief that she was consenting to sexual intercourse'. If the Crown establish to your satisfaction that [the complainer] was asleep at the time of intercourse, it follows that there is no actual consent and no reasonable belief in consent."

[8] The jury subsequently raised several questions as follows: :

> "Q2. Does consent require explicit consent or just a reasonable belief of consent?
>
> Q3. Does her being asleep mean that there can't be a reasonable belief of consent?
>
> Q5. What constitutes reasonable belief? And does grinding constitute reasonable belief?

The trial judge gave directions consistent with the contents of his charge.

Trial judge's report

[9] The trial judge states that his directions were based on observations in the second sentence of para 27 of *GW* v *HM Advocate* 2019 SCCR 175,

> "The court agrees with the decision and reasoning of the PH judge, that consent which is expressed at a point materially remote from the conduct said to constitute

> the crime, cannot provide a defence in terms of the statutory provisions. It agrees also with the Sheriff Appeal Court in *KT* v *Procurator Fiscal, Falkirk* (para 4) that it is axiomatic that, if the law provides that a person is incapable, while asleep or unconscious, of consenting to any conduct, there can never be a reasonable belief of consent in such circumstances."

He understood the jury manual to proceed, following *GW*, on the basis that a reasonable belief in consent can never exist if the complainer was in fact asleep.

[10] In any event, had he considered that a defence of reasonable belief could be made out where the complainer was asleep but the appellant asserted he thought she was awake, the trial judge would have contemplated refusing to allow the issue to go to the jury on the evidence. The appellant only spoke of the complainer grinding her buttocks against him although he added during cross-examination that she was making sexual noises. The appellant knew that the complainer had been asleep and did nothing to check whether she had woken up. The act of the complainer moving against the appellant did not, in his view, give rise to a reasonable inference of consent.

Submissions for the appellant

[11] The learned trial judge erred in giving the directions he did to the jury based on *obiter* remarks in *GW*. *GW* was a case where the issue was whether a person could consent in advance to having intercourse whilst asleep, and where the appellant was well aware that the complainer was asleep at the time. It has never been the case that simply because someone is asleep or incapable of consenting a reasonable belief was excluded.

[12] It could be said that if an accused person is aware a complainer is asleep or incapable of consenting then it could follow that he could not be said to have a reasonable belief. However, the situation here was one where the actions of the complainer in fact initiated contact by grinding against the appellant. The appellant could be said, in such

circumstances, to have a reasonable belief the complainer was not only awake but consenting. In such circumstances reasonable belief was a live issue. In the circumstances, a miscarriage of justice had occurred.

Submissions for the Crown

[13] Under reference to *Nyiam* v *HM Advocate* 2021 SCCR 315 and *Winton* v *HM Advocate* 2017 SCCR 320 it was submitted that the court has allowed of at least the possibility of an accused person raising the issue of reasonable belief in consent in the context of circumstances in which there was no consent due to intoxication (in terms of s.13(2)(a)) or no capacity to consent due to mental disorder (in terms of s.17). These sections operate in the same way as section 14 of the Act and there would appear to be no basis in the text or structure of the Act itself to treat the circumstances covered by s.14 differently from those covered by sections 13 and 17. Section 14 should therefore be treated in the same way as the other sections: it sets out circumstances in which consent is absent but does not exclude the possibility that there may have been a reasonable belief in consent.

[14] *GW* and the case of *KT* referred to therein, can be distinguished on the basis that the defence of reasonable belief was presented on the basis of an avowed knowledge by the accused that the complainer was asleep at the relevant time. Whilst it is axiomatic that where the accused person knows that the complainer is asleep at the time of the acts complainer of, he can have no reasonable belief in consent, that does not exclude the possibility of a reasonable belief where an accused believed the person to be awake or conscious and consenting, provided that the basis for that belief has been put in evidence and is considered by the jury to be reasonable.

[15] As to the trial judge's suggestion that he would in any event have considered refusing to allow the matter to go to the jury on the basis of the evidence, issues of consent and capacity to consent should normally be left to the jury to determine (*HM Advocate* v *MMI* [2022] HCJAC 19). Even where the evidence is slight, or where two conflicting but reasonable views may be held, the matter should be left to the jury, as in the case of a special defence (*Crawford* v *HM Advocate* 1950 JC 67). Essentially, if there is any evidence capable of supporting a reasonable belief in consent, the matter should be left to the jury.

[16] In directing the jury that no such belief could be held when a complainer was asleep, the trial judge misdirected them on a matter of considerable importance, in effect instructing them that they could not consider the only defence on which the appellant relied. The jury's questions show that they were interested in this issue, and against that background the effect of the verdict must have been a miscarriage of justice.

Decision and analysis

[17] The appellant had lodged a special defence, which asserted actual consent or reasonable belief in consent. This should probably have been the subject of further exploration at the Preliminary Hearing, because it became apparent at trial that actual consent was no part of the defence.

[18] As is now well understood, following *Maqsood* v *HM Advocate* 2019 JC 45, beyond the statutory definition of the crime appropriate to the circumstances of the case, no further direction on reasonable belief is required unless that is a live issue at trial. That issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting. That does not normally

arise, for example, where an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding.

[19] A sleeping person is deemed incapable of consent to any sexual conduct. The evidence of the complainer alone can be sufficient to rebut any suggestion of reasonable belief, see *Schyff* v *HM Advocate* [2015] HCJAC 67 at para 13. The circumstances in which a reasonable belief in consent may be a live issue where the complainer maintains that she was asleep at the time of penetration will, at best, be vanishingly rare. It is obvious that this must be so, because the basis of any such assertion is that the complainer was, as a matter of fact, asleep, and incapable of consenting, but that the accused nevertheless maintains there were reasonable grounds to think that she was consenting to the conduct in question. This can only arise in very unusual and rare circumstances. It is important to recognise that the critical issue in such a case is not merely whether the accused thought the complainer was awake, but whether the circumstances were such as to permit of a reasonably held belief that she was consenting to the activity in question.

[20] In the present case, the focus of the evidence of the accused was on whether he thought the complainer was awake: there was virtually no focus in the course of his evidence on whether he thought she was consenting, far less on whether there were objectively reasonable grounds for so believing. The following exchange in re-examination encapsulates the nature of the evidence of the appellant:

> "Did you think she was awake. – Yes.
>
> What made you think she was awake. – Because she was grinding up and down on me."

Clearly, evidence that the appellant thought the complainer was awake, and thus capable of consenting, does not amount to an assertion of a reasonable belief that she was as a matter of fact, in all the circumstances, consenting.

[21] The only point at which the evidence stretched beyond that was with the following

> "had anything happened to make you think that she *might* want sex. – Yeah I said, I said at the beginning grinding up and down on me and we were in a spooning position." (examination in chief)
>
> "She was making noises…not like sleeping noises but like sexual noises." (cross-examination – what this meant, and what he took from it, was not explored further at any stage).

[22] These questions, and the answers, do not focus the issue and do not provide an evidential basis for a reasonable belief in consent. It was not put to the complainer that there might have been a misunderstanding or that the appellant could reasonably have believed that she was consenting. The trial judge summarises the cross-examination of the complainer thus:

> "It was put to the complainer during her cross-examination that she was rubbing against the appellant in bed which she denied. She was asked: "If I suggest that LW thought you were awake due to the way you were moving about in bed?" to which she replied "I don't know I was still asleep."

[23] We do not consider that reasonable belief was a live issue in the case, which is enough for disposal of the appeal, without considering any wider issue. The complainer had been asleep, as the appellant knew; he did not speak to her; and she did not say anything to him. He did not see her eyes. The position advanced in the speech on his behalf was that he accepted that he had "got it wrong" and that she was not in fact awake, although he thought she was.

[24] The appellant did not dispute that he sent the message to the complainer stating "I was trying to wake you up in a nice way." In the context of a lack of focus on the issue of

consent, the evidence falls short of allowing consideration of a reasonable belief in consent to vaginal penetration. It is notable that in the defence speech the matter was addressed on the basis of mere assertion, with no attempt to identify an evidential basis for the assertion. It follows that the trial judge did not err in directing the jury that no issue of reasonable belief arose in the case.

[25] It also follows that the issue of reasonable belief was not a live issue in the case, a direction on reasonable belief was not necessary, and the appeal must fail. The Crown concession was wrongly made.

Postscript

[26] At the close of the evidence, the trial judge raised the issue of the terms of the special defence. The solicitor advocate for the appellant confirmed that there could be no issue of consent, and that only the reasonable belief aspect of the defence was being insisted upon. It is clear from the terms of his charge that the trial judge had formed the view, correctly, that this was not a relevant issue in the case. It would have been preferable had he made this clear to parties at this stage, heard such submissions as appropriate, and ruled on the matter. This would have avoided the situation where the jury heard a speech on a matter the judge was going to tell them to ignore. Having allowed the jury to hear a speech on this basis, however, he should have given very clear directions that as a matter of law there was no evidential basis for reasonable belief, and the special defence should have been withdrawn. The jury would not then have been left pondering the relevance of an irrelevant issue, and asking the questions noted above.