

Neutral Citation Number: [2011] EWCA Crim 2665
No. 2011/04619/B2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 3 November 2011

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Judge)

MR JUSTICE BUTTERFIELD

and

MR JUSTICE HENRIQUES

R E G I N A

- v -

YURI CICCARELLI

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Miss K Mallison appeared on behalf of the Applicant

Miss P Page appeared on behalf of the Crown

J U D G M E N T
(As Approved by the Court)

Thursday 3 November 2011

THE LORD CHIEF JUSTICE:

Introduction

1. On 27 July 2011, in the Crown Court at Reading, before Her Honour Judge Mowat, the applicant was convicted of sexual assault. The applicant's application for leave to appeal against conviction has been referred to the full court by the Registrar. We grant leave.
2. The appeal raises a short point about the evidential presumptions relating to consent to be found in section 75 of the Sexual Offences Act 2003 ("the 2003 Act").
3. "Consent" is defined by section 74 of the 2003 Act. It provides:

"For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

It is in this context that section 75 comes to be considered. Section 75, which deals with "Evidential Presumptions about Consent, provides:

"(1) If in proceedings for an offence to which this section applies [and these were such proceedings] it is proved --

- (a) that the defendant did the relevant act,
- (b) that any of the circumstances specified in subsection (2) existed, and
- (c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it."

The circumstances are explained in subsection (2). As will be seen in a moment there is nothing fanciful or unrealistic about the circumstances. They identify situations in which a complainant will be vulnerable or disadvantaged, and as a matter of reality, unlikely to be consenting. The circumstances are that:

- "
- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
 - (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
 - (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
 - (d) [which applies here] the complainant was asleep or otherwise unconscious at the time of the relevant act;
 - (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
 - (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act."

All those circumstances have to be seen in the context of the meaning of "consent" in this Part of the Act. Consent is an agreement by choice made in circumstances where the individual had the freedom and the capacity to make that choice.

The Facts

4. One night in October 2010 the appellant touched in a sexual way a young woman who was fast asleep or unconscious through drink, and possibly drugs, without her consent. The only issue was whether he might reasonably have believed that she was consenting. At the end of the

evidence, including the evidence the appellant had given, the judge concluded that no sufficient evidence had been adduced in accordance with section 75(1) to raise the issue. Accordingly, she indicated that she would give appropriate directions to the jury. Following her ruling, the appellant pleaded guilty. He appeals against conviction on the basis that the ruling was wrong and that his guilty plea was tendered in the context of an incorrect ruling.

5. It is important to emphasise at the very outset that we do not here consider the situation which arises between couples in an established relationship, who understand each other and what is and what is not appropriate and acceptable to them in their sexual relationship. We are not considering even a relatively short sexual relationship. The appellant and the complainant had met on about three previous occasions, when nothing romantic or sexual had occurred between them. There was nothing to suggest that there was any attraction by one for the other, and in particular by the complainant for the appellant. The appellant was the boyfriend, as the complainant knew, of another young woman.

6. On the evening of 15 October 2010 the appellant, who had been working, joined a gathering of about seven people at the house of a mutual friend. His girlfriend was there, as was the complainant. The complainant was "pretty drunk" by any assessment. There was evidence of some drug-taking that evening by her and by others. As they sat around the table she fell asleep.

She then woke up and felt very embarrassed. In a gesture of friendship she was taken in a taxi back to a flat shared by the appellant and his girlfriend. It was common ground that the arrangement was that she would sleep that night in their spare room. She went to bed tired and drunk. She fell fast asleep in the spare room before the appellant went to his own bed.

7. According to the appellant's evidence at trial, when the party was gathered around the table before he, his girlfriend and the complainant were driven back to the flat he shared with his girlfriend, the complainant put a hand on his upper thigh between his legs, pulled him towards her and appeared to try to kiss him. At any rate she pursed her lips into such a gesture. He found this disagreeable, so he moved away. In other words, on his account, when the group of friends were all together the complainant made an advance to him. Thereafter, she fell asleep, was taken back to the flat, and went to bed in order to sleep before he went to bed with his girlfriend.

8. The appellant told the jury that he was unable to sleep and so he got up to fetch a drink. He decided to go into the spare room where the complainant was asleep to check that she was all right "because she had not said good night to me. This time I did nothing. I did not touch her sexually". That was his evidence to the jury.

9. In his earlier interview with the police he had said that on the first occasion he went into the spare bedroom, stayed for about a minute, got into bed with the complainant, "but just sort of gave her a stroke and a small kiss". He then went to the lavatory before returning to the spare room. In the interview he said that the complainant did not wake up at all on that first occasion.

10. When the inconsistency between the evidence he had given at trial and his interview was pointed out, he explained that he had become confused and tired in the interview, but conceded that what he had said shortly after the event in the interview was likely to be right.

11. On any view, however, the appellant returned to the spare bedroom on a second occasion. The complainant was still fast asleep. She did not respond to his activities. Indeed, for a while

she did not move at all.

12. Reminding ourselves of the issue, that in accordance with section 75(1), given all the proved facts, the question was whether sufficient evidence was adduced to raise an issue as to whether the appellant reasonably believed that the complainant consented, the appellant told the jury that he went back a second time to "try it on" with the complainant to see if he was "lucky". He lay down in the bed next to her and started to kiss her face. She remained asleep. He said that he cuddled her, kissed her and tried to see if she could be awakened. He did this "to understand if she was awake or not -- whether she wanted to wake up". Apparently she did not. Nevertheless, in his evidence he said that he lay very close to her, behind her back. He had an erection. He removed his erect penis from his trousers and touched her with it over her knickers from behind. She was still asleep. She was wearing knickers, not trousers. In cross-examination he said that he had only lowered the knickers and not removed them. He said that he was unable to remove them because she moved. Indeed she did. She woke up just before he got on top of her. When she awoke her response was immediate. She told him to get out and to get off, and that is what he did.

13. The complainant's evidence was that she was aware of waking up with the appellant on top of her in bed, clearly looking for sexual intercourse. She believed that her knickers were removed, but whether they were or not, as soon as she realised what was going on she yelled at him to get off, and indeed he did.

14. In his evidence the appellant said that he had "felt a bit let down" by his girlfriend that evening because she did not make him happy. He thought she was flirting with people she had known from a long time earlier. That was one reason for going to the complainant's room. The second was that she had "tried it on" with him when the group was gathered together around the table before the three left for the flat.

15. It was not in dispute that the appellant sexually assaulted the complainant when she was asleep and when he knew that she was asleep. Further, it was not in dispute that the complainant did not, in fact, ever consent to be touched sexually by the appellant in any way. The only question was whether sufficient evidence had been adduced for the issue whether he reasonably believed that the complainant consented to him touching her sexually to be raised. If there was, the issue would be left to the jury.

16. The judge rightly addressed her attention to section 75 of the 2003 Act, both the evidential presumption about consent and the circumstances in which issues about the evidential presumption arose for consideration. She concluded that the requirements of section 75(1)(a) to (c) were established. She then asked herself how the evidence, taken at its highest in the appellant's favour, could possibly suggest "that he could reasonably have believed this woman was consenting to sexual touching while she was asleep and therefore incapable of giving contemporaneous consent". She concluded that there was no evidence on which the appellant could advance an argument on the basis that he reasonably believed the complainant would have consented to him touching her while she was asleep, and said that he could not be heard to say, "I believe she would have consented if she had been awake. Therefore it was reasonable for me to believe she consented while she was asleep". The judge said that could not conceivably be a reasonable belief "if that was what was being argued" on the appellant's behalf.

17. Having reached that conclusion, the judge told counsel for the appellant that she would direct the jury accordingly. She did not suggest that she would direct the jury to convict. In the light of the indication she had given, an application was made for the appellant to be re-arraigned. He vacated his "not guilty" plea and pleaded guilty.

18. It is submitted that the judge's ruling was wrong. It was suggested that section 75 of the 2003 Act reverses the ordinary principles relating to the burden of proof in criminal cases. We do not agree. Section 75 is an evidential provision. It relates to matters of evidence, and in particular evidential presumptions about consent in circumstances where, as we have already indicated, as a matter of reality and common sense, the strong likelihood is that the complainant will not, in fact, be consenting. If, however, in those circumstances there is sufficient evidence for the jury to consider, then the burden of disproving them remains on the prosecution. Therefore, before the question of the appellant's reasonable belief in the complainant's consent could be left to the jury, some evidence beyond the fanciful or speculative had to be adduced to support the reasonableness of his belief in her consent to him touching her sexually when and although she was fast asleep, and remained so, both when he went in to see her on the first occasion and again when he went in on the second occasion.

19. We remind ourselves that effectively these were two strangers. As far as both were concerned, the appellant had a girlfriend with whom he shared the flat in which she was sleeping at the time of the sexual touching of the complainant. Moreover, before he touched her sexually, he made no attempt to awaken her by talking to her or indeed by touching her in a non-sexual way, for example, by shaking her by the shoulder. Taking the appellant's case at its highest, it came to no more than this. The reasonableness of his belief that the sleeping complainant was consenting was based on the single advance she had made to him (according to his account) at an earlier stage in the evening when she was awake, in a different place, before she was taken to the flat he shared with his girlfriend and put to bed in the spare room to sleep off her drunken stupor.

20. The basis of the submission that the judge's ruling was wrong is encapsulated in the proposition that it was enough for the appellant to have given the evidence which he gave, that he believed that the complainant was consenting. Thereafter, whether or not that belief was reasonable was a question for the jury. In other words, his asserted belief was sufficient to raise the issue. The difficulty with this submission is readily identified. It is not what section 75 provides. The belief must be reasonable, or putting it more precisely, there must be some evidence that the belief was reasonable.

21. The issues of the appellant's reasonable belief in the complainant's consent, either when she was asleep or in any other of the situations identified in section 75(2) (in what we describe as a position of disadvantage) will be considered by the jury provided that there is evidence which is sufficient to raise that issue. That involves a careful evaluation of the evidence. That exercise was carried out by Judge Mowat. On the facts of this case her conclusion was entirely justified. The evidence did not raise any issue for the consideration of the jury.

22. Accordingly this appeal is dismissed.