APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 34
HCA/2018/502/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

JOHN KURSULIS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: S Collins (sol adv); Collins & Co (for Blantyre Criminal Lawyers)
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

29 May 2019

General

[1] On 17 August 2018, at the High Court in Glasgow, the appellant was convicted of two charges of rape, as follows:

> "(1) on 6 April 2016 at ... Cedar Drive, East Kilbride you ... did supply [RQ, aged 16] ... with alcohol and did intentionally administer to her, or cause a substance to be taken by her for the purpose of stupefying or over-powering her so as to enable you

> to engage in sexual activity involving her and thereafter you did assault [RQ] while she was under the influence of alcohol and a drug or similar intoxicating substance, unconscious or asleep and incapable of giving or withholding consent and thereafter whilst she was awake and did seize her, touch her on the body, remove her clothing, bind her hands to a bed frame and penetrate her vagina with your penis and you did thus rape her: CONTRARY to sections 1 and 11 of the Sexual Offences (Scotland) Act 2009; and
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> (2) on 11 May 2017 at ... Carlyle Road ... Hamilton, you ... did supply [LS, aged 17] ... with alcohol and intentionally administer to her, or cause a substance to be taken by her for the purpose of stupefying or over-powering her so as to enable you to engage in sexual activity involving her and thereafter you did assault [LS] while she was under the influence of alcohol and a drug or similar intoxicating substance, unconscious or asleep and incapable of giving or withholding consent and did seize her ... remove her clothing and penetrate her vagina with your penis and you did thus rape her: CONTRARY to sections 1 and 11 of the Sexual Offences (Scotland) Act 2009."

On 21 September 2018, the appellant was sentenced to 9 years imprisonment.

Evidence

[2] The judge reports that the complainer in the first charge had, along with a friend, visited the appellant's house. She was a vulnerable person, having been in homeless accommodation. She had injured her leg and was on crutches. During the evening, while alcohol was being drunk, the appellant took some tablets. He suggested that the complainer should also do so in order to get a "good night's sleep". The next thing which the complainer remembered was waking up in the morning. She was lying on her back on a bed with her wrists tied to the headboard. The appellant got on top of her, pushed her knees apart and forcibly penetrated her with his penis. The incident lasted for some 20 minutes. He had been laughing at the time.

[3] In relation to the second charge, the appellant and the complainer were living in the same homeless accommodation. The appellant suggested that they should go to his room to smoke some cannabis. There was no cannabis and the appellant was smoking Heroin. The

complainer began to feel unwell. The appellant gave her tablets "to make her feel better". She quickly became drowsy, and awoke to find him on top of her. When he saw that she was awake, he stopped. When she was able to stand up, she was aware of ejaculate running down her leg.

[4] The appellant did not give evidence. In an interview with the police, however, it was his position that there had been no intercourse with the complainer on charge (1). He had taken too many Diazepam tablets and had passed out. The allegation was simply a malicious one. On charge (2) his position was that intercourse had taken place, but that this had been with the complainer's consent. The complainer had initiated the intercourse. She had been awake at the time. She could not have been sleeping. He had asked her if she wanted him to stop because the bed had been squeaking, and he had done so.

Charge to the jury

[5] The trial judge directed the jury that rape could be committed in a number of ways, but for the purposes of the particular trial it consisted of the intentional or reckless penetration by the man's penis of the woman's vagina without the woman's consent and without any reasonable belief that the woman was consenting. A lack of reasonable belief could be inferred from the evidence. In relation to charge (1), there would be no consent if the complainer had been incapable of consenting as a result of the ingestion of alcohol or drugs, or if the sexual conduct had been forced upon her. The judge continued by explaining that the appellant's position on charge (1) was that sexual intercourse had not happened, whereas, in relation to charge (2), he had said that the complainer was sober and had consented. In the context of whether the Crown could show that the appellant did not have a reasonable belief that either of the complainers was consenting, the judge continued:

> "... [The appellant] says that in relation to charge 1 the events didn't happen, but in relation to charge 2 ... he didn't know that [the complainer] was not consenting. He thought that she was consenting and believed that she was ... The Crown must prove that such a belief ... wasn't a reasonable one for him to have held. Now it's only if his belief that the women were consenting was a reasonable one that his actions would not amount to rape."

The judge said, that in order to decide whether the appellant's belief that the complainers were consenting was a reasonable one, they had to have regard to a number of factors, including whether the appellant took any steps to find out if they were consenting. He summarised the position, as follows:

> "In relation to charge 1, what the Crown must show to your satisfaction ... is this. First of all, intentional or reckless penile penetration ... the absence of her consent to that, and the absence on his part of any reasonable belief that she was consenting. ...
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> ... [in relation to charge 2] The Crown must show intentional or reckless penile penetration by [the appellant] ... the absence of her consent to that. The absence on his part of any reasonable belief that she was consenting ...".

[6] The judge later repeated the appellant's position at interview in relation to each charge whereby there had been no sexual contact with the complainer on charge (1), and that the complainer on charge (2) had consented. He continued:

> "All of that in the context of the aspect of the charge relating to administration of the drugs [the complainer on charge 1's] evidence was that she just couldn't fight back ... and the Crown say that ... taking all of that evidence together ... applying the rule of mutual corroboration with the evidence relating to charge 2 proves [the appellant's] guilt of this charge, charge 1.
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> ...
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> ... in relation to charge 2, ... it's the same context, the administration of drugs. ... the issues which are alive in relation to charge 2 are whether or not she was consenting and whether or not she had a reasonable belief that she was consenting. ... Her evidence ... was that ... she was feeling dizzy and sick and became unconscious. And, again, the position for the Crown is that applying the rule of mutual corroboration in relation to charge 1 you should find that charge 2 has been proved".

Ground of appeal and submissions

[7] The ground of appeal which passed the sift was that the trial judge explained to the jury that it had not been for the appellant to show that he did not have a reasonable belief. He stated that it was only if the appellant's belief was a reasonable one that his actions would not amount to rape. The judge had said that, to decide if the appellant's belief that the complainers were consenting was a reasonable one, the jury would be entitled to have regard to certain things. This amounted to a misdirection on the facts. There had been no suggestion of the appellant claiming that he had a belief that the complainer in charge (1) was consenting. Given that the appellant's defence focused on a denial that there had been intercourse, the judge's direction, suggesting as it did that the issue was one of consent, had distracted the jury from their task. The direction was inappropriate and unnecessary. There was no live issue of consent on charge (1) (*Maqsood* v *HM Advocate* 2019 SCCR 59; *Graham* v *HM Advocate* 2017 SCCR 497). The material misdirection amounted to a miscarriage of justice.

Decision

[8] The trial judge's charge has to be read as a whole. The necessary elements of the crime of rape were described to the jury. The judge made it clear to them on several occasions that the issue on charge (1) included whether intercourse had taken place at all. He went on to explain to the jury that the absence of reasonable belief was a necessary element of that crime. It cannot be said that this reference in any way misled the jury as to the essential issue. The judge was bound to explain the essentials of the crime to the jury, whatever the appellant's position might have been. Equally, he was entitled to explain how an absence of consent could be inferred, albeit that he could have gone on in the particular

passage to explain that that was not a live issue on charge (1). The judge made it clear that, in relation to charge (2), the question was whether the complainer had been unable to consent due to her intoxication, whereas the appellant maintained that intercourse had been consensual.

[9] In these circumstances, no miscarriage of justice has occurred. The appeal is refused.