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Reasonable belief in consent under the Sexual Offences Act 2003

R v B [2013] EWCA Crim 3

Keywords: Rape; Consent; Reasonable belief; Mental illness; Mental disorder

B was convicted of two counts of common assault and two counts of rape upon his partner and a further minor offence of criminal damage to her house. There was evidence that B had been suffering from either paranoid schizophrenia or schizo-affective disorder at the time of the offences. The main issue on appeal was the trial judge's direction to the jury that B's mental illness was irrelevant to whether he reasonably believed the complainant was consenting to sexual intercourse.

B and the complainant (C) had been in a relationship since 2004. B had previously pleaded guilty to three offences of common assault upon C, for which he received a suspended sentence of imprisonment in March 2010. The convictions in the instant case arose out of events that took place in July and August 2010. On 16th July 2010, B assaulted C by spitting at her after seeing her talking to her (male) neighbour. On the evening of 4th August 2010, B presented C with a mixture consisting of cold canned peas and crumbled leaf from an apple tree and insisted that she eat it. When C began to remove the pieces of leaf, B assaulted C by grabbing her finger and made her eat the mixture. A short time later, B informed C that he wanted to have sex. At trial, C gave evidence that that she did not want to but submitted because B insisted. C accepted that she removed her own clothing prior to intercourse taking place. Later that night, B again wanted sexual intercourse. C maintained that she had said 'no' but B insisted. Again she removed her own nightdress before submitting to intercourse.

B was interviewed by the police and denied the first offence of common assault, claiming that he had no problem with C talking to her neighbour. In relation to the second offence of assault, B admitted giving C the mixture but denied forcing her to eat it. When asked about the rape allegations, B told the police that he had never had sexual intercourse with C without her consent. B did not give evidence at trial but the account that he gave to the police formed the basis of the case that was put on his behalf.

A psychiatrist gave evidence that, at the time of the offences, B had been suffering from paranoid schizophrenia, or possibly schizo-affective disorder. She testified that B was not insane at the time of the offences but his illness caused him to believe that he had healing powers, including sexual healing powers. The offences might have been motivated by a delusional belief that intercourse would be good for C, even though she was saying 'no'. However, B's delusions would not have

extended to a belief that C was consenting and his illness was irrelevant to his understanding of whether she was consenting or saying 'no'. B did have an impaired ability to interpret events normally and to read signals or see things as others would as a result of his illness.

Notwithstanding defence counsel's submissions, the trial judge directed the jury that it should not have regard to B's mental illness when determining whether he might have reasonably believed that C was consenting to sexual intercourse: 'a delusional belief in consent or a belief in consent which is the result of… mental illness cannot be a reasonable belief…' (at [24]). The judge further directed the jury that it must determine 'what society [would] reasonably expect of a person **not suffering from mental illness**... who found themselves in the circumstances that pertained on each of the occasions…' [emphasis added] (at [24]).

The defendant appealed against his convictions on the ground, inter alia, that in deciding whether a belief in consent might have been reasonable, the question was whether it was reasonable in the circumstances of the particular defendant, having regard to any evidence of mental illness.

HELD, DISMISSING THE APPEAL, The psychiatric evidence established that B's mental illness did not affect his ability to understand whether his partner was consenting. On the facts, it was not possible that B's mental illness might have caused him to believe that C was consenting and the convictions were, therefore, safe. In any event, an objective test should be applied in deciding whether a defendant's belief in consent might have been reasonable. A belief in consent caused by a delusional psychotic illness or personality disorder would be an unreasonable belief. Although there might be circumstances in which a defendant's impaired ability to read social signals or behavioural cues would be relevant to the reasonableness of his belief, this was not such a case.

COMMENTARY:

To secure a conviction for rape, the prosecution must prove both that the complainant was not consenting (s.1(b) Sexual Offences Act 2003) and that the defendant did not reasonably believe the complainant was consenting (s.1(c)). Section 1(2) provides limited guidance in relation to the issue of reasonableness:

> Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps which [the defendant] has taken to ascertain whether [the complainant] consents.

Absence of reasonable belief in consent is also required for offences of assault by penetration (s.2), sexual assault (s.3) and causing another person to engage in sexual activity without consent (s.4). The wording of s.1(2) is repeated in ss. 2-4 of the 2003 Act.

Where it is accepted that the requisite sexual activity took place, there are three successive questions to be addressed:

(1) did the complainant in fact consent? If not,

(2) did the defendant believe that she was consenting? If yes,

(3) was his belief reasonable? (at [21])

In relation to the first question, it is well established that there is a distinction between consent and submission: 'every consent involves a submission, but it by no means follows that a mere submission involves consent' (*R v Day* (1841) 9 C.&P. 722; *R v Olugboja* [1982] QB 320). In the instant case the Court of Appeal observed that 'the line between reluctant consent and submission despite lack of consent is often a fine one, especially in cases of an existing sexual relationship, and it was so here'. However, the jury had concluded by its verdicts that C was not consenting and this was a decision it was entitled to reach on the facts, particularly given that sexual intercourse followed an incident of forced feeding (at [22]).

In relation to the second question, mental disorder might be relevant in determining whether a defendant believed the complainant was consenting. In B's case, the Court of Appeal observed that the psychiatrist had testified that B's illness would not have caused him to believe that C was consenting when she was not. Although the psychiatrist also stated that B's ability to interpret events normally was impaired as a result of his illness, B had not given evidence. The suggestion that he had misunderstood and thought the complainant was consenting was, therefore, mere speculation (at [34]). Their Lordships nevertheless went on to consider whether B's mental illness would have been relevant if B had believed that C was consenting.

Prior to the Sexual Offences Act 2003 ("SOA 2003"), a defendant was not liable for rape if he honestly believed the complainant was consenting to intercourse (*DPP v Morgan* [1976] AC 182). The reasonableness of a belief in consent was relevant only to the question of whether it was a genuinely held belief (s.1(2) Sexual Offences Amendment Act 1976). The subjective approach adopted in *Morgan* was heavily criticised for having insufficient regard to sexual autonomy and authorising the assumption of consent regardless of the victim's wishes. The SOA 2003 reversed the

Morgan principle and introduced a requirement that D's belief in consent should be reasonable. The difficulty lies in the wording of s.1(2) which provides that, in determining whether a belief was reasonable, the jury must have regard to 'all the circumstances'. Is the phrase 'all the circumstances' limited to the factual circumstances surrounding the act of intercourse or does it extend to the circumstances of the defendant, including his personal characteristics, such as youth or mental disorder?

In *R v Grewal* [2010] EWCA Crim 2448, the Court of Appeal held that voluntary intoxication is not a circumstance that can be taken into account under s.1(2). Drunkenness may be relevant to whether the defendant believed the complainant was consenting but it cannot be relevant to whether that belief was reasonable; 'one has to look at the matter as if he were sober' (*Grewal* at [30]). The decision in *Grewal* was unsurprising given the general principle that voluntary intoxication does not negative mens rea for a crime of this type (*R v Heard* [2007] EWCA Crim 125).

The relevance of mental disorder to the reasonableness of a defendant's belief is a more difficult issue. In *R v MM* [2011] EWCA Crim 1291, the Court of Appeal, while not deciding the point, acknowledged that '[t]here is... an interesting argument to be addressed as to whether there is a material difference between (1) an honest belief held by a defendant which may have been reasonable in the circumstances and (2) a belief which a reasonable man, placed in the defendant's circumstances, may have held' (*MM* at [54]). Mental disorder would potentially be relevant to the former but would not be relevant to the latter.

In the present case, their Lordships acknowledged that the House of Commons Home Affairs Committee had assumed that the wording of s.1(2) would allow the jury to take into account the defendant's characteristics 'such as learning disability or mental disorder' in determining whether a belief in consent was reasonable (at [30]). In response, the Government stated that it would be 'for the jury to decide whether any of the attributes of the defendant are relevant to their deliberations, subject to directions from the judge where necessary' (at [31]).

The Court of Appeal pointed out that the term 'mental disorder' covers a wide range of conditions, including psychotic delusional states and psychopathic or anti-social personality disorders, many of which are not susceptible to treatment. The court concluded that, even if B might have believed that C was consenting, B's mental illness could not be taken into account in determining whether his belief was reasonable. B's condition generated delusions and a delusional belief is, by definition, irrational and unreasonable (at [35]). If it was otherwise, a sexual predator who believed that all women welcomed his advances would not be liable for offences under ss.1-4 of the SOA 2003 if his

belief was attributable to mental disorder. Thus, 'beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably arise without it' (at [40]).

The Court of Appeal did not rule out the possibility that mental disorder might be relevant to the issue of reasonableness in an appropriate case. The court opined that an impaired ability to read 'subtle social signals' caused by 'less than ordinary intelligence or… demonstrated inability to recognise behavioural cues' might be a circumstance that could be taken into account in determining whether a defendant's belief in consent was reasonable (at [41]). The reference to 'subtle social signals' is, of course, dangerous territory. One of the Government's aims in reforming the law on sexual offences was to ensure that those who engage in sexual activity take care to establish that it is consensual. Accordingly, consent is not to be assumed from subtle signals or behavioural cues. While the terminology is perhaps unfortunate, the Court's acceptance that mental disorder might be relevant in an appropriate case introduces a necessary degree of flexibility and will allow future courts to take account of a defendant's mental disorder where it is in the interests of justice to do so.

The difficulty for practitioners is that, until a particular diagnosis or symptom has been considered by the Court of Appeal, it is difficult to say with any degree of certainty whether it is a characteristic that may be taken into account in assessing the reasonableness of any belief in consent. This piecemeal approach towards the law as it applies to offenders with mental disorder has also been seen in other areas. For example, the Court of Appeal held in *R v Dowds* [2012] EWCA Crim 281 that, while acute intoxication is a recognised medical condition, it is not sufficient to support a defence of diminished responsibility. Many medical conditions 'raise important additional legal questions when one is seeking to invoke them in a forensic context' (*Dowds* at [31]). Their Lordships concluded that '[t]he presence of a "recognised medical condition" is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility' (*Dowds* at [41]). (See N. Wake, 'Diminished Responsibility and Acute Intoxication: Raising the Bar' (2012) 76 JCL 197). The decisions in *Dowds* and *R v B* potentially require the courts to determine the relevance of particular diagnoses on a case by case basis. Further case law in this area seems inevitable.

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