Neutral Citation Number: [2020] EWCA Crim 971

Case No: 201903220B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NOTTINGHAM CROWN COURT
MR JUSTICE JEREMY BAKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2020

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF OF JUSTICE OF ENGLAND AND WALES

THE HON MRS JUSTICE CUTTS DBE

and

THE HON MRS JUSTICE TIPPLES DBE

- -

Between:

Regina

- and -

JASON LAWRANCE

- -
- -

Mr David Emanuel QC appeared on behalf of the **Appellant**
Mr Clive Stockwell QC appeared on behalf of the **Crown**

Hearing date: 30 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 22 July 2020 at 10am.

The Lord Burnett of Maldon CJ

1. This appeal raises a question about the meaning of consent for the purposes of section 74 of the Sexual Offences Act 2003. Can a lie about fertility negate ostensible consent? The prosecution alleged that the appellant falsely represented to the complainant that he had had a vasectomy. On that basis she agreed to unprotected sexual intercourse when otherwise she would have insisted on his wearing a condom. On 31 July 2019, in the Crown Court at Nottingham, the jury convicted the appellant of two counts of rape on that basis. He was convicted of three other counts of rape, one of sexual assault and one of assault by penetration, involving other complainants. He was given a life sentence on each count of rape with a minimum term of ten years and 47 days with concurrent determinate sentences on the other counts. The appellant was already serving a life sentence for similar offending.

2. The complainant has the benefit of lifelong anonymity in this case. No matter relating to the complainant in this case shall during her lifetime be included in any publication if it is likely to lead to members of the public to identify her as the victim of these alleged offences.

The facts

3. In 2014, the appellant met a woman on a dating website. Messages and phone calls became sexually explicit. In one conversation the complainant spoke of a sexual encounter with another man. When the appellant asked if he had used a condom, she replied that he had not because "he had the snip years ago". The appellant responded "so have I." There were no further messages concerning the issue of contraception.

4. On 21 July 2014 they met. They spent the evening together before returning to the complainant's home. They went to her bedroom. Her evidence was that before they had sexual intercourse, she sought an assurance that the appellant had definitely had a vasectomy. He assured her that he had. She made it clear that she did not want to risk becoming pregnant. He reassured her again that he had undergone a vasectomy. Sexual intercourse then took place between them on two occasions without the use of contraception.

5. The appellant left during the night. In an exchange of messages the following morning he said "I have a confession. I'm still fertile. Sorry." The complainant later discovered that she was pregnant and underwent a termination.

6. The prosecution case was that the complainant's consent was vitiated by the appellant's deception and that even if he genuinely believed that she had consented, such a belief was unreasonable.

7. The appellant did not give evidence. His defence on these counts was one of consent. The complainant's account was challenged in cross-examination as the appellant's case was that there was no discussion about a vasectomy in her flat. The jury must have accepted the complainant's account.

Relevant statutory provisions

8. Section 1(1) of the Sexual Offences Act 2003 ("the 2003 Act") provides:

> "(1) A person (A) commits an offence if—
>
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
>
> (b) B does not consent to the penetration, and
>
> (c) A does not reasonably believe that B consents.
>
> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
>
> (3) Sections 75 and 76 apply to an offence under this section.
>
> (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life."

9. Section 74 of the 2003 Act provides the basic definition of consent:

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

10. Section 75 is concerned with a series of evidential presumptions (not in issue in this appeal) and 76 sets out "conclusive presumptions about consent":

> "(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—
>
> (a) that the complainant did not consent to the relevant act, and
>
> (b) that the defendant did not believe that the complainant consented to the relevant act.
>
> (2) The circumstances are that—
>
> (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
>
> (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant."

Application to dismiss

11. Prior to arraignment the appellant applied to dismiss these two rape counts. He submitted that a lie told about a person's fertility could not as a matter of law vitiate consent, even if relied upon by the complainant. In particular, he submitted:

i) Not all deceptions leading to an individual consenting to sexual intercourse are sufficient to negate consent.

ii) *Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) and *R (F) v. DPP* [2014] QB 581, [2013] EWHC 945 (Admin) were distinguishable. In *Assange*, the prosecution case was that the complainant agreed to sexual intercourse only if Assange wore a condom, but either he did not do so, or removed it during intercourse. In *F*, the prosecution case was that the complainant consented to intercourse only on the basis that the defendant would withdraw before ejaculation, but he never intended to comply with that condition and did not do so. On behalf of the appellant it was submitted that deceit as to fertility would not be sufficient to negate consent. In the two cases the consent was given on the basis that ejaculate would be prevented from entering the complainants' vaginas, whereas in the present case this was not what was sought to be avoided. Preventing ejaculate from entering the vagina related to an integral part of the sexual act and was therefore closely connected with it, such that a deceit as to its performance was sufficient to negate consent. In contrast, in the present case the deceit went to the consequences of the sexual act, that is the risk of pregnancy, and was insufficiently connected with the sexual act to negate consent. The appellant relied on the judgment in *R v B* [2007] 1 WLR 1567, [2006] EWCA Crim 2945 where the appellant in question had not disclosed that he was HIV+ (although he did not represent that he did not have HIV). Consent was not vitiated in that case.

12. The prosecution submitted:

i) That there was a material distinction between the present case and *R v B* which concerned a failure to disclose a disease rather than, as in the present case, a positive deception concerning fertility.

ii) There was no material difference between the position of the complainants in *Assange* and *R (F) v. DPP*, both of whom sought to avoid the risks of pregnancy, and this case, where consent to sexual intercourse with the appellant was conditional upon his infertility and thus no risk of pregnancy.

13. The judge ruled that if the jury accepted the evidence of the complainant, the appellant's deceit as to his fertility was capable of negating her consent to having sexual intercourse with him. The question whether an individual's deceit about fertility is capable of negating consent to sexual intercourse should be considered by reference to section 74 of the 2003 Act. It was necessary to consider whether the appellant's deceit as to fertility was sufficiently closely connected to the act of sexual intercourse to be capable of negating the complainant's agreement to have sexual intercourse with him.

14. The judge concluded that the distinction which the appellant sought to draw between the consequences of the act of intercourse and the nature of the act itself was "artificial". *R v. B* was distinguishable because the subject matter of the deceit was the risk of disease as opposed to the risk of pregnancy and because the case concerned a failure by the accused to disclose his HIV status rather than a positive representation to that effect which was relied upon by the complainant. The prosecution case was that the appellant made a positive representation that he was infertile, relied upon by

the complainant. Further, one of the fundamental purposes of sexual intercourse is the procreation of children. In those circumstances the appellant's deceit as to his fertility was sufficiently closely connected to the act of sexual intercourse as to be capable of negating her consent to sexual intercourse with him.

15. The fact that but for the deceit in *Assange* and *R (F) v. DPP* the accused's ejaculate would have been prevented from entering the complainants' vaginas, whereas in the present case this would have occurred in any event, was of marginal relevance when the primary purpose of contraception either by way of vasectomy, the wearing of a condom or by the withdrawal method is to prevent pregnancy. The reason why the complainant was prepared to have sexual intercourse was because she believed that there was no risk of pregnancy due to the appellant's false representation.

Summing up

16. The judge directed the jury on the legal elements of the offence of rape. In relation to the issue of consent he summarised the effect of section 74:

> "A complainant consents to having sexual intercourse if she agrees by choice to the penetration and has the freedom and capacity to do so."

Having further directed the jury in relation to the difference between submission and consent he said:

> "As consent is based upon a complainant's agreement by choice to have sexual intercourse with another person, a woman may choose to have sexual intercourse with a man only if he wears a condom and, if he does not do so, it would be open to you to determine that the complainant had not consented to the penetration… Likewise, where a woman agrees to have sexual intercourse with a man in the belief that he has had a vasectomy, if the man has deceived the woman into believing that he has had a vasectomy when he has not done so it would again be open to you to determine that, if she would not otherwise have agreed to have sexual intercourse with the man she did not consent to the penetration."

17. The judge crafted a route to verdict which he handed to the jury. On these counts he directed the jury members to ask themselves the following questions:

i) Whether they were sure that the appellant falsely represented to the complainant that he had had a vasectomy. If yes:

ii) Whether they were sure that she did not consent to the appellant penetrating her vagina with his penis because she relied upon that false representation and would not otherwise have agreed to be penetrated by him. If yes:

iii) Whether they were sure that the appellant did not reasonably believe that she consented to him penetrating her vagina with his penis.

Grounds of appeal

18. Mr Emanuel QC submits that the appellant's convictions on these two counts are unsafe because:

    i) there was no evidence upon which a jury could be sure that the offence of rape had taken place and the judge should therefore have acceded to the defence submission that there was no case to answer and withdrawn these counts from the jury's consideration; and

    ii) the judge misdirected the jury about what they needed to be sure about before they could convict the appellant.

Ground 1: Consent

19. On the first ground Mr Emanuel submits that the courts have previously found that a deception that goes to the nature of the sexual act or a deception that is closely connected to the sexual act may be capable of vitiating consent. In the present case the deception fits into neither category. He argues that, applying the test identified in *R (Monica) v. Director of Public Prosecutions* [2019] QB 1019 [2018] EWHC 3508 (Admin) at [74], the deception in the present case was not so closely connected to the performance of the sexual act that it was capable of vitiating consent. The act of sexual intercourse is a physical one which comprises penile penetration and usually ejaculation. In this case the complainant had the freedom and capacity to choose and consented to both aspects. The deception went not to the physical act itself but to the quality of the ejaculate and the potential consequences and risks associated with it.

20. Mr Emanuel further submits that the judge fell into error in deciding that the deceit of the men in *Assange v Sweden* and *R (F) v. DPP*, respectively to the wearing of a condom and the promise of withdrawal before ejaculation, was not materially different from the present case. In those cases, the complainant sought to prevent ejaculation into her vagina which was part of the physical act. In the present case the complainant consented to every aspect of the physical act. In addition the judge was wrong to distinguish the present case from *R v B* in which the Court of Appeal Criminal Division held that an agreement to all aspects of the sexual act that took place amounted to consent even where the defendant had failed to disclose to the complainant his HIV status and, as a result, had misled her about the nature of his ejaculate (in that case infected with HIV). Mr Emanuel submits there can be no practical difference between an express and implied deception.

21. Mr Emanuel submits that the judge's ruling in the present case marks a profound change in the courts' approach to consent and potentially criminalises many sexual acts to which factual consent has been given. To uphold the ruling would amount to an unwarranted extension of the law which, if it is to happen, is properly the domain of Parliament rather than the courts.

22. On behalf of the respondent Mr Stockwell QC submits that the judge's ruling was correct. There is no material difference between the decision in *Assange* and that made by the judge in the present case. In both cases the complainant was deceived not about the surrounding circumstances but as to the sexual intercourse itself. In the present case the deception deprived the complainant of having a free exercise of

choice for the purposes of section 74 of the 2003 Act. Further, the judge was correct to distinguish the case of *R v. B* on the basis that there was no express deception; whereas there was in the present case. Mr Stockwell submits that had there been such an express deception in *R v. B* as to HIV status that would have been capable of vitiating consent. A deception about venereal disease would be capable of vitiating consent.

Discussion

23. The law concerning the impact of deception on the issue of consent to sexual intercourse was recently reviewed by the Divisional Court in *R (Monica) v. DPP*. The facts were that a woman who was an environmental activist had an intimate relationship with a man she thought agreed with her ideological beliefs, but he was in fact an undercover police officer who had infiltrated her group. The claim was a challenge to the decision of the Director of Public Prosecutions not to prosecute the officer for a series of offences, including rape. Her case was that consent was obtained on the basis of deceit and that she would not have consented to an intimate relationship had she known what he was. The DPP's decision was upheld.

24. The court (Lord Burnett CJ and Jay J) traced the evolution of the law of deception as it affects consent. The trail starts with *R v. Dee* [1884] 14 LR Ir 468 where a woman's ostensible consent to intercourse was vitiated because she thought the man concerned was her husband and not the defendant. The complainant consented to sexual intercourse with her husband and no one else. The concept was considered in *R v. Clarence* [1882] 22 QBD 23 where it was held that a man who did not inform his wife that he had venereal disease did not commit an offence under the Offences Against the Person Act 1861. By parity of reasoning there could be no rape in such circumstances. The court explained in *Dee* that,

> "... consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not consent to a sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery." per Stephen J at 44

25. The court considered the consequences of drawing a wide principle of deceit vitiating consent in cases, for example, of bigamy and seduction, the former almost always involving a fundamental deceit and the latter not uncommonly involving lies about marital status, wealth and the like. Wills J, at 29, saw real difficulties in identifying where to draw the line if the areas in which deceit could negative consent extended beyond impersonation of a husband and the medical sphere, the latter having been established in *R v. Flattery* [1877] 2 QBD 410.

26. Section 1(2) of the Sexual Offences Act 1956 gave statutory force to the common law position that a man who induces a married woman to have intercourse by impersonating her husband commits rape. Subsequent decisions of this court extended the concept to mistake of identity generally: see *R v. Elbekkay* [1995] Crim LR 163 and *R v. Linekar* [1995] QB 250 at 255 G to H. *Linekar* was an important decision because it limited the instances where deception could vitiate consent to the two well-established categories, namely deceit as to identity and the medical cases. The facts in *Linekar* were very particular. A prostitute and her client had agreed a

price. Intercourse followed but the man did not pay and had never intended to do so. In the course of the judgment of the court given by Morland J, there was reference to the 15th report of the Criminal Law Revision Committee in which a recommendation had been made that Parliament should state expressly the circumstances in which deceit in persuading a partner to engage in sexual activity should vitiate consent.

27. Section 76(2) of the 2003 Act puts on a statutory footing the two well-established common law bases upon which deceit or fraud will vitiate consent, but Parliament did not take the opportunity to go further. The facts of the instant appeal do not fall within either of the categories identified in section 76(2).

28. As foreshadowed in para. 11(ii) above, *Assange* concerned dual criminality in the context of an extradition request pursuant to a European Arrest Warrant. The allegation was that a woman consented to have sexual intercourse with him only if he wore a condom, but he proceeded to have sexual intercourse without. Sir John Thomas P (as he then was) at para. 86 concluded that section 76 of the 2003 Act had no application because there was no deception as to identity or the nature or purpose of the act. The question whether the deliberate failure to wear a condom in these circumstances meant there was no consent was to be judged by section 74. He noted the decision in *R v. B* as authority for the proposition that a failure to disclose HIV status could not be relevant to the issue of consent under section 74. He explained at para. 89 that the editors of Smith & Hogan 13th edition, 2011, regarded it as self-evident that deception in relation to the use of a condom would "be likely to be held to remove any purported free agreement by the complainant under section 74" and that a similar view was expressed in Rook and Ward Sexual Offences 4th edition, 2010.

29. In para. 72 of *Monica* the effect of the decision in *Assange* was explained in these terms:

> "What may be derived from *Assange* is that deception which is closely connected with "the nature or purpose of the act", because it relates to sexual intercourse itself rather than the broad circumstances surrounding it is capable of negating a complainant's free exercise of choice for the purposes of section 74 of the 2003 Act."

30. Section 74 defines consent for the purposes of Part 1 of the 2003 Act. It contains a wide range of offences, not just rape, which requires the prosecution to prove a lack of consent.

31. We return to *R (F) v. DPP*. This, like *Monica*, was a Divisional Court case in which the decision of the DPP not to prosecute was challenged. In para. 26 Lord Judge CJ referred to section 74 of the 2003 Act and continued:

> "The evidence relating to "choice" and the "freedom" to make any particular choice must be approached in a broad common-sense way. If before penetration began the [man] had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because "penetration is a continuing act from entry to withdrawal" (see s.79(2) of the 2003 Act) he

> decided that he would not withdraw at all, just because he deemed the [woman] subservient to his control, she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly, her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuing of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape."

32. In *R v. McNally* [2014] QB 593 a teenage woman impersonated a teenage man and secured the consent of another young woman on that basis to engage in digital penetrative activity. Sir Brian Leveson P, giving the judgment of the court, concluded at para. 26 that the nature of the sexual act was "on any common-sense view, different where the complainant is deliberately deceived by the defendant into believing that the latter is male." The complainant "chose to have sexual encounters with a boy and her preference (her freedom whether or not to have a sexual encounter with a girl) was removed by the appellant's deception."

33. In both these two last cases the courts referred to broad common-sense but as the court said in *Monica* at para. 80:

> "An appeal to "broad common sense" in the application of any law does not relieve a court from the obligation of identifying the boundaries within which a jury will be asked to bring to bear its common sense and experience of life. For that reason, when considering the governing principle or approach it is necessary to examine how it has been applied by the courts to date. It has never been applied to deceptions which are not closely connected to the performance of the sexual act, or are intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation."

34. Returning to the facts of this case, the jury concluded that the complainant relied on the appellant's deception regarding a vasectomy and that she would not have consented to unprotected sexual intercourse had she thought him to be fertile. However, the "but for" test is insufficient of itself to vitiate consent. There may be many circumstances in which a complainant is deceived about a matter which is central to her choice to have sexual intercourse. *Monica* was an example, but they can be multiplied: lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth are such examples. A bigamist does not commit rape or sexual assault upon his or her spouse despite the fundamental deception involved. The consent of the deceived second spouse, even if it would not have been forthcoming had the truth been known, does not vitiate consent for the purposes of sexual offending. Neither is the consent of a sex worker vitiated if the client never intends to pay.

35. The question is whether a lie as to fertility is so closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it that

it is capable of negating consent. Is it closely connected to the performance of the sexual act?

36. In our opinion, a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so and different from engaging in sexual activity having misrepresented one's gender.

37. Unlike the woman in *Assange*, or in *R(F),* the complainant agreed to sexual intercourse with the appellant without imposing any physical restrictions. She agreed both to penetration of her vagina and to ejaculation without the protection of a condom. In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it. We should add that the question of consent could not be affected by whether pregnancy followed or not; and neither could it be affected by the gender of the person who was guilty of deceit. On the prosecution case, a woman who lied about her fertility in circumstances where the man would not otherwise have consented to sexual intercourse would be in the same position, albeit guilty of a different sexual offence.

38. In terms of section 74 of the 2003 Act, the complainant was not deprived by the appellant's lie of the freedom to choose whether to have the sexual intercourse which occurred.

39. There is force in the appellant's submission of an analogy with *R v. B* where the accused failed to disclose that he was HIV positive prior to having sexual intercourse with the complainant. The transmission of the disease through sexual intercourse was not part of the performance of the sexual act but a consequence of it. In giving the judgment of the court the Vice President, Latham LJ, explained:

> "18. Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexual transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease.
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> 19. This problem is one which has been recognised, not surprisingly, for many years. In its Second Consultation Paper Relating to Sexual Offences, in 1995, the Law Commission acknowledged that there was a case for treating a deception as to a person's HIV status or freedom from other sexually transmissible disease as being of such fundamental importance that it should nullify consent. However, in its ultimate review, in 2000, the Commission felt that the right solution to these issues was a delicate matter requiring expertise in public health and social policy rather than the law. In our judgment, that

> conclusion, which is reflected in paragraph 1.55 of Rook and Ward on Sexual Offences Law and Practice (3rd edition), is one which this Court should support.
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> 20. As has been indicated in an article by Professor Tempkin and Professor Ashworth, in the 2004 Criminal Law Review, page 328, the Sexual Offences Act 2003 does not expressly concern itself with the full range of deceptions other than those identified in section 76 of the Act, let alone implied deceptions. It notes that this leaves, as a matter of some uncertainty, the question of, for example, as it is put: "What if D deceives C into thinking that he is not HIV positive when he is?" …
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> 21. The consequence seems to us to be matter which requires debate, not in a court of law but as a matter of public and social policy, bearing in mind all the factors that are concerned including the questions of personal autonomy in delicate personal relationships. That does not mean that we in any way dissent from the view of the Law Commission that there would appear to be good reasons for considering the extent to which it would be right to criminalise sexual activity by those with sexually transmissible diseases who do not disclose that to their partners. But the extent to which such activity should result in charges such as rape, as opposed to tailormade charges of deception in relation to the particular sexual activity, seems to us to be a matter which is a matter properly for public debate.
>
> 22. All we need to say is that, as a matter of law, the fact that the appellant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 in relation to the sexual activity in this case."

40. We recognise that in *McNally* at para. 24 the President indicated that this case did not go so far as to say that a positive deception regarding HIV could not vitiate consent. Mr Stockwell did not shy away from the submission that a lie that one was free of sexually transmittable diseases, assuming that was critical to the other person, would vitiate consent. Yet deceit and deception are very slippery concepts which, at one end of the spectrum, may result from a clear short lie, through more obscure utterances, obfuscation or evasion, to conduct designed to convey an unspoken false impression. In this area it is difficult to draw clear principled lines which could distinguish a deceit resulting from one course from another.

41. In our view, in any event, it makes no difference to the issue of consent whether, as in this case, there was an express deception or, as in the case of *R v. B,* a failure to disclose. The issue is whether the appellant's lie was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it. For the reasons we have given, in our view in the present case it was not.

42. Arguments about consent in cases of alleged sexual offending sometimes proceed on the assumption that the meaning of "consent" is a matter for development by the

common law. That was the position in the nineteenth century when the seminal cases on impersonation and misconduct during medical examinations were decided. It is no longer the position because consent is defined in section 74 of the 2003 Act, with the evidential presumptions found in section 75 and the conclusive presumptions in section 76. Any novel circumstances must be considered by reference to the statutory definition, namely whether the alleged victim has agreed by choice and has the freedom and capacity to make that choice. There is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003. The Law Commission and Criminal Law Revision Committee, as we have noted above, have both in their turn drawn attention to the acute difficulties in dealing with the circumstances where someone had been tricked into consenting to sexual contact as a result of misrepresentations. We echo the observations of Latham LJ that these issues require debate as matter of social and public policy.

43. Our conclusion, in respectful disagreement with the judge, is that the appellant's lie about his fertility was not capable in law of negating consent. This appeal therefore succeeds on the first ground. In those circumstances there is no need for us to consider the appellant's submissions concerning the judge's directions in the summing up. We find that the appellant's convictions on counts 8 and 9 are unsafe and must be quashed.