Neutral Citation Number: [2025] EWCA Crim 46

Case No: 202401129 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WARWICK
His Honour Judge Berlin

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2025

Before :

LORD JUSTICE EDIS
MR JUSTICE LAVENDER
and
HIS HONOUR JUDGE LEONARD K.C.

- -

Between :

MARTIN HOBDAY	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Mr. Robert Fitt (assigned by the Registrar) for the **Appellant**
Ms. Emma Rutherford (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates : 16 January 2025

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 31 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case, see para.2.1 of the Practical Guide to Reporting Restrictions in CACD and paragraph 10 below. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Lord Justice Edis :-

Introduction

1. This is an appeal against conviction. On 6 March 2024 the appellant was convicted of assault occasioning actual bodily harm against a young woman whom we will call "V", contrary to section 47 of the Offences Against the Person Act 1861. He was sentenced to 20 months' imprisonment. There is no appeal against sentence, perhaps because the appellant had been remanded in custody awaiting trial on other serious charges which were ultimately not pursued and this sentence was designed to enable his immediate release. At the conclusion of the hearing on 16 January we announced that the appeal would be dismissed and that we would give our reasons in due course in writing. These are our reasons.

The trial

2. The judge's written directions to the jury summarised the law, facts and issues as follows:-

> **Assault Occasioning Actual Bodily Harm, contrary to section 47 of the Offences against the Person Act 1861.**
>
> The Crown must prove that:
>
> 1. The Defendant deliberately or recklessly assaulted* [V]; and
>
> 2. that the Defendant caused her to suffer any injuries (however minor save for trifling) by his actions.
>
> *The prosecution does not have to prove an intent to assault although that may well be part of their case. Recklessness will do.
>
> In this case the infliction of a cut (or additional cut) to the buttock with a knife is enough for assault occasioning actual bodily harm.

> Consent to the activity is no defence to this charge.
>
> **Summary of Issues**
>
> The Crown say:
>
> This Defendant met [V] in September 2023. She was looking for speed. She was in her late teens. She instigated and consented to sexual activity with the Defendant during which she started and he finished carving an M onto her buttock. That activity constitutes assault occasioning actual bodily harm and there is no lawful defence of consent.

3. The letter "M" is not part of the name of V. It is the first letter of the appellant's first name.

4. V did not give evidence. Her age at the time, 17, was not formally in evidence but the judge's direction was accurate on that issue and no point is made about that.

5. The Prosecution relied on Agreed Facts relating to the appellant's interview:-

> 1. On 8th September 2023 the Defendant was interviewed by DC Hall and DC Nicholls. The Defendant's legal representatives were present. The interview was tape recorded.
>
> 2. At the beginning of the interview the Defendant was cautioned.
>
> 3. The words of the caution given to the Defendant are:
>
>> "You do not have to say anything, but it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence".
>
> 4. The record of interview is an accurate record of the relevant parts of the interview.

6. The jury had a photograph of the carving, although, so far as we can see, no evidence about when it was taken, and certainly no expert evidence to assist in its interpretation. It shows a complete red letter "M" incised on to V's right

buttock. It is in a location where she may have found it difficult to complete the letter herself. Although not measured, it can be seen to be a significant size. The cuts which form it appear to be very superficial. There was no evidence about whether it was likely to leave a permanent scar, or whether the scarring would fade entirely or partially away. In interview the appellant said that there had been bleeding, which would mean that there was a wound, which requires that "the whole skin must be broken and not merely the outer layer called the epidermis or the cuticles: see *J.J.C. (A Minor) v. Eisenhower* [1983] 3 All E.R. 230": see *R v. Brown* [1994] AC 212 ("*Brown"*) at 231A, per Lord Templeman. The appellant's case on this was summarised like this:-

> "He denies the bit he had done bled initially, but states it started to bleed a little bit afterwards. He states she sat on the bed then and it left like a print of it on the bed."

7. The jury also had an edited record of the interview, which said, in our summary:

> The appellant said that one Sunday night he was standing outside a bar in Coventry town centre when he was approached by V. After some conversation, including the victim asking the appellant for some speed, they both went to the appellant's home address and engaged in consensual sexual activity. They attempted sexual intercourse but he was not able to get an erection. They then gave each other oral sex. The victim then started to carve the appellant's initial into her buttock with the Stanley blade which was on his windowsill. She asked him to finish it, so he did. The victim asked the appellant to make it bleed more, which he declined. There was some bleeding and the image was imprinted in blood on the bed when she sat on it. Afterwards, the victim video called her friend to show her, but she was not complaining about what had happened. Everything that happened was consensual, with the victim as the driving force.

8. The actual words used by the appellant when he first described the creation of the letter "M" were:-

> I filmed erm I filmed her sucking my cock, she's filmed me on her phone licking her out and then erm and then after..and then after that erm it's kind of just.. She started asking me to do some mad shit to her, like be freaky..be like I don't know freaky and that like. She started erm she started carving my initial into her arse. She done two lines and then she asked me to finish it, so I finished it and then she's asked me to make it bleed more and that. I was like 'Nah, what you on about? What you on about?', it's a bit..bit freaky and that.

9. The appellant did not give evidence or call any witnesses on his behalf.

10. In addition, the jury had, by agreement, screenshots taken from V's phone. These showed a conversation in which it was clear that V was extremely keen to meet the appellant again during the days following the incident in which she had been cut by him. The conversation concluded with her sending him a photograph of her buttocks showing the "M", with the comment, "Looks better today". They did in fact meet again after that and had a further sexual encounter, which gave rise to other serious criminal allegations which were later discontinued. There is an account of this further meeting in the appellant's interview, but nothing which is said about it there is relevant to the current allegation.

11. The judge ruled, and then directed the jury, that her consent was not a defence to the charge. It is that ruling, and the consequent direction, which is the subject of this appeal. The direction is at [2] above.

12. The judge's ruling involved consideration of the decision of the House of Lords in *Brown*. Subsequent decisions which require consideration include *R v. Wilson* [1997] Q.B. 47; [1996] 2 Cr App R 241 ("*Wilson"*), in which the appellant used a hot knife to brand his initials on his wife's buttocks, and *R v.*

BM [2019] QB 1; [2018] EWCA Crim 560 ("*BM"*). The judge also considered section 71 of the Domestic Abuse Act 2021. This provides:-

> **71 Consent to serious harm for sexual gratification not a defence**
>
> (1) This section applies for the purposes of determining whether a person ("D") who inflicts serious harm on another person ("V") is guilty of a relevant offence.
>
> (2) It is not a defence that V consented to the infliction of the serious harm for the purposes of obtaining sexual gratification (but see subsection (4)).
>
> (3) In this section—
>
> "relevant offence" means an offence under section 18, 20 or 47 of the Offences Against the Person Act 1861 ("the 1861 Act");
>
> "serious harm" means—
>
> (a) grievous bodily harm, within the meaning of section 18 of the 1861 Act,
>
> (b) wounding, within the meaning of that section, or
>
> (c) actual bodily harm, within the meaning of section 47 of the 1861 Act.
>
> (4) Subsection (2) does not apply in the case of an offence under section 20 or 47 of the 1861 Act where—
>
> (a) the serious harm consists of, or is a result of, the infection of V with a sexually transmitted infection in the course of sexual activity, and
>
> (b) V consented to the sexual activity in the knowledge or belief that D had the sexually transmitted infection.
>
> (5) For the purposes of this section it does not matter whether the harm was inflicted for the purposes of obtaining sexual gratification for D, V or some other person.
>
> (6) Nothing in this section affects any enactment or rule of law relating to other circumstances in which a person's consent to the infliction of serious harm may, or may not, be a defence to a relevant offence.

The judge's ruling

13. The judge found that the general principle is that, subject to well-recognised exceptions such as tattooing, consent is no defence to a charge of actual bodily harm, citing *Brown*. The judge accepted that the facts of *Brown* were more extreme than in the appellant's case. In *Wilson*, he said, the court distinguished the case factually from *Brown* in that Mrs Wilson not only consented to the act, but instigated it. The appellant in *Wilson* had no aggressive intent toward his wife; he instead desired to assist her in what she regarded as a desirable piece of personal adornment. They concluded that it was not in the public interest that consensual activity between husband and wife in the privacy of the matrimonial home be a matter for criminal investigation**.**

14. The judge found that private husband and wife activity was at the heart of the judgment in *Wilson*, which was then considered on public interest grounds to be outside criminal sanction. In *BM*, the Court of Appeal upheld convictions for extreme acts of body modification. The court held that new exceptions to the general principle should not be recognised on a case-by-case basis, save perhaps where there was a close analogy with an existing exception.

15. The judge ruled that the appellant's case was not a 'close analogy' with *Wilson*. The appellant and the victim were not husband and wife, nor were they in an equivalent loving relationship. Here, although there were similarities with *Wilson* in relation to the consent, the knife and the buttock, the consent was by a young woman looking for drugs and having sex with a mature man whom she had only just met and the carving was seen as a 'freaky' act by the appellant

following sexual activity. The facts perhaps had more in common with other cases such as *Brown*.

16. Therefore, the judge concluded that there was no valid defence of consent available to the appellant.

The grounds of appeal

17. The grounds of appeal are set out as follows:-

i) The judge fell into error in concluding that at the heart of the judgment in *Wilson* was that consensual activity between spouses in private was not a subject for criminal investigation and prosecution. The purpose of the court stating that consensual activity in the matrimonial home should not normally be the subject of criminal prosecution was to set the scene for its concluding remarks:

> "We conclude this judgment by commenting that we share the judge's disquiet that the prosecuting authority thought it fit to bring these proceedings. In our view they serve no useful purpose at considerable public expense."

ii) The judge's consequent distinguishing of the appellant's case, on the basis that the appellant was not in a long-term and loving relationship with the victim, was flawed. The nature and quality of the act in each case were so similar that no proper distinction could be drawn.

iii) The real reason for the decision in *Wilson* was that the nature and quality of the appellant's actions were logically no different from tattooing or piercing, which were recognised exceptions to the general rule that consent is not a defence to a charge of assault occasioning actual bodily

harm. The court in *Wilson* mentioned several other important factors, such as that Mrs Wilson had not only consented to the activity but had initiated it, and that there was no aggressive intent from the appellant. Therefore, the nature of the alleged assault in *Wilson* was a far more important consideration for the court than the relationship between the parties.

iv) The manner in which the judge distinguished the appellant's case from *Wilson* effectively introduced a new element to the legal test, namely a value judgment about the wisdom of a valid consent. The fact that, objectively, consent may not be wise does not invalidate that consent.

v) On the facts of the appellant's case, it was for the jury to decide whether s.71 Domestic Abuse Act 2021 applied, in that the victim's consent would have been no defence if the jury concluded that the assault was committed for sexual gratification. However, the issue of consent was not left to the jury at all.

vi) It was wrong for the judge to direct the jury that consent was not a defence in all the circumstances of the case. The misdirection of law deprived the appellant of his defence and made conviction an inevitability. As a result, the appellant's conviction is unsafe.

The prosecution response

18. The Respondent's Notice argues the contrary position in this way:-

i) The judge was correct to conclude that this case, whilst superficially similar to *Wilson*, can and should be distinguished from the appellant's

case in *Wilson*. The nature and quality of the relationship between the parties was an important distinguishing feature. The judge was right to conclude that it was an important part of the reasoning in *Wilson* that the parties were married. Lord Justice Russell made this abundantly clear at [50]:

> "…consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution. Accordingly, we take the view that the judge failed to have full regard to the facts of this case and misdirected himself in saying that [he was] constrained to rule that consent was no defence."

ii) Therefore, it was not just the nature and quality of the act that was relevant to the availability of consent as a defence in *Wilson*, but also the nature and quality of the relationship.

iii) The position was fortified in *BM*, with the Court of Appeal commenting at [33] that the conclusion of the Court in *Wilson* was that:

> "consensual activity between husband and wife in the matrimonial home was not a matter for criminal investigation and prosecution under section 47."

iv) The Court in *BM* further recognised the need to protect those who are vulnerable from harm and that Parliament has intervened to regulate certain activities that cause bodily harm, such as tattooing.

v) In the appellant's case, the injured party was a stranger whom the appellant had met on the street. She was aged 17 at the time. She was seeking psychoactive drugs and behaving in a way that, in the appellant's words, 'freaks [him] out.' The appellant was aware that her behaviour

was not rational and acted with no regard to any potential physical or psychological risk to her.

19. We have received very helpful written and oral submissions on behalf of the appellant from Mr. Robert Fitt and on behalf of the prosecution from Ms. Emma Rutherford.

Analysis of the legal materials

20. The decision in *Brown* is authority for the proposition that consent is a defence to assault occasioning actual bodily harm only if the activity in the course of which the assault occurs is one of the exceptions to the general rule. The general rule is that consent is no defence to an assault involving the intentional occasioning of actual bodily harm. For the purposes of the present case it is not necessary to consider how that rule applies in the case of assaults where the defendant is reckless as to the occasioning of actual bodily harm. This case involves an allegation of an offence of assault contrary to section 47 of the Offences Against the Person Act 1861, in which the harm which was done was caused intentionally. It is also unnecessary to consider how the rule might be expressed if the charge were wounding contrary to section 20 of the Act, because the charge was brought under section 47. That is so, even though the present case did involve a wound. In this judgment from this point on we use the term "assault" to mean an offence of violence involving greater harm than common assault to which the rule in *Brown* applies.

21. The judgment in *Brown* did not deal in any depth with the nature of a consent which might render an assault lawful. Notions of consent in the area of sexual offending have developed since 1994 and we consider that for consent to

amount to a defence (or to render an assault lawful: see the analysis of Lord Jauncey in *Brown* at 246G-247A) it must be truly voluntary and not the result of coercion or duress. The person giving consent must have capacity to do so and the consent must be informed. The law on capacity in this area is not well-formed: see *Smith, Hogan and Ormerod* Criminal Law, 17th Edition, at page 719. The burden of proving that no consent in this sense existed is on the prosecution. It is not necessary for this case for the court to attempt to state the law in this regard comprehensively. The evidence did not allow the prosecution to allege that V did not give a legally valid consent to what happened to her and it was accepted that she did.

22. Even if consent in this sense cannot be disproved, the fact that an assault might occur in circumstances where there was an imbalance of power between the defendant and the recipient of the assault or where the assault placed that person at risk of additional harm, for example by infection, may be relevant to determining whether the activity is within an exception to the general rule that consent is no defence. The AIDS epidemic was very prominently in the mind of the majority of the House in *Brown*. Although not placed before the jury, since it was not relevant to any issue the jury had to decide, there was evidence in this case that V had recently engaged in self-harm with a razor blade.

23. The exceptions to the general rule may not be fixed in time and it has been suggested that they can be developed in response to changes in social attitudes, or perhaps increased knowledge of risk. A decision of the Court of Appeal in *R v. Boyea* [1992] Crim LR 574-576 was cited with apparent approval by Lord Jauncey and Lord Lowry in *Brown*. Glidewell LJ said:-

> "In *Att.-Gen. Ref. (No. 6 of 1980)* [1981] Q.B. 715, it was held, in relation to a fist fight in the street, that consent was no defence because it was not in the public interest for people to cause each other actual bodily harm for no good reason. The central proposition in *Donovan* was consistent with *Att.-Gen. Ref.*, which proposition could be expressed as follows: an assault intended or which was likely to cause bodily harm, accompanied by indecency, was an offence irrespective of consent, provided that the injury was not "transient or trifling." The judge so summed-up, read as a whole, referring to that test, and making specific reference to the phrase "transient or trifling." There was no misdirection.
>
> However, the court must take account of the fact that social attitudes have changed, particularly in the field of sexual relations between adults. As a generality, the level of vigour in sexual congress which was generally acceptable, and therefore the voluntarily accepted risk of incurring some injury was probably higher now than it was in 1934. It followed that the phrase "transient or trifling" must be understood in the light of conditions in 1992 rather than those of nearly 60 years ago."

24. The recognised exceptions identified in *Brown* are not exhaustively defined. The one with which we are concerned is described in this way by Lord Templeman in *Brown* at 231E-F:-

> "Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities."

25. At 236B-C, Lord Templeman, in a passage which explained why the sexual activity engaged in by the appellants in *Brown* should not fall within that lawful category and referred to the danger of really serious harm and also of infection, said this about branding:-

> "In one case a victim was branded twice on the thigh and there was some doubt as to whether he consented to or protested against the second branding."

26. Details of the relevant counts alleging assault by branding in *Brown* are set out in the Court of Appeal's judgment at [1992] Q.B. 491, 495E & G (counts 5 and 8).

27. Lord Slynn of Hadley, dissenting on a different issue, said this:-

> "The law has recognised cases where consent, expressed or implied, can be a defence to what would otherwise be an assault and cases where consent cannot be a defence. The former include surgical operations, sports, the chastisement of children, jostling in a crowd, but all subject to a reasonable degree of force being used, tattooing and ear-piercing; the latter include death and maiming."

28. In *Wilson* the Court of Appeal had to consider a case whose facts have some similarity to the present. Mr and Mrs Alan Wilson were happily married and he was convicted of assaulting her, occasioning her actual bodily harm. Russell LJ, giving the judgment of the court, summarised the facts in this way:-

> "The facts were not in dispute. Mrs. Wilson, a woman of mature years, did not give evidence. The evidence of a Dr. McKenna was read. The only oral evidence heard by the jury was from a police officer who produced the record of an interview with the appellant which was tape-recorded on the afternoon of 20 May 1994. The content of that interview, it was acknowledged, told the whole story.
>
> The police informed the appellant that his wife had been medically examined and that marks had been observed on both her buttocks. On the right buttock, as the photographs before the court disclose, there was a fading scar in the form of a capital letter "W," and on the left buttock, a more pronounced and more recent scar in the form of a capital letter "A." The two letters "A" and "W" were the initials of the appellant.
>
> He at once admitted that he was responsible for the marks. He told the police:
>
> > "I put them there. . . . She wanted a tattoo and I didn't know how to do a tattoo, but she wanted my name tattooing on her bum and I didn't know how to do it; so I burned it on with a hot knife. It wasn't life threatening, it wasn't anything, it was done for love. She loved me. She wanted me to give her - put

> my name on her body. As I say, she asked me originally if I would tattoo my name on her. She wanted me to do it on her breasts and I talked her out of that because I didn't know how to do a tattoo. Then she said, 'Well, there must be some way. If you can't do a tattoo, there must be some way' she says. I think her exact words were summat like, 'I'm not scared of anybody knowing that I love you enough to have your name on my body,' something of that nature, and between us we hit on this idea of using a hot knife on her bum. I wouldn't do it on her breasts."

> The medical evidence simply commented upon the existence of the letter "A" on the left buttock as having been branded on Mrs. Wilson a few days before 20 May 1994. Dr. McKenna added: "There was associated bruising around the burn and the skin hadn't fully healed." No reference was made by the doctor to a faded scar on the right buttock.

29. The decision of the court was that consent was a defence to this activity because:-

> “For our part, we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing. The latter activity apparently requires no state authorisation, and the appellant was as free to engage in it as anyone else. We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing. There was simply no evidence to assist the court on this aspect of the matter.”

30. The court did not refer to sections 15 and 16 of the Local Government (Miscellaneous Provisions) Act 1982, which establish a registration scheme for persons carrying on the business of tattooing and create an offence of acting otherwise than in accordance with it. This, of course, did not apply to Mr. Wilson, because he was not carrying on a business, but it does indicate that Parliament has decided that tattooing carries enough risk to require regulation. Their Lordships in *Brown* did not specify whether they had in mind tattooing carried out in this regulated way by businesses as being within the exception, or whether it extends to other factual situations as well.

31. The court then went on, perhaps unnecessarily, to consider whether the public interest required the act of Mr. Wilson to be a criminal offence and considered that it did not. This passage, with respect to its distinguished author, may perhaps conflate different things.

> "Does public policy or the public interest demand that the appellant's activity should be visited by the sanctions of the criminal law? The majority in *Reg. v. Brown* clearly took the view that such considerations were relevant. If that is so, then we are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution. Accordingly we take the view that the judge failed to have full regard to the facts of this case and misdirected himself in saying that *Rex v. Donovan [1934] 2 K.B. 498* and *Reg. v. Brown [1994] 1 A.C. 212* constrained him to rule that consent was no defence.
>
> In this field, in our judgment, the law should develop upon a case by case basis rather than upon general propositions to which, in the changing times in which we live, exceptions may arise from time to time not expressly covered by authority.
>
> We shall allow the appeal and quash the conviction. We conclude this judgment by commenting that we share the judge's disquiet that the prosecuting authority thought it fit to bring these proceedings. In our view they serve no useful purpose at considerable public expense. We gave the appellant leave to appeal against his sentence. Had it been necessary for us to consider sentence we would have granted the appellant an absolute discharge."

32. It is quite correct that the majority in the House of Lords in *Brown* clearly took the view that there was a role for public policy in deciding whether sado-masochistic sexual activity in which actual bodily harm was intended should thereafter be recognised as one of the exceptions to the general rule. However, the House did not attach any relevance to the nature of the relationship between the alleged offender and the proposed victim, going beyond their part in the conduct. The proposition that conduct which would be criminal in other

circumstances is not so where the alleged offender and the proposed victim are married to each other is not one which can be sustained as a rule of the criminal law.

33. We suggest that nearly 30 years after *Wilson* there would now be much less enthusiasm for deterring police investigation of possible criminal activity on the ground that the parties were in a domestic relationship with each other. The new offence of coercive and controlling behaviour and modern approaches to domestic abuse would be significantly undermined were the police to adopt the approach suggested by the court in *Wilson*. Where this passage in *Wilson* is no doubt correct is in its assertion that a prosecutor must consider not only whether there is a realistic prospect of conviction but also whether a prosecution is in the public interest. It is also correct in its implied proposition that, although consent is not a defence to an offence contrary to section 47 of the Offences Against the Person Act 1861 except where the conduct is a recognised exception to the rule, it is plainly highly relevant to sentence.

34. The reference in *Wilson* to the "changing times in which we live" echoes the words of Glidewell LJ in *Boyea*, cited above.

35. The judge distinguished *Wilson* and did not apply it in the present case. The question is whether he was right.

36. There was a good deal of discussion before the judge of section 71 of the Domestic Abuse Act 2021, set out above. This is substantially a statutory codification of the decision in *Brown* and does not address the issue in the present case. Sexual gratification is not a good reason for occasioning actual bodily harm so as to render it lawful and never has been. By section 71(4) the

Act provides for a situation where V contracts a sexually transmissible disease having consented to sexual activity knowing that the other person was infected. That may perhaps be a valuable clarification in some cases. In our judgment section 71 is not relevant to anything we have to decide and we will say nothing further about it.

37. The last decision we need to mention before determining this appeal is *BM*. This was a case about "body modification", as it was called. The allegations were of causing grievous bodily harm with consent and were described as follows:-

> "The procedures performed by the defendant which found these counts were first, the removal of a customer's ear; secondly, the removal of a customer's nipple; and thirdly, the division of a customer's tongue to produce an effect similar to that enjoyed by reptiles."

38. The court in *BM* concluded:-

> "40 Whilst the exceptions are incapable of being accommodated within any universally stated test, there are two features which may be thought to underpin almost all of them. First, they may produce discernible social benefit. That is true of the sporting exceptions and may even be true of boxing or "dangerous exhibitions" as entertainment. It is possible that those with a religious hue might also be considered as conferring a social benefit, at least at the time they were recognised. But the second is that it would simply be regarded as unreasonable for the common law to criminalise the activity if engaged in with consent by (or on behalf of) the injured party. That would apply to tattooing and piercing and, again, perhaps to those with a religious hue, including ritual male circumcision.
>
> 41 New exceptions should not be recognised on a case-by-case basis, save perhaps where there is a close analogy with an existing exception to the general rule established in *R v Brown (Anthony)*. The recognition of an entirely new exception would involve a value judgment which is policy laden, and on which there may be powerful conflicting views in society. The criminal trial process is inapt to enable a wide ranging inquiry into the

> underlying policy issues, which are much better explored in the political environment..”

Discussion and decision

39. The real basis of this appeal is that the judge ought to have applied the decision in *Wilson* to the facts of this case and should have directed the jury that consent was a defence. In our judgment he was quite right not to do so.

40. First, we consider that *Wilson* should be treated as a case where the court decided that, on its particular facts, the conduct of Mr. Wilson should have been treated as closely analogous to tattooing. Tattooing is the infiltration of ink into the surface of the skin and is required by law to be carried out in registered premises if done in the course of a business. It does not involve branding. Branding was referred to in *Brown* as one of the activities of the defendants which the decision in *Brown* rendered unlawful: see [25] and [26] above. The decision in *Wilson* is, therefore, hard to justify as an application of the rule in *Brown*. It would, therefore, be even harder to describe a further extension of the decision in *Wilson* as a close analogy with an exception in *Brown.*

41. Secondly, the approach in *Wilson* was, by implication, not followed in *BM*. The court in *Wilson* considered that the law should develop on a case by case basis “in our changing times” and no doubt understood that that is what it was doing. *BM* at [41] rejects this approach, “save perhaps where there is a close analogy with an existing exception to the general rule established in *R v Brown (Anthony)*.” In this respect *BM* is plainly to be preferred. The suggestions in *Boyea* and *Wilson* that judges in the Court of Appeal Criminal Division are able to assess the relevant considerations would, if followed, lead to uncertainty in

the law. The law as established in *Brown* and explained in *BM* is clear in most respects and, if it requires changing, that is a matter for Parliament.

42. The present case is not a close analogy with an exception in *Brown* and, although the harm is far less grave than the harms in *BM*, the case is within the principle explained in *BM*. It follows that we are bound by those decisions to dismiss this appeal.

43. Thirdly, in any event, if we considered that we were free to decide whether cutting the skin of a young person with an unsterile Stanley knife should be a lawful activity if she consented to it, we would decide that it should not be. In *BM* at [43] the court said:-

> "Yet the first response in almost every other context to those who seek to harm themselves would be to suggest medical assistance. That is not to say that all who seek body modification are suffering from any identifiable mental illness but it is difficult to avoid the conclusion that some will be, and that within the cohort will be many who are vulnerable."

44. Cutting the skin is a commonly encountered form of self-harm to which the young and vulnerable are particularly prone. There are good reasons why people should not be permitted to do this to others and no good reason, outside the recognised *Brown* exception of medical intervention, why they should be.

Conclusion

45. For these reasons this appeal is dismissed.

46. There is no appeal against sentence in this case. We say nothing about that subject and mention it only to ensure that this decision is not taken as approving either the judge's sentence of 20 months or the approach to sentence in *Wilson*.

The judge's sentence was imposed, as we explained at the start of this judgment, for a particular reason and allowed the appellant's immediate release.

47. As we have said at [33] above, consent may not be a defence to a charge of assault but it may (on proper investigation) amount to a reason why a prosecution should not be brought in the public interest and it is very relevant to sentencing, especially in cases where the harm is not really serious.