APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 37
HCA/2019/278/XC

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 107A OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

BILAAL AFZAL

Respondent

Appellant: Fraser AD; the Crown Agent
Respondent: Duff; Victoria Good

4 June 2019

Evidence at trial

[1] The respondent is charged with the assault and rape of AK "while she was asleep and incapable of giving or withholding consent" on 4 September 2017 at a Travelodge in Edinburgh. According to the complainer, she had been collected from a bar by arrangement

with a man whom she knew as "Kamil" and the respondent. She went with these two men to a bedroom, which was occupied by a number of other men. The room contained three beds; two single and one double. The complainer and Kamil had consensual intercourse. Initially the complainer said that, after intercourse, she had fallen asleep. She was only woken later by the sound of her handbag zip being undone and things being removed from it by the two men. On being asked if she had consented to intercourse with anyone other than Kamil, she said that she had not. She was then asked if she had consented to intercourse with the respondent and she replied "certainly not ". The complainer remembered that immediately ("right away") after having intercourse, it felt as if someone else had penetrated her from behind. At first she had thought it was Kamil. She could hear him whispering to her. She felt that this second penis was different. She did not say anything, as she was not sure. Although she said that she was awake, she was "hazy". The man ejaculated and the intercourse was over very quickly. The complainer fell asleep after this second episode of intercourse. In cross-examination, the complainer reiterated that she had felt hazy at the time. The second episode of intercourse had seemed like a "swap". It was after that that she had fallen asleep.

[2] A witness, AS, testified that he had been in the room. He saw the respondent having intercourse with the complainer on one of the single beds. The respondent was on top of the complainer. He said that the complainer was sleeping at the time. She was snoring. She never knew what was going on. The respondent was laughing. He was taking advantage of the complainer. Kamil, known to the witness as Ziggy, was in the room at the time. The respondent and Ziggy had taken money from the complainer's handbag.

[3] There was forensic evidence that semen recovered from vaginal swabs of the complainer contained a mixed DNA profile, which could be explained by the complainer having had intercourse with both the respondent and Kamil.

No Case to Answer

[4] The trial judge sustained a No Case to Answer submission. She reached the view that the Crown required to prove by corroborated evidence that the complainer had been asleep during the act of intercourse. The complainer, in the trial judge's view, had not spoken to this. The evidence from the witness, that intercourse had occurred when the complainer had been asleep, was not enough without evidence from the complainer of facts and circumstances from which it could be inferred that she was asleep. If the jury deleted the libel of being asleep, there would be no specification of the circumstances in which penetration took place. The judge expressed the view that the Crown had to corroborate both lack of consent and lack of reasonable belief of consent.

Submissions

[5] The advocate depute submitted that the Crown required to prove by corroborated evidence only that the respondent had penetrated the complainer (which was not in dispute) and that the complainer had not consented to that penetration (*Maqsood* v *HM Advocate* 2019 JC 45 at para [18]). There were two sources of evidence that the complainer had not consented because she was asleep. First, there was the witness AS. Secondly, there was the complainer who had initially said that she had fallen asleep after intercourse with Kamil. In any event, she had said that she had not consented to having intercourse with the respondent. The potential inconsistency of this with her later description of penetration by

the respondent immediately after intercourse with Kamil was not relevant to sufficiency. The differences between the complainer's testimony and that of AS did not amount to a lack of conjunction. The complainer had been hazy and the line between the conscious and unconscious may not have been distinct. The essence of the crime was lack of consent. It was open to the jury to delete the libel of being "asleep" (*Van der Schyff* v *HM Advocate* [2015] HCJAC 67).

[6] The respondent maintained that proof of the complainer being asleep was of the essence of the charge (*Maqsood* (*supra*) at para [19]). The tenor of the complainer's evidence, when taken as a whole, was that she had not been asleep when penetrated by the respondent. Her account of her position when penetrated was not the same as that of the witness AS. There was no conjunction of testimony (*McDonald* v *Scott* 1993 JC 54).

Decision

[7] The complainer gave evidence that she had not consented to having intercourse with anyone other than Kamil. There was scientific evidence that she had intercourse with someone other than Kamil. That other person was the respondent, as testified to by the witness and as demonstrated by the DNA findings. Taken at its simplest, the witness said that the complainer was asleep at the material time. There is scientific evidence of intercourse having taken place with the respondent. The complainer said that she did not consent to having intercourse with the respondent. In these circumstances the jury would be entitled to find that the complainer had not consented to intercourse with the respondent, but that such intercourse had taken place. That would entitle the jury to return a verdict of guilty of rape. There is a sufficiency of evidence in that regard. The appeal will accordingly be allowed and the case remitted to the trial judge to proceed as accords.

[8] The court observes, under reference to *Maqsood* (*supra*) that, although reasonable belief is not an issue at this stage, it is not something which requires to be corroborated.