The meaning of ‘reasonable belief in consent’ under the Sexual Offences Act 2003 and the admissibility of bad character evidence under the Criminal Justice Act 2003

R v Hepburn [2020] EWCA Crim 820, Court of Appeal

Rape; reasonable belief in consent; inconsistent verdicts; bad character evidence

Alex Hepburn (H) was a professional cricketer with Worcestershire County Cricket Club. He shared a flat in Worcester with a teammate, Joe Clarke (C). On Friday 31st March 2017, the two men went out ‘drinking and clubbing’ in the city. They were part of a group, which also included C’s ‘on-off’ girlfriend, V. The two men anticipated some of their friends spending the night at their flat. C and H had therefore agreed that they would sleep in C’s room, leaving H’s room free for their friends to use, if necessary.

In the early hours of the morning of Saturday 1st April, C and V returned to the flat and went to C’s room, where they had sex. Later, C felt sick and went to the bathroom. He ended up asleep on the bathroom floor. Some time after that, H returned to the flat and went to C’s room, as arranged. What happened next was disputed.

According to H, he did not realise that V was in the room until after he got undressed and lay down on the bed. When he did so, he saw that there was a naked woman on the bed. He recognised her as V, they ‘made eye contact’ and she kissed him. They went on to have oral and vaginal sex; throughout, V was ‘a fully engaged and consenting partner’. Nothing happened to suggest that she was not enjoying herself until V said, ‘What are you doing?’, pushed him off and said, ‘Where’s Joe?’

V said that she awoke to find H straddling her with his erect penis in her mouth. She was ‘groggy’ and assumed that it was C ‘being a bit cheeky’. She performed oral sex ‘for about 10 minutes’ after which they had vaginal sex. V maintained that she did not realise that it was H because of the low lightning levels in the room combined with her still ‘being intoxicated and sleepy with her eyes closed’. That changed as soon as H spoke in a ‘distinctive Australian accent’. At that point, V pushed him off and said, ‘Where’s Joe?’ She went to find C in the bathroom and told him that she had been raped.

H was charged with two counts of rape (one oral, one vaginal), contrary to s.1(1) of the Sexual Offences Act 2003 (the SOA 2003). He initially appeared before a judge and jury in January 2019. As part of its case, the Crown was permitted to rely upon a series of WhatsApp messages to suggest that H was ‘indifferent’ whether V was consenting. These messages were sent between the three WhatsApp group members (C, H and another cricketer with the club) and suggested that the three men had agreed to play a ’sexual conquest game’ starting that night. The game was in fact a competition to ‘have sex with as many different women as possible’ before a set date. All of these messages predated the night of 31st March / 1st April, some going back as far as January 2017.

The trial judge admitted 17 messages dating from 27th March onwards. In these messages, the ‘rules of the game’, written by H, were set out. The trial judge ruled that these messages were ‘to do with the offence’ for the purposes of s.98(a) of the Criminal Justice Act 2003 (the CJA 2003); alternatively, they were admissible as bad character evidence. However, he refused to admit another 39 earlier messages because the Crown had enough material in the later messages to make its point; moreover, some of the earlier messages were prejudicial and not related to the facts of the present case.

The jury was unable to reach a verdict and a retrial was ordered. H appeared before HHJ Tindal and a jury at Worcester Crown Court in April 2019. The decision to admit the 17 WhatsApp messages was not reviewed at the retrial.

H was convicted of one count of rape (the oral rape) and sentenced to five years imprisonment, although he was acquitted of the count alleging vaginal rape. He appealed against his conviction for the oral rape, contending (1) the trial judge had been wrong to admit the WhatsApp messages, on the grounds that they were either irrelevant or 'deeply prejudicial'; (2) the jury's verdicts were inconsistent, given that the 'only issue in respect of both counts was consent'.

HELD, DISMISSING THE APPEAL, that the conviction was safe (at [30]). There was 'no error' in admitting the WhatsApp messages (at [14]), and there was no 'logical inconsistency' between the two verdicts (at [29]).

Ground 1: Admissibility of the WhatsApp messages
Notwithstanding the apparent disagreement with the trial judge as to whether the recent WhatsApp messages amounted to bad character evidence (at [15]), the Court of Appeal concluded that the judge had not erred in allowing the Crown to adduce the evidence. Lord Burnett CJ, giving the unanimous judgment, said that even if the messages were not admissible under s 98(a) of the CJA 2003, they were nevertheless potentially admissible as evidence of bad character under s.101(1)(c) as being 'important explanatory evidence' and s.101(1)(d) as being 'relevant to an important matter in issue between the defendant and the prosecution', namely belief in consent (at [15]). The Court also rejected defence arguments to the effect that the trial judge had misdirected the jury on the relevance of the WhatsApp messages. In doing so, Lord Burnett CJ concluded that there 'was no deficiency in the summing up' (at [17]).

Ground 2: Inconsistent Verdicts
On the second ground, Lord Burnett CJ explained that the jury were entitled to reach different verdicts on the two counts owing to the passage of time during which the events giving rise to the counts occurred. The Crown case had been that V was asleep at the time of the penetration of her mouth, although that was disputed by the defence. Lord Burnett CJ acknowledged that some of the jurors might have convicted H of (oral) rape on the basis that V was asleep, whereas others may have convicted H on the basis that V was awake but H nevertheless lacked reasonable belief in her consent. However, by the time of the vaginal intercourse several minutes later, by which time V was awake, the jury was entitled to acquit on the basis that any belief on H's part in V's consent might have been reasonable. According to the Lord Chief Justice:

> Even if one starts from the premise that [V] was awake at the outset, the jury could be sure she did not appreciate that it was [H] with whom she was having sex at the beginning, and that he had no genuine and reasonable belief that she was consenting, but that things might have changed the longer the sexual contact went on without any outward demonstration of a lack of consent (accepted by [V]) it is at least possible that by the time vaginal intercourse started the jury's conclusion about [H's] belief and whether it was reasonable was different (at [28]).

Commentary

Admissibility of the WhatsApp messages
The decision of the judge to allow evidence of the recently sent WhatsApp messages but not evidence of earlier messages highlights an important, yet sometimes difficult, distinction between evidence 'to do with the offence' for the purposes of s.98(a) of the CJA 2003 and evidence which is too remote in time to fall within this definition. Rather than potentially

amounting to evidence of H's bad character, the trial judge opined that the messages sent in the days leading up to the alleged offence "might merit different treatment, as having 'to do with the offence'" (at [10]) but the Court of Appeal, by suggesting that the messages were admissible under the combination of paragraphs 101(1)(c) and (d), reinforces Spencer's proposition that

> There is a potential overlap between evidence that has to do with the alleged facts of the offence – and hence is admissible because it falls outside the definition of bad character evidence – and evidence that falls inside the ban, but is admissible as important explanatory evidence under s.101(1)(c) (J R Spencer, Evidence of Bad Character, third edition, Oxford 2016, p 44).

The Court of Appeal's finding that the judge had not erred in allowing the introduction of evidence concerning the WhatsApp messages from when the appellant set out the rules of the game on 27th March 2017 (at [14) is correct. Notwithstanding the proposition that earlier messages (sent from January 2017) would be subject to the requirements of the CJA 2003 admissibility 'gateways' (by reason of not falling within the s 98(a) definition of 'to do with the offence' and hence potentially amounting to bad character evidence) the trial judge excluded the earlier messages because 'the prosecution had enough material in the later extracts to make the relevant point' (at [11]) and thereby limiting the use of potentially prejudicial evidence because it was 'not related to these facts' (at [11]). This approach mirrors that taken by the Court of Appeal in *Phillips* [2012] 1 Cr App R 25, in which it was held that once evidence is admitted to demonstrate propensity, the judge may be prepared to exclude further evidence demonstrating the same point because the probative value of the additional evidence is diminished.

Reasonable belief in consent

The definition of rape in s.1(1) of the SOA 2003 requires, *inter alia*, that the complainant [A] was not consenting to the penetration and that the accused [B] lacked a reasonable belief in A's consent. At one point during the retrial in the present case, the jury asked for clarification as to the meaning of 'reasonable belief' in consent. The trial judge responded by telling the jury that 'belief must be judged by the standards of ordinary, reasonable people'. The Court of Appeal made no comment about this although the fact that the conviction was upheld indicates tacit approval. Nevertheless, a more definitive explanation of the jury's approach to determining whether an accused's belief was reasonable would be welcome.

Section 1(2) of the SOA 2003 only provides limited assistance here, stating that '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'. Thus, under English law, the taking of steps is a relevant, but not decisive, factor, in determining whether a belief in consent was reasonable. There is an interesting contrast that can be drawn here with Canadian jurisprudence. Under Canadian law, the accused in a sexual assault case is not guilty if he or she *honestly* believed in *communicated* consent. In the recent Canadian Supreme Court case of *Barton* [2019] SCC 33, Moldaver J, giving judgment for the majority, explained the law as follows:

> An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence. This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent… [W]here there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, the defence of honest but mistaken belief in communicated consent must not be left with the jury (at [121]).

On the surface, the law in Canada appears more generous to the accused in a sexual assault case by permitting him or her to claim an *honest* (not necessarily a reasonable) belief in consent. However, this is very much a superficial appearance because of the need to demonstrate an ‘air of reality’, requiring evidence that the accused actually ‘took reasonable steps to ascertain consent’. Whether English law should move towards the Canadian position is a matter for discussion but is beyond the scope of this case note.