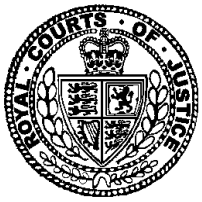

Neutral Citation Number: [2020] EWCA Crim 1665

Case No: 202000391 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TEESSIDE
HHJ ARMSTRONG
T20180637

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE HOLGATE
and
SIR RODERICK EVANS

- -

Attorney General's Reference (Section 36 of the CJA 1972) (No 1 of 2020)

- -
- -

Duncan Atkinson Q.C. appeared on behalf of the Attorney General
Michelle Heeley Q.C. (instructed by Cartwright King Solicitors) appeared on behalf of the Acquitted Person
Louis Mably Q.C. appeared as an amicus curiae

Hearing dates : 26th November 2020

- -

Approved Judgment

Lord Justice Fulford V.P. :

Background

1. On 17 October 2019, in the Crown Court at Teesside (Judge Armstrong) the defendant was acquitted of an offence of sexual assault contrary to section 3 of the Sexual Offences Act 2003. He was also acquitted of the alternative offence, common assault.

2. The Attorney General, pursuant to section 36 Criminal Justice Act 1972 ("CJA"), has referred to this court a point of law which arose in the trial proceedings upon which she desires the opinion of the Court, as follows:

> "Is it necessary for the prosecution to prove, as an element of the offence of sexual assault, not only that the offender intentionally touched another person without their consent and without reasonable belief in their consent, and that the touching was sexual, but that the offender intended his touching of that person to be sexual?"

3. Section 36 (7) CJA provides that a reference under this section shall not affect the trial in relation to which the reference is made or any acquittal in that trial.

4. Rule 41 of the Criminal Procedural Rules governs the procedure for referrals under section 36 CJA. Rule 41.7 provides that that the Court must not allow the defendant to be identified during these proceedings unless he gives permission, which did not happen.

5. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. No matter relating to the alleged victim shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her as the alleged victim of the section 3 offence.

The Facts

6. On 20 August 2018, the defendant was with his two nephews on a train travelling towards Newcastle, when the complainant joined the train at York. Whilst their accounts of precisely what took place differed, it was common ground at trial that the defendant kissed the complainant without her consent and without any reasonable belief that she was consenting.

7. She testified that the defendant appeared to be intoxicated and was seeking to engage other passengers in conversation. He approached where she was sitting in an aisle seat at a table. She moved across into the window seat as he lowered himself onto her seat and almost sat on her lap. He tapped her on the arm, and when she turned to face him, he grabbed her face and kissed her with what she described as a "sloppy" and "forceful" kiss full on the lips. She was upset and reported the incident when she got off the train at Durham.

8. The defendant's account in police interview and in his evidence was that he was not drunk, albeit his voice may have sounded slurred as he did not have the dental bridge in place which he usually wore in the lower half of his mouth. He said that he had heard someone

say (in relation to the complainant) "*What do you want a photo with her for? She's fat and ugly?*" and his reaction was to protect her. He told her she was not fat and gave her a "*peck*" on the lips" to support her. It was not, he suggested, a sexual kiss and he had not intended sexually to assault her.

The Relevant Statutory Provisions

9. Section 3 Sexual Offences Act 2003 ("SOA") provides:

Sexual Assault

"3. (1) A person (A) commits an offence if-
(a) he intentionally touches another person (B),
(b) the touching is sexual,
(c) B does not consent to the touching, and
(d) A does not reasonably believe that B consents.

[…]"

10. Section 78 SOA provides:

"Sexual"
For the purposes of this Part (except sections 15A and 71), penetration, touching or any other activity is sexual if a reasonable person would consider that –

(a) Whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual."

11. We interpolate to note that the two offences in Part 1 which apply a different definition of "sexual" are, as set out above, sexual communication with a child (section 15A) and sexual activity in a public lavatory (section 71). In each case, the communication or activity respectively is "sexual" if a reasonable person would, in all the circumstances *but regardless of any person's purpose*, consider it to be sexual.

The Submissions and Ruling in the Crown Court

12. It was conceded by the defence that the requirements of section 3(1) (a), (c) and (d) SOA 2003 were met. The sole live issue for the jury was thus whether the touching was sexual. The parties were in agreement that, as a general proposition, a kiss on the lips was not necessarily sexual within the meaning of section 78 (a), but that it could be sexual within section 78 (b).

13. Against that background, it was the prosecution's case that the touching was sexual within section 78 (b) both because of its circumstances (including the nature of the kiss, the respective ages of the defendant and complainant, the fact that they were strangers, the location on the train, the alleged intoxication of the defendant, and what it was alleged was said before and during the incident) and because the purpose of the kiss was sexual gratification. It was the prosecution's case that the defendant's account that it was intended as a friendly or reassuring gesture was false.

14. The defence case was that whilst a kiss on the lips may be sexual, in this instance it was not sexual within section 78 (b) either because of the circumstances or because the purpose of the kiss, as the defendant maintained, was not sexual.

15. Following the evidence, submissions were advanced to the judge regarding the appropriate directions to be given to the jury as to the mental element of the offence. It was submitted on behalf of the defendant that, in addition to proving that the touching was sexual for the purposes of section 78(b), it was necessary for the prosecution to establish that the defendant intended his touching of the complainant to be sexual (put otherwise, that his motivation was sexual). Reliance was placed on *R v JAS* [2015] EWCA Crim 2254 and on a passage from the supplement to *Rook and Ward on Sexual Offences: Law and Practice* 5th edition see ([30]) below.

16. On behalf of the prosecution it was submitted that the offence of sexual assault did not require proof of the mental element that the accused intended his or her touching of the victim to be sexual. It was argued that *R v JAS*, a case which concerned the particular facts of an offence of inciting a child under 13 to engage in sexual activity under section 8 SOA 2003, did not support the contentions of the defence on this section 3 charge.

17. The judge ruled in favour of the defendant. Uncontroversially, he concluded that the actus reus of the offence of sexual assault is sexual touching of the complainant and, as regards mens rea, the prosecution need to prove that the touching was intentional, and that the defendant did not reasonably believe that the complainant consented to it. But, critically for this application, he ruled that it was a necessary ingredient of the offence for the Crown to prove that the defendant had intended the touching to be sexual. His reasoning for this conclusion had a number of elements. First, the offence of sexual assault, contrary to section 3 SOA 2003, replaced the offence of indecent assault, contrary to section 14 Sexual Offences Act 1956 ("SOA 1956"). As the judge interpreted the decision, in *R v Court* [1989] AC 28 the House of Lords held that it was an element of that latter offence that the defendant intended to assault the complainant in circumstances of indecency. The judge additionally observed that the editors of *Rook and Ward* in the section quoted below ([30]) and the Court of Appeal in *R v JAS* required that the actions of the defendant were sexually motivated. The judge observed that "[...] *s.78 is simply a definition of "sexual" and does not define what is meant by "intention" in s.3(1).* " The judge concluded that the prosecution needed to prove either the defendant intended to touch in circumstances which would

amount to it being sexual or he had a purpose in relation to it which was sexual. Therefore, he decided it is a necessary ingredient of the offence to prove that the defendant intended to commit a sexual touching.

18. He put the matter to the jury, *inter alia*, as follows:

> "The sole issues remaining to be decided are these: firstly, whether the prosecution has made you sure that the touching was sexual and the defence case is that it wasn't; and secondly, whether the prosecution has made you sure that the defendant intended to touch the complainant sexually. That is that the touching was sexually motivated. Not simply intended as a friendly or reassuring gesture, but with a view to sexual gratification.
>
> […]
>
> Well, if you are sure that the kiss was sexual you would proceed to decide the second issue. If you are not sure that the kiss was sexual that would be the end of it and you would find the defendant not guilty of sexual assault.
>
> So, the second issue is whether there was an intention on the defendant's part to touch sexually. The prosecution must make you sure that the defendant intended not just to touch the complainant but to touch the complainant sexually. That is that the touching was sexually motivated, namely with a view to sexual gratification on the part of the defendant."

The Submissions on the Present Application

19. Mr Atkinson Q.C. on behalf of the Attorney General submits that the mens rea required for an offence contrary to section 3 SOA 2003 is the intention to assault and that the judge erred in suggesting the prosecution additionally needed to prove an intention to touch the complainant sexually. It is argued that the judge inappropriately compared the present offence with the offence of Inciting Sexual Activity contrary to section 8 of the SOA 2003 and the earlier offence of indecent assault, section 14 SOA 1956.

20. In succinct and able submissions, Mr Atkinson highlights that the question whether intentional touching (for the purposes of section 3) is sexual is answered by reference to section 78 SOA 2003. Touching is sexual if a reasonable person would consider this was the case i) by virtue of the nature of what occurred, regardless of the circumstances of the incident or the purpose of the accused (78(a)); or ii) because the nature of what occurred is potentially sexual and it is rendered sexual because of the circumstances or the purpose of the accused (or both). Although the "purpose" of the accused may be relevant under section 78 (b), ultimately the determination of whether or not an incident of touching is sexual is a question for a "reasonable person" rather than the defendant.

21. Against that background, it is alleged that the judge blurred the distinction between the defendant's intention on the one hand and the possible relevance of his purpose to the

determination of whether his action was sexual on the other, thereby ignoring the clear wording of sections 3 and 78.

22. Mr Mably Q.C. who has provided able submissions as an amicus curiae, submits that section 78 is clear in its terms. Addressing section 78 (a), Mr Mably echoes the submissions of Mr Atkinson and highlights that the jury can find that an intentional touching is sexual if they decide that a reasonable person would consider the touching is sexual because of its nature. In these circumstances, it is the touching itself that matters and it would be irrelevant whether or not any person (*e.g.* the accused) had a **sexual** intention or purpose. Equally, the circumstances of the touching would be irrelevant.

23. Under section 78 (b), an intentional touching is sexual if a reasonable person would consider that because of its nature it may be sexual and it is sexual because of the circumstances. In this situation it would again be irrelevant whether or not any person (*e.g.* the accused) had a **sexual** intention or purpose. Finally, an intentional touching is sexual if a reasonable person would consider that because of its nature it may be sexual and it is sexual because of the purpose of any person (*e.g.* the accused).

24. Mr Atkinson and Mr Mably contend that this approach to section 3 and section 78 finds support in *R v H* [2005] EWCA Crim 732; [2005] 1 WLR 2005; [2005] 2 Cr App R 9. In *R v H* the issue was raised, *inter alia*, whether the defendant's actions in grabbing the victim's tracksuit bottoms whilst making an indecent suggestion could be regarded as sexual within the meaning of section 78 (b). At [12] Lord Woolf C.J. stated:

> "12. The fact that in s.78(b) there are two different questions which we have sought to identify complicates the task of the judge and that of the jury. If there is a submission of ''no case'' the judge may have to ask himself whether there is a case to be left to the jury. He will answer that question by determining whether it would be appropriate for a reasonable person to consider that the touching because of its nature may be sexual. Equally, the judge will have to consider whether it would be possible for a reasonable person to conclude, because of the circumstances of the touching or the purpose of any person in relation to the touching (or both), that it is sexual. If he comes to the conclusion that a reasonable person could possibly answer those questions adversely to the defendant, then the matter would have to be left to the jury.
>
> 13. We would suggest that in that situation the judge would regard it as desirable to identify two distinct questions for the jury. First, would they, as 12 reasonable people (as the section requires), consider that because of its nature the touching that took place in the particular case before them could be sexual? If the answer to that question was ''No'', the jury would find the defendant not guilty. If ''Yes'', they would have to go on to ask themselves (again as 12 reasonable people) whether in view of the circumstances and/or the purpose of any person in relation to the touching (or both), the touching was in fact sexual. If they were satisfied that it was, then they would find the defendant guilty. If they were not satisfied, they would find the defendant not guilty."

25. There was no suggestion that the judge needed, additionally, to decide whether there was evidence fit for the jury's consideration that the defendant had intended the touching to be sexual or that the jury needed to be sure of this factor. It is argued that if the Court had considered that an intention to touch sexually was a part of the mens rea of the offence, this additional element would inevitably have featured in this full explanation of the ingredients of the offence by Lord Woolf.

26. Mr Atkinson and Mr Mably similarly rely on *R v Heard* [2007] EWCA Crim 125; [2008] QB 43; [2007] 1 Cr App R 37. The issue on that appeal was whether voluntary intoxication could be relied on by an accused to say that he did not have the necessary state of mind to commit a section 3 SOA 2003 offence. Lord Justice Hughes V.P. giving the judgment of the court observed:

> "15. […] The different elements of the offence, identified in paras (a)–(d) of s.3, do not call for proof of the same state of mind. Element (a), the touching, must by the statute be intentional. Element (b), the sexual nature of the touching, takes one to section 78. By that section the primary question is a purely objective one, as set out in s.78(a). If, however, the act itself is objectively equivocal, the purpose of the defendant may be a relevant consideration, as provided by s.78(b), and that must be a reference to his own (subjective) purpose. The state of mind in a defendant which must be proved in relation to element (c), the absence of consent, is expressly stipulated by element (d) and by s.3(2), and the stipulation is in terms which make it clear that the test is substantially objective; a belief in consent which was induced largely by drink would be most unlikely to be reasonable. It is accordingly of very limited help to attempt to label the offence of sexual assault, as a whole, one of either basic or specific intent, because the state of mind which must be proved varies with the issue. For this reason also, it is unsafe to reason (as at one point the Crown does) directly from the state of mind required in relation to consent to the solution to the present question.
>
> 16. Since it is only the touching which must be intentional, whilst the sexual character of the touching is, unless equivocal, to be judged objectively […]."

27. It is submitted that this summary by Hughes LJ strongly supports the contention that there is no requirement for the prosecution to prove that the defendant intended the touching to be sexual, given the absence of any such suggestion.

28. We have referred to other elements of Mr Mably's submissions in the Discussion part of this judgment below.

29. Ms Heeley Q.C., in succinct and helpful submissions on behalf of the acquitted defendant, argues that if a jury is not sure that a defendant intended his actions to be sexual then the mens rea for the offence would be lacking and he ought to be acquitted. She relies on the judgment in *R v JAS* [2015] EWCA Crim 2254 in support of this submission, which we consider in detail below.

Discussion

30. In his ruling, the judge relied on commentary in the supplement to *Rook and Ward on Sexual Offences: Law and Practice* (5th Edition):

> "2.80 Must A intend the touching to be sexual? On a literal reading of s.3, the requirement of intention is linked only to the touching and not to the requirement that the touching is sexual. Further, the effect of s.78 of the 2003 Act is that a touching may be sexual by virtue of its nature, or its nature combined with its circumstances, regardless of A's intention in carrying it out. On the other hand, as a matter of general principle mens rea is required as to every element of the actus reus of an offence, which, in the case of s.3, includes the sexual element. More importantly for practical purposes, in *R. v JAS* the Court held in relation to the similarly-constructed offence in s.8 of the 2003 Act that "sexual motivation" is a vital ingredient of the mental element of the offence. It is highly likely that the same decision would be reached in relation to s.3. Accordingly, if A may have had a non-sexual purpose in touching B, this ought to lead to an acquittal."

31. However, in the main work (2016), the learned editors indicated the opposite conclusion on the same point:

> "2.80 Must A intend the touching to be sexual? As a matter of principle, it seems not. On a natural reading of s.3, the requirement of intention is linked only to the touching and not to the requirement that the touching is sexual. Further, the effect of s.78 is that the touching may be sexual by virtue of its nature, or its nature combined with its circumstances, regardless of A's intention in carrying it out. Finally, certain offences in the 2003 Act expressly require the defendant to act for the purpose of sexual gratification, and the implication is that where this is *not* an element of the offence, such a purpose need not be proved. It is, however, difficult to conceive of circumstances in which a jury is likely to find that A's touching of B was sexual without being satisfied that A had a sexual purpose. Evidence that A had a non-sexual purpose is therefore likely to be of real practical significance."

32. For the reasons set out hereafter, we disagree with the conclusions of the editors on this issue in the supplement to *Rook and Ward*. The starting point for this analysis is the reliance that has been placed by the editors, the judge and Ms Heeley on the judgment in *R v JAS*. It is useful in those circumstances to consider the ambit of the decision in that case. The appellant, who was autistic, had been convicted of causing or inciting a child under the age of 13 (his cousin, aged 3 ½) to engage in sexual activity (section 8 SOA 2003: "Causing or inciting a child under 13 to engage in sexual activity"). It would appear that section 78 (a) did not apply, given the touching that occurred on the unusual facts of that case was not necessarily sexual within the meaning of section 78 (a), but it could have been sexual within section 78 (b). Equally, it does not appear to have been suggested that the circumstances rendered the touching sexual for the purposes of section 78 (b). The appellant's case was that his purpose was educational and not for sexual gratification. On that basis, the jury would have had to be sure that what occurred was, as considered by a reasonable person, potentially sexual and it was rendered sexual because of the purpose of the accused.

33. It follows that the resolution of the relevant section 78 (b) question (*viz.* that relating to the appellant's sexual purpose) was determinative of an essential ingredient of the offence, namely whether the activity was sexual. Macur LJ suggested that in these circumstances the jury would have been better assisted by a direction that included, *inter alia*:

> "Are we sure that the [appellant's] invitation was sexually motivated, that is not to demonstrate good and bad touching, but with a view to sexual gratification?"

34. As it seems to us, the Court's reference to sexual motivation was directed at the particular factual issue that the jury needed to determine in that case and the decision is not in any sense authority for the proposition that sexual motivation is a free-standing ingredient of the section 8 offence.

35. In his ruling in the present case, the judge observed that the offence of sexual assault, contrary to section 3 SOA 2003, replaced the offence of indecent assault on a female, contrary to section 14 SOA 1956 ("Indecent assault on a woman: It is an offence […] for a person to make an indecent assault on a woman"). The judge expressed the view that in *R v Court* [1989] AC 28 the House of Lords held that it was an element of that offence that the defendant intended to assault the complainant in circumstances of indecency. He suggested that if the SOA 2003 was intended to remove the ingredient of an intention to commit a sexual assault, there "*would have been considerable publicity about it*".

36. With respect to the judge, we disagree with the judge's understanding of the decision in *Court*. The question for the House of Lords was (page 47C):

> "Whether it is correct that on a charge of indecent assault the C prosecution must prove: (a) that the accused intentionally assaulted the victim; and (b) that he was aware of the indecent circumstances of what he did or was reckless as to their existence; but that it is not necessary for the prosecution to prove in addition that the accused had an indecent purpose or intention."

Thus, the question directly raised the issue whether or not the prosecution had to prove that the accused had an indecent purpose or intention.

37. The decision of the Appeal Committee was by way of a majority, with Lord Goff alone dissenting. It answered the certified question at p 45H:-

> "On a charge of indecent assault the prosecution must prove: (1) that the accused intentionally assaulted the victim; (2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent; (3) that the accused intended to commit such an assault as is referred to in (2) above."

Therefore, the prosecution had to prove that the accused intended to commit an assault judged objectively to have the quality described in (2), but not also that in so doing he had an indecent purpose or intention.

38. It is helpful to set out some of the central passages in which their lordships explained this conclusion. Lord Griffiths at page 35 C put the matter thus:

> "[…] in the context of indecent assault, the necessary intent is to commit an assault which the jury as right-thinking people consider to be sexually indecent."
>
> At page 35 D:
>
> "Whether or not right-thinking people will consider an action indecent will sometimes depend upon the purpose with which the action is carried out."
>
> And at page 35 H:
>
> "The fact is that right-thinking people do take into account the purpose or intent with which an act is performed in judging whether or not it is indecent. If evidence of motive is available that throws light on the intent it should be before the jury to assist them in their decision.

> Suppose, in the present case, the appellant had said to the police, "I thought the girl had been stealing and I beat her to stop her doing it again." Such evidence would surely have been admissible to attempt to persuade the jury that this was an act of chastisement and therefore they should not regard it as indecent. If, on the other hand, evidence is available that shows the spanking was not an act of chastisement but carried out with the intention of obtaining perverted sexual gratification, it would, in my view, be an affront to common sense to withhold that evidence from the jury when asking them to decide if this man had behaved indecently."

39. Lord Ackner similarly indicated at page 42 H *et seq.*:

> "The assault which the prosecution seek to establish may be of a kind which is inherently indecent. The defendant removes against her will, a woman's clothing. Such a case, to my mind, raises no problem. Those very facts, *devoid of any explanation,* would give rise to the irresistible inference that the defendant intended to assault his victim in a manner which right-minded persons would clearly think was indecent. Whether he did so for his own personal sexual gratification or because, being a misogynist or for some other reason, he wished to embarrass or humiliate his victim, seems to me to be irrelevant. He has failed, ex-hypothesi, to show any lawful justification for his indecent conduct. This, of course, was not such a case. The conduct of the appellant in assaulting the girl by spanking her was only *capable* of being an indecent assault. To decide whether or not right-minded persons might think that assault was indecent, the following factors were clearly relevant—the relationship of the defendant to his victim—were they relatives, friends or virtually complete strangers? How had the defendant come to embark on this conduct and *why* was he behaving in this way? Aided by such material, a jury would be helped to determine the quality of the act, the true nature of the assault and to answer the vital question— were they sure that the defendant not only intended to commit an assault upon the girl, but an assault which was indecent—was such an inference irresistible? For the defendant to be liable to be convicted of the offence of indecent assault, where the circumstances of the alleged offence can be given an innocent as well as an indecent interpretation, without the prosecution being obliged to establish that the defendant intended to commit both an assault and an indecent one, seems to me quite unacceptable and not what Parliament intended." (our emphasis by way of underlining)

40. It follows that although the former section 14 SOA 1956 and its successor, section 3 SOA 2003, are differently expressed, in this respect they bore distinct similarities in terms of the approach to be applied. For section 14 SOA 1956, if the assault was "indecent in itself" or "inherently indecent" the Crown did not have to prove a specific indecent intent on the part of the defendant. As with section 78 SOA 2003, the motive or purpose of the accused only

became relevant when his actions were not necessarily indecent. In that situation, the jury would need to consider, bearing in mind why the defendant behaved in that way (along with other factors), whether the irresistible inference was that he intended to assault his victim in a manner which the jury, as right-minded persons, would clearly think was indecent. That would enable them to decide whether the defendant not only intended to commit an assault upon the woman, but an assault which had the objective quality of being indecent.

41. We are unpersuaded, therefore, that section 3 SOA 2003 brought about a significant change in the law as regards the mens rea of the offence of indecent/sexual assault.

42. Mr Mably has helpfully highlighted that the approach to the presumption of mens rea in the interpretation of criminal statutes was recently considered by the Supreme Court in *R v Lane and another* [2018] UKSC 36; [2018] 1 WLR 3647; [2018] 2 Cr App R 35 (see in particular [9] and [12]). There is a presumption that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary. This is of great importance in relation to the approach to the construction of criminal statutes, but it remains a principle of construction. Mens rea should not be inadvertently, silently or ambiguously removed from the ingredients of a statutory offence, but it is not a power in the court to substitute for the plain words of Parliament a different provision, on the grounds that it would, if itself drafting the offence, have done so. The first duty of the court is therefore to consider the words of the statute. Finally, the presumption is a principle of construction which must give way to either the plain meaning of the words of the statute, or to other relevant pointers to meaning which clearly demonstrate what Parliament intended.

43. We acknowledge that, as a matter of principle, given the actus reus of the offence involves sexual touching without consent, it might be presumed that the actus reus would be accompanied by a culpable state of mind, namely intention, particularly bearing in mind the seriousness of this offence. If the Attorney General is correct, the result is that an accused could be guilty without intending the touching to be sexual or that he or she had no sexual purpose.

44. As against these considerations, the statutory ingredients do not contain the requirement that the accused intended the touching to be sexual. Furthermore, section 3 is not silent as to mens rea. As Mr Mably has rightly submitted, the required state of mind in respect of each ingredient has been expressly set out by Parliament. In our judgment, the legislature did not intend a further, unexpressed state of mind to be established, particularly given the relevance of the accused's sexual purpose for the purposes of section 78 (b) (*viz.* his state of mind/purpose as to the nature of the touching) was expressly set out. Under that provision

touching is sexual if a reasonable person would consider that because of its nature it *may be* sexual, and because of its *circumstances* it *is* sexual, irrespective of the purpose or intention of the accused.

42. We gain support for this conclusion from the way in which this issue is dealt with elsewhere in the statute. The scheme of the Act, put broadly, is that whenever an offence is committed directly against a victim by sexual touching or sexual activity, proof of a sexual intention as part of the mens rea is not required, whilst for "voyeuristic" offences, the Crown must establish that the accused acted "for the purpose of obtaining sexual gratification" (*e.g.* sections 12, 15A and 19).

43. We agree with the submissions of Mr Atkinson and Mr Mably as regards *R v Heard* and *R v H*, namely that it is striking in the detailed assessment of the ingredients of the offence in both judgments that there is an absence of any mention of a requirement with a section 3 offence that the prosecution need to prove that the defendant intended the touching to be sexual.

Conclusion

45. Notwithstanding Ms Heeley's cautionary submission that this is an offence that carries serious consequences on a conviction, we are confident that the answer to the question posed by the Attorney General is that it is not necessary for the prosecution to prove, as an element of the offence of sexual assault, that the offender not only intentionally touched another person without their consent and without reasonable belief in their consent, and that the touching was sexual, but also that the offender additionally intended his touching of that person to be sexual.

46. Instead, under section 78 (b) the accused's purpose in relation to the activity may be relevant if a reasonable person would consider that, given the nature of the activity, it may be sexual and, because of the accused's purpose, it was sexual.