Conditional consent? An emerging concept in the law of rape

R (on the application of F) v DPP and A 2013 EWHC 945 (Admin)

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This was an application for judicial review of the DPP's refusal to initiate a prosecution for rape and/or sexual assault of the claimant (F) by her former partner (A). A detailed review of the DPP's original decision had been carried out by his principal legal advisor, Alison Levitt QC. Miss Levitt proceeded on the basis that F's account was *"entirely truthful and reliable"* but concluded that, even if a jury were to believe every word of F's testimony, there was no realistic prospect of conviction.

F and A were in a relationship and an Islamic marriage took place between them in November 2009. Both before and after the marriage, A asserted control over F, telling her that *"as his Muslim wife [she] should fulfil his sexual needs unquestionably"*. F became increasingly frightened of saying to no to A "*because of the potential consequences of doing so"*. By this Miss Levitt concluded that F feared A would leave her.

There were three main incidents that F contended should give rise to criminal charges. The first incident took place in May 2009. A wanted F to come home with him for sexual intercourse. F did not want to do so but went to meet A in a basement gym of their University building. A made aggressive sexual advances to F, kissing her very roughly, pulling open her belt and trousers and grabbing at her face and hair. He pushed her to the floor and demanded that she perform oral sex upon him but she refused. A then masturbated in front of F. He stopped when she asked him to. He pushed her away and told her to leave but she did not do so. At some point A

held F by the throat, sufficient so as to scare her. F stated that she had feared that she might be raped during the incident.

The next day F telephoned the Rape Crisis Line. A told her that their relationship was over because of his behaviour, saying he had *"crossed the line"*. F said she did not want the relationship to end. She went with A back to the basement gym and agreed to perform oral sex upon him. They had consensual sexual intercourse and F told A that she would not in future refuse his sexual demands.

Miss Levitt approached the first incident, that is when sexual intercourse did not take place, on the basis that F did not consent to A's conduct. However, she was of the view that a jury *"would struggle to be sure that <u>at the time</u> (her emphasis) he realised that she was not consenting to what he did… his subsequent expressions of remorse reflected a level of understanding which may not have existed at the time"*.

The second specific incident occurred 6 months later, in November 2009. A and F were in bed together and argued. F was upset and turned away from A who became aggressive and pulled off F's pyjama bottoms, tore her underwear and took her by the throat. The incident ended when a child in the house woke up.

In respect of this incident Miss Levitt's view was that a jury would be likely to conclude that a *"pattern of sexual force or roughness had developed between [A and F], to which there was at least a degree of acceptance on her part, and which he understood that she agreed to, even if reluctantly".* Accordingly, there was no realistic prospect of a jury being sure either that F had not consented, or that A had not believed that F was consenting.

The last specific incident, in February 2010, was the most serious. F did not want another child and A knew this. F could not take the contraceptive pill for medical

reasons. However, A did not like to use a condom and their agreed method of contraception was withdrawal.

A commenced sexual intercourse with F, who did not object. A was aware that F would not consent to him ejaculating inside her vagina. However, shortly after penetration, A said that he intended to ejaculate inside her *"…because you are my wife and I'll do it if I want"*. A then ejaculated before F could say or do anything and, as a result, F became pregnant.

As the relationship was ending, F sent e-mails to A complaining bitterly of the way he had treated her. A sent text messages to F seeking a reconciliation, including one saying *"I am sorry for raping you. I can think of no other word."* In later text messages he accepted he had *"…degraded [her], humiliated [her] from the first day…".* F made a formal complaint of rape at the end of May 2010. In his police interview, A denied ever forcing F to engage in sexual activity.

In relation to the third incident, Miss Levitt asked herself whether ejaculation without consent could transform consensual intercourse into rape. Her view was that <u>if</u> it could be proved that A had embarked on penetration intending to ejaculate and knowing that F did not consent to ejaculation, it might be argued that he knew she would not have consented to sexual intercourse. However, although penetration is a continuing act under section 79(2) of the Sexual Offences Act 2003 ("SOA 2003"), and despite what F alleged A had said during intercourse, Miss Levitt concluded that it would be impossible to prove that it was not *"a spontaneous decision made at the point of ejaculation"*.

HELD, ORDERING A JUDICIAL REVIEW, F consented to sexual intercourse on the clear understanding that A would not ejaculate inside her vagina. A deliberately

ignored the basis of F's consent to sexual intercourse as a manifestation of his control over her. Accordingly, her consent was negated and A had committed rape. The entire body of evidence should be reviewed and the decision not to prosecute reconsidered.

COMMENTARY:

The court began by emphasising that judicial control over the prosecutorial process generally arises only after a case has reached court. Where there has been a careful internal review of a decision not to prosecute, as occurred here (and as will be required now that the victim right of review has been introduced), it will be a *"very rare case indeed"* in which the court will interfere with that decision (at [4]). Nevertheless, the court ordered the DPP to review the entire body of evidence in light of their Lordships observations concerning the issue of consent.

The court focused on the third specific incident and considered whether A's actions constituted rape. The court noted that, although ejaculation is irrelevant to the definition of rape in section 1(1) Sexual Offences Act 2003 ("SOA 2003"), it may be relevant to the questions of consent and reasonable belief in consent.

Consent is defined in s.74 of the SOA 2003:

"A person consents if he agrees by choice, and has the freedom and capacity to make that choice."

Section 76 sets out two situations in which it will be presumed both that the complainant did not consent and that the defendant did not have a reasonable belief in consent, including:

"(2)(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act…"

The court confirmed that a decision by a defendant to ejaculate inside his partner against her wishes does not alter the nature or purpose of sexual intercourse, so s.76 is not activated. However, it may be relevant to whether her "choice" is "free" under s.74.

The court referred to *Assange v Swedish Prosecution Authority* (2011) EWHC 2849 (Admin), which was decided after Miss Levitt had concluded her review. In that case the court concluded that a deliberate decision not to use a condom, contrary to a complainant's express wishes, did not amount to a deception of the complainant as to the "nature" of the relevant act (*Assange* at [87]). Accordingly, a conclusive presumption under s.76 would not be triggered in such circumstances. However, deception as to the use of a condom was relevant to the issue of consent under s.74. A man who has sexual intercourse without a condom when his partner has made clear she will only consent to sexual intercourse if he uses one, commits the offence of rape under s.1 of the SOA 2003 (*Assange* at [86]).

In the instant case the court concluded that if, before penetration, A determined to ejaculate inside F and ultimately deliberately did so, F was "*deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based"* (at [26]). Accordingly, her consent was vitiated. The same conclusion would be reached if, after sexual intercourse commenced, A made the deliberate decision to ejaculate inside F, as penetration is a continuing act from entry to withdrawal (s.79(2)).

The court was at pains to underline that it was not concerned with situations where a man ejaculates prematurely or *"accidentally"* before withdrawal during an act of consensual intercourse. *"These things happen. They always have and they always will, and no offence is committed when they do"* (at [24]). The difficulty for prosecutors is that it will usually be impossible to prove that a defendant deliberately decided to ejaculate inside his partner's vagina, as opposed to having done so "accidentally". The instant case was exceptional in that the defendant (allegedly) announced his intention in advance to commit the act complained of (ejaculation contrary to the complainant's expressed and acknowledged wishes) and subsequently apologised in writing for committing an act of rape. These facts, against the background of the *"well evidenced history"* of A's sexual dominance of F and her *"unenthusiastic acquiescence"* to his sexual demands, led the court to conclude that there was *"evidence that he deliberately ignored the basis of her consent to penetration as a manifestation of his control over her"* (at [25]).

Although the facts of the instant case are, therefore, highly unusual, the judgment does have wider implications. The Divisional Court has recognised that a woman is entitled to consent to sexual intercourse on condition that her partner wears a condom or agrees not to ejaculate inside her vagina. Provided such a condition has been communicated to the defendant, a deliberate decision by him to ignore it will give rise to liability for rape.

This principle that consent may be conditional could lead to argument that *R v EB* [2006] EWCA Crim 2945 was wrongly decided. In *EB* the Appellant, who was HIV positive, had sexual intercourse with the complainant. The Appellant contended that intercourse was consensual, but conceded that he had not disclosed his HIV status. The court concluded that this non-disclosure was irrelevant to the issue of consent:

"Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act." (*EB* at [17])

In *EB* the court cited with approval the judgment in the case of *R v Dica* [2004] EWCA Crim 1103, where it was simply accepted that the non-disclosure of HIV positive status could not transform a consensual act of intercourse into a rape.

Following *Assange* and the instant case, it could now be argued that where a person has made consent to intercourse clearly conditional on the sexual health of the defendant, and the defendant, knowing that he is HIV positive, deliberately ignores that condition, liability for rape ought to ensue. If this is right, it creates myriad ethical and evidential dilemmas. Imposing liability only where a person has specifically made it clear that she consents on the basis that her partner is not HIV positive places a heavy onus on the potential victim. What if she is too drunk to remember to make such an enquiry (although not too drunk to consent to intercourse)? What if the defendant suspects but does not know that he is HIV positive? How would the law apply to other, more common but perhaps less harmful, sexually transmissible diseases?

What seems to be being decided in the instant case is that if a man misleads a woman, for instance his wife, as to his intention to ejaculate, her apparent consent is not a free choice and the man is guilty of rape. Further it would not in fact require ejaculation for the offence to be complete, as ejaculation is not an element of the offence of rape. Once the defendant has the intention, and penetration occurs, the offence is made out, regardless of the ultimate outcome. Yet, following *EB*, if a man who is HIV positive has unprotected sexual intercourse with a woman who does not know his HIV status, but who would never have consented to intercourse if she had

known, no rape is committed. The Appellant in *EB* was convicted of an offence contrary to s.20 of the Offences Against the Person Act 1861 ("OAPA"), which carries a maximum sentence of 5 years, because the unfortunate complainant did contract HIV as a result as the Appellant's actions. If she had not, no offence would have been committed beyond, perhaps, common assault. Which of those putative defendants, the man who ejaculates inside his wife, or the HIV positive man who has unprotected intercourse with a stranger, risking her life thereby, is the more culpable? Is it really only common assault (or s.20 OAPA) rather than rape simply because the sexual partner of an HIV positive man has not communicated a condition perhaps thought too obvious to need to be stated *("I consent to unprotected sexual intercourse on the understanding that you are not HIV positive"*)? It will be an absurdity if only a person who expressly makes such a statement is entitled to the full protection of the courts.

The decision in the instant case was based entirely on the court's analysis of the third incident and the extent to which F's consent to sexual intercourse was vitiated by A's conduct and intentions. It is surprising that the court did not explore the issue of the reasonableness of any belief that A may have had in F's consent, or refer to the accepted learning that consent should not be confused with submission.

In relation to the first incident, Miss Levitt accepted that F did not consent to A's actions. The only issue, therefore, was whether A might reasonably have believed that F was consenting. Miss Levitt concluded that a jury could not be sure that A realised at the time that F was not consenting. However, even if a jury thought that A might have believed that F was consenting, it would still have to consider the reasonableness of that belief. F's own lack of understanding would not be determinative of the issue of reasonableness. An objective test must be applied in

determining whether a defendant's belief in consent was reasonable (*R v B* [2013] EWCA Crim 3).

In relation to the second incident, Miss Levitt thought that a jury would be justified in concluding that F had come to accept the *"pattern of sexual force or roughness"* that had developed and that A understood that F accepted it, albeit reluctantly (at [13]). However, whether F was consenting or merely submitting was surely a matter for the jury to decide (*R v Olugboja* [1982] QB 320). The danger of Miss Levitt's approach is that it suggests that prosecutions may be less likely where there is a background of domestic violence, on the basis that a jury might equate the complainant's "reluctant acceptance" with consent. Furthermore, her analysis again appears to ignore the issue of whether A's belief in consent, if it existed at all, was a reasonable belief.

Nevertheless, the distinction between consent and submission, and the need for a defendant's belief in consent to be reasonable, have been explored in numerous previous authorities. The significance of the instant case is that it recognises that a person may consent to sexual intercourse on a particular basis. There is clearly a strong public interest in requiring men to respect the wishes of their sexual partners as regards ejaculation and the use of a condom. The question the courts will now have to address is whether the concept of conditional consent ought to be extended to other situations.

Gavin A Doig and Natalie Wortley