APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 9
HCA/2024/85/XC

Lord Justice General
Lord Justice Clerk
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY the LORD JUSTICE GENERAL

in the

NOTE OF APPEAL UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

SEAN KIRKUP

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Taylor, Brannigan; PDSO Edinburgh
Respondent: Solicitor General for Scotland (Charteris KC), Harvey AD; the Crown Agent

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27 June 2024

Introduction

[1] This appeal concerns whether consent is a defence to behaviour, which would constitute an assault, when it occurs in the context of sexual activity.

Legislation

[2] The Sexual Offences (Scotland) Act 2009 followed the Scottish Law Commission's Report (No. 209, 2007) on *Rape and Sexual Offences*. Section 1 defined the essential elements of rape and sections 2 and 3 did the same for sexual assault by penetration and sexual assault *simpliciter*. Both sections 2 and 3 involve "A", without B's consent, or without any reasonable belief that B is consenting, doing certain things. Section 3 in particular refers to doing any of the things mentioned in subsection (2). These include intentional or reckless sexual penetration or touching, and (s 3(2)(c)) engaging in any other form of "sexual activity" in which A, intentionally or recklessly, has physical contact with B. Section 60(2) provides that: "penetration, touching, or any other activity … is sexual if a reasonable person would, in all the circumstances, … consider it to be sexual."

[3] The draft Bill, which was annexed to the SLC's report, contained a section (s 37) which would have decriminalised consensual acts which were carried out for sexual gratification, provided that they were not likely to result in serious injury. An attack would be unlikely to result in serious injury if a reasonable person would so consider it. The section would have enacted for Scotland the reasoning, which had been adopted for England and Wales, in *R* v *Brown* [1994] 1 AC 212. A note accompanying the draft section stated that its intention would exempt "certain activity of a sado-masochistic nature" from the definition of assault.

[4] The proposal was not taken forward by the Scottish Government. The Policy Memorandum recognised that, having regard to the SLC's focus on consent, it made sense to decriminalise consensual sexual violence. Nevertheless, it continued:

> "…the vast majority of respondents to the Scottish Government's consultation on the SLC's final report were opposed to the inclusion of such a provision. In particular,

> many consultation respondents were concerned that such a provision could provide a loophole for defendants (*sic*) in rape and domestic violence cases. There was a real concern that defendants in such cases might try to argue that the victim consented to the attack and, as such, no crime was committed…. At present, any such consent would be irrelevant as it is not possible to consent to be assaulted…".

[5] Consent means "free agreement" (s 12). Consent to one activity does not imply consent to any other conduct and consent may be withdrawn at any time (s 15). In determining whether there is a reasonable belief in consent, "regard is to be had to whether the person took any steps to ascertain whether there was consent…" (s 16). On a charge of rape, the jury may return an alternative verdict of assault (s 50; sch 3).

Background

[6] The appellant has been indicted to the High Court in Glasgow on seven charges. These include the rape of, sexual assault upon and domestic abuse of several former partners. This appeal is only concerned with charge (7) which is in the following terms:

> "on various occasions between 1 October 2020 and 30 August 2021, at … Edinburgh and elsewhere you…did assault [LM], and did seize hold of her, push her, pull her hair, punch and slap her on the face and body, seize her by the throat and compress same thereby restricting her breathing and penetrate her vagina with your penis and you did thus rape her to her injury; CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009".

[7] The appellant pled not guilty. He lodged a special defence to this charge which states that:

> "insofar as he slapped LM to the face and body, seized her by the throat and restricted her breathing, and penetrated her vagina, he did so with her consent and with the reasonable belief that she was so consenting".

[8] The appellant maintains that he and the complainer had agreed at an earlier date that a safe word would be used by the complainer as a sign that she no longer consented to the violent elements of the appellant's behaviour.

[9] At the Preliminary Hearing, the question of whether consent could be a defence to the libel of assault was identified. The Advocate Depute submitted that it could not. The appellant argued that the effect of sections 3(2)(c) and 60(2) of the 2009 Act, the general purpose of which was to promote and protect sexual autonomy, provided a defence of consent to any conduct occurring during sexual activity, except where the conduct would result in death or significant, irreparable injury that would require medical treatment.

The First Instance decision

[10] The Preliminary Hearing judge held that the 2009 Act did not create a defence of consent to assault when it was committed in the context of sexual activity. Consent was not a defence to assault (*Smart* v *HM Advocate* 1975 JC 30 at 33). The definition of assault, as an attack with "evil intent", meant no more than that the attack needed to be deliberate (*Lord Advocate's Reference* (*No.2 of 1992)* 1993 JC 43 at 48 and 52; *Stewart* v *Nisbet* 2013 SCCR 264, at para [37]). The *dicta* in *Smart* (at 33) to the effect that evil intent meant "intent to injure and do bodily harm", should not be followed. The *dicta* in later cases, which had also suggested this, were either *obiter* (eg *Sutherland* v *HM Advocate* 1994 JC 62 at 70) or had not taken account of *Lord Advocate's Reference (No. 2 of 1992)* (eg *McDonald* v *HM Advocate* 2004 SCCR 161; *Scott* v *HM Advocate* 2012 SCCR 45). *JH* v *Scottish Children's Authority Reporter Administration* 2023 SLT (SAC) 97, which also referred to the need for an intention to injure, was wrong. The SAC had relied on *dicta* from *Lord Advocate's Reference (No. 2 of 1992)* (at 51), which did not support its opinion, and on *HM Advocate* v *Harris* 1993 JC 150, which involved a different context and in which there was no reference to *Lord Advocate's Reference (No. 2 of*

1992). The SAC had erroneously interpreted *Stewart*, which had made it clear that motive was irrelevant.

[11] The Preliminary Hearing judge referred to the position in England and Wales where, by statute, consent was available as a defence in certain circumstances (Offences Against the Person Act 1861; Archbold, *Criminal Pleading and Evidence* at para 19-273; cf Domestic Abuse Act 2021, ss 70 and 71). The convictions in *Brown* were held to have been necessary for the protection of public health (*Laskey* v *United Kingdom* (1994) 24 EHRR 39). The national authorities had a margin of appreciation within which to determine the level of harm that the law would tolerate. There might be policy reasons for exempting exceptional cases from constituting assaults, such as sports, where there were benefits to the community, provided that the participants complied with recognised rules. There were strong policy reasons for criminalising choking and blows to the head or face, whether or not in a sexual context, in order to protect health. Accordingly, the jury should be directed that consent was not available as a defence should they be satisfied that the appellant: (i) deliberately seized the complainer's throat, compressed it and restricted her breathing, or (ii) slapped her on the face or head.

[12] An assault was committed regardless of the complainer's attitude and whether or not it had occurred during consensual sexual activity. The position was slightly different in relation to slapping the body. It may not have the same potential to cause serious harm, and could be equated with scratching or the infliction of love bites. It may not constitute an "attack" and may fall within the margin of appreciation afforded to national authorities under Article 8 of the European Convention by which private and consensual acts, which are inherent in, or associated with, consensual sexual activity, are not criminalised.

Submissions

Appellant

[13] The appellant argued that, prior to the 2009 Act, there was already a defence to conduct which would be an assault when it occurred in the context of consensual sexual activity. That continued after the Act. *Smart* and *Lord Advocate's Reference (No.2 of 1992)*, which were both concerned with assault, provided little assistance. There was an illogicality in the PH judge's approach, where he stated that acts inherent in combat sports did not constitute assault, yet the achievement of mutual sexual pleasure through violence did. The law of assault, in which consent was irrelevant, should not be applied to consensual sexual conduct. The decision to remove section 37 of the draft Bill did not alter the statutory language, which allowed for consent to what would otherwise be an assault when it occurred during consensual sexual activity. The 2009 Act contained no restriction on what could be consented to in the context of sexual relations. Section 60(2) provided that "sexual" included "any other activity". It was a question of fact for the jury to determine, applying an objective test, whether behaviour was "sexual". The court was being asked to go beyond the terms of the Act by imposing limitations which were not in the statute. Amendment of the Act was required to impose any limitations (cf Domestic Abuse Act 2021, s 71).

[14] Any belief in consent had to be reasonable. It had to be real and genuine, in the sense of there being "free agreement" which was contemporaneous with, and specific to, a particular activity. The appellant had taken steps in the present case. A "safeword" had been agreed in advance to indicate the limit of consent. If the jury did not accept either that

the behaviour was sexual, or that the appellant held a reasonable belief that the complainer was consenting, it would be open to them to convict of assault.

[15] Articles 7 and 8 of the Convention were engaged because of the Preliminary Hearing judge's approach. Persons, who believed that they were engaging in consensual sexual activity, would be unaware of the limits imposed by the law. There would be a significant interference with private lives and sexual autonomy. If there were limitations on behaviour that could be consented to, this could be determined only after the evidence had been led. The PH judge ought to have proceeded in the same way as he had in relation to slapping of the body. Once evidence had been led, the trial judge could give appropriate directions on what may or may not be consented to.

Crown

[16] The PH judge was correct to refuse the appellant's special defence in so far as it related to slapping the complainer on the head, seizing her throat and strangling her. All of those actions were assaults. The law was clear that consent was not a defence to assault. There was nothing in the Sexual Offences (Scotland) Act 2009 that changed this.

[17] An assault was an attack on the person of another with evil intent (*Smart* v *HM Advocate* at 33). The modern concept of evil intention was contained in *Lord Advocate's Reference (No. 2 of 1992)*. It meant that an assault cannot be committed accidentally, recklessly or negligently (*ibid* at 48, citing Gordon: *Criminal Law* (2nd ed) at para. 29-30). Intention meant nothing more than wilful, intentional or deliberate, as opposed to accidental, careless or reckless (*ibid* at 52, citing also Macdonald: *Criminal Law* (5th ed; see also eg *Gilmour* v *McGlennan* 1993 SCCR 837; *Quinn* v *PF Edinburgh* 1994 SCCR 159; *Stewart* v

Nisbet at para [35]); *Burnett* v *International Insurance Co of Hanover* 2021 SC (UKSC) 1). The PH judge acknowledged that there have been several decisions which overlooked *Lord Advocate's Reference (No. 2 of 1992)* and suggested that evil intent required an intention to harm or injure (*Sutherland* v *HM Advocate, McDonald* v *HM Advocate* and *Scott* v *HM Advocate*). Little weight should be attached to those cases or to *JH* v *Scottish Children's Authority Reporter*. In *Dickson* v *PF Kilmarnock* 2023 SCCR 167 the Sheriff Appeal Court had correctly applied the test in *Lord Advocate's Reference (No. 2 of 1992)* a matter of weeks before *JH*.

[18] There was a clear line of authority confirming that consent was not a defence to assault (*HM Advocate* v *Rutherford* 1947 JC 1 at 5 and 6). In *Smart*, the court considered that an agreement to have a "square go" could not constitute a defence. This approach was endorsed in *Sutherland* at 69 and in *Stewart*. *McDonald* proceeded upon a concession that proof of an intention to cause pain would not be sufficient to justify a conviction. It was necessary for there to have been an intention to cause physical injury.

[19] In England and Wales the prosecution had to prove lack of consent to secure a conviction in simple assault cases. In *R* v *Brown*, the appellants were members of a group who engaged in consensual sado-masochistic acts. A distinction was made between assault at common law and other forms of assault. Consent was irrelevant in respect of more serious assaults. The subsequent application to the European Court of Human Rights was unsuccessful (*Laskey* v *United Kingdom*).

[20] The Preliminary Hearing judge correctly held that the 2009 Act delineated conduct which can constitute sexual assault. It did not create a new defence to common law assault. The fact that the SLC had considered that distinct provision was required to exempt sado-

masochistic practices from assault was a helpful indicator that this was neither the intention nor the effect of sections 3(2)(c) and 60(2) of the 2009 Act. The SLC rightly considered that, if the law on assault was to change, legislation would be required. Its recommendation was consulted upon, considered and rejected for valid policy reasons, primarily relating to concerns about its impact on prosecutions for sexual offences.

[21] An argument similar to that made by the appellant under Article 7 of the European Convention was rejected in *Brown*. The point was renewed in *Laskey*, but rejected by the European Commission as manifestly ill-founded. Although the appellants may not have realised that their conduct was criminal, it was reasonably foreseeable that it was with appropriate legal advice (para 51). It would be reasonably foreseeable to the appellant that his conduct would be criminal regardless of whether the complainer consented.

[22] A similar argument to that raised under Article 8 was again rejected in *Brown* and renewed unsuccessfully in *Laskey*. The engagement of Article 8 having been conceded, the issue was whether the conviction of the appellants was "necessary in a democratic society". A margin of appreciation was left to the national authorities (*Laskey* at paras 42-44). The state was entitled to seek to regulate activities which involve the infliction of physical harm. What was at stake related, on the one hand, to public health and general deterrent effect and, on the other, the personal autonomy of the individual. The national authorities were entitled to have regard not only to the seriousness of the harm, but also to the potential for harm. If the conduct engaged Article 8, the interference involved was justified in terms of Article 8(2). It was in accordance with the law (*Slivenko* v *Latvia*, App no. 48321/99, 9 October 2003 at para 107). The interference pursued the legitimate aim of the protection of health. The Preliminary Hearing judge was correct in finding that, among the strong policy

reasons to criminalise actions of choking, neck compression and similar conduct, whether it occurred during a sexual encounter or otherwise, such behaviour carries an obvious potential of danger to life. This applied also to the slapping on the face or head. The law pursued the legitimate aim of protecting the rights and freedoms of others. The state had a positive obligation to establish and apply an effective system for punishing all forms of domestic violence (*Opus* v *Turkey* App no. 33401/02 at para 147). On proportionality, the Preliminary Hearing judge accepted that it may be that, in light of Article 8, the law did not criminalise certain acts inherent in, or associated with, consensual sexual activities, where these were not seriously harmful and did not have the potential to cause serious harm. The PH judge refrained from determining in advance that slapping to the body was inevitably an assault. This was similar to the approach in *Brown* and was a proportionate one.

Decision

[23] An assault is an attack on the person of another with evil intent (*Stewart* v *Nisbet* 2013 SCCR 264, LJC (Carloway), delivering the opinion of the court, at para [35], following *Smart* v *HM Advocate* 1975 JC 30, LJC (Wheatley), delivering the opinion of the court at 33 and citing Macdonald: *Criminal Law* (5th ed) 115). An attack is a physical interference with the person of another. The motive for the attack is irrelevant (*ibid*). Evil intent means that the attack has to be intentional, as distinct from being accidental, negligent or reckless (*ibid* at para [37] citing *Lord Advocate's Reference (No. 2 of 1992)* 1993 JC 43, LJC (Ross) at 48 and Lord Sutherland at 52-53, again citing Macdonald at 115). It was made clear by Lord Sutherland (at 52) that it was not a requirement that the accused intended "evil consequences" as a

result of his acts; ie that that was the motive for his behaviour. Hence, it was not a defence that an apparent bank robbery was intended as a joke.

[24] The court agrees with the Preliminary Hearing judge that there is no need for there to be an intent to injure and to cause bodily harm. *Smart* is correct insofar as it makes it clear (LJC (Wheatley), delivering the opinion of the court, at 33, following *HM Advocate* v *Rutherford* 1947 JC 1, LJC (Cooper) at 6) that consent is no defence to a charge of assault; in that case a "square go". The *obiter* remarks (*ibid* and in *Sutherland* v *HM Advocate* 1994 JC 62, LJG (Hope), delivering the opinion of the court, at 70) that evil intent requires an intent to injure are erroneous. *McDonald* v *HM Advocate* 2004 SCCR 161, which involved a death during sexual activities to which, according to the appellant, the deceased had consented, proceeded upon a Crown concession that assault required an intent to injure, not merely one to cause pain. That concession was erroneous. Although *Lord Advocate's Reference (No. 2 of 1992)* and *Stewart* v *Nisbet* were analysed in *JH* v *Scottish Children's Reporter Administration* 2023 SLT (SAC) 97, the court (SP Lewis) nevertheless made the same error in holding that there must be an intention to cause bodily harm, or fear of such harm. The requisite intention is to do the act deliberately. The contrary reasoning in *Dickson* v *PF Kilmarnock* 2023 SCCR 167, SP Anwar, delivering the opinion of the SAC at para [29], is correct.

[25] The Sexual Offences (Scotland) Act 2009 has no effect on the requirements of, or defences to, assault. Section 3(2)(c) concerns the definition of a *sexual* assault, which need not involve any *attack* but can be committed simply by touching or otherwise making physical contact with a complainer. In these cases, consent will be a defence. The crime of assault remains unaltered and consent is no defence to an attack on the person of another.

[26] The appellant's reliance on Articles 7 and 8 of the European Convention is undermined by decisions of the European Commission and subsequently the European Court of Human Rights in *Laskey* v *United Kingdom* (1997) 24 EHRR 39. *Laskey* was a complaint made by the unsuccessful sado-masochistic appellants in *R* v *Brown* [1994] 1 AC 212. The Commission held (at para 51) that the Article 7 complaint (no punishment without law) was inadmissible as manifestly unfounded. The contention, which was accepted, was that the appellants may have been unaware, at the relevant time, that their conduct was criminal. That was not the test. The question was whether it was reasonably foreseeable to a person, who had taken legal advice, that the conduct was illegal. As in *Laskey*, had the appellant obtained such advice, it would have been reasonably foreseeable that choking a person or slapping them on the head would be regarded as an assault and hence criminal.

[27] The Commission also concluded (para 65) that there had been no violation of Article 8 (right to respect for private and family life). The application had been declared admissible and it was considered by the court. It was accepted that Article 8 was engaged but that the convictions had been in accordance with the law. The aim of the law was the protection of health or morals. The question resolved itself into one of whether the law was necessary in a democratic society in terms of Article 8(2). In considering this, a margin of appreciation was afforded to national authorities (para 42). These authorities were "unquestionably entitled" to seek to regulate activities which involved the infliction of physical harm, whether or not in the sexual context (para 43), since what is involved is a balance between, on the one hand, public health considerations and the general deterrent effect of the criminal law and, on the other, personal autonomy or risk of harm (para 46, citing *R* v *Brown*, Lord Jauncey at 44) and was not trifling or transient. The state was entitled

to take suitable measures to prevent such behaviour. The PH judge's analysis of proportionality was a reasonable one. Whereas some physical encounters may be seen as inherent in, or associated with, consensual sexual activity, those with the potential to cause serious harm were not.

[28] The appeal is refused.