COMMENT:

Revelations that undercover officers (UCOs) were widely deployed to infiltrate political, social, and environmental justice groups for decades, caused much consternation. There has now been a surfeit of damning inquiries, investigations and reports, and the Undercover Policing Inquiry, commenced in 2015 and presently chaired by Mitting J, is (very slowly) attempting to establish the scope and impact of undercover operations upon individuals and the public. Concerns over the ethics of such policing operations were further heightened when it became clear that some UCOs had engaged in “intimate relationships with a number of people while undercover, and in doing so encroached very significantly into their lives” (*A review of national police units which provide intelligence on criminality associated with protest*, Her Majesty’s Inspectorate of Constabulary 2012). The UCOs used false personal details (“legends”), involving fictitious lives and histories, sometimes using the names of deceased children. Some UCOs entered into long-term and supposedly monogamous relationships with women associated with groups they were assigned to infiltrate. Some of these women, who had lived with UCOs and even had children with them, gave evidence to the Home Affairs Select Committee in 2013, indicating that they would not have engaged in intimate relationships if they had known the UCOs’ true identities. One woman told *The Guardian* that she felt she had been “raped by the state” (<https://www.theguardian.com/uk/2013/jun/24/undercover-police-spy-girlfriend-child?guni=Article:in%20body%20link>).

The Metropolitan Police Service issued a formal apology in 2015 to seven women (not including the claimant), stating that the relationships had been “abusive, manipulative, deceptive and wrong” and that a sexual relationship should “never be authorised in advance nor indeed used as a tactic of deployment” (apology quoted in judgment at [9]). The apology continued: “If an officer did have a sexual relationship despite this (for example if it was a matter of life or death) then [the UCO] would be required to report this in order that the circumstances could be investigated for potential criminality and/or misconduct”. One might legitimately wonder how a sexual relationship could ever be a matter of life and death but, in any event, there was no suggestion that this was the situation in respect of any of the women to whom the apology was issued. Some UCOs were indeed investigated in relation to offences they may have committed while undercover. However, although the apology had hinted that a UCO conducting an intimate relationship might be committing an offence, the CPS declined to prosecute any of the UCOs investigated.

“Monica” (as she is known in the Undercover Policing Inquiry, as well as these judicial review proceedings), was involved in a relationship with a UCO now known to be Andrew James Boyling, for seven months in 1997. She was an environmental activist and “under no circumstances would she have entered into any sort of relationship with Mr Boyling had she known the truth” (at [3]). Following representations made on “Monica’s” behalf, a specialist prosecutor undertook a “careful and fully independent consideration of all the available evidence [and] concluded that the decision not to prosecute in this case was in fact correct” (at [13]). The claimant applied for judicial review of that decision.

At the time of “Monica’s” relationship with Mr Boyling, the law of rape was governed by the 1956 Act. However, the specialist prosecutor’s review considered case-law both before and after the 2003 Act, “on the assumption that the provisions in the 2003 Act defining consent were declaratory of the law with the consequence that they wrought no change in the meaning of consent” (at 18]). The court adopted the same approach, although suggested it “may have been unduly favourable to the claimant” (at [48]).

Neither the 1956 Act, nor the common law, defined, “consent”, albeit it had long been recognised that there were two situations in which consent would be vitiated by fraud, namely where the complainant was deceived as to the nature of the act (*Flattery*) or as to the identity of the perpetrator (*Dee*). After much deliberation and debate, the 2003 Act did include a definition of consent (s.74), along with a number of evidential presumptions as to when consent would be assumed absent (s.75) and two conclusive presumptions (s.76). The section 76 presumptions were designed to reflect the settled common law on when deception may negate consent. Under section 76, it will be conclusively presumed both that the complainant did not consent to the relevant sexual activity and that the defendant did not reasonably believe the complainant was consenting, if:

“(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.”

The rule that consent was negated by deception as to the nature of the act developed in the context of cases in the 1800s, involving defendants who deceived women into believing that sexual intercourse was a medical procedure (*R. v Case* (1850) 169 E.R. 381, CCR; *Flattery*. However, the Court of Appeal in *R. v Tabassum*, CLW/00/20/7, [2000] 2 Cr.App.R. 328, went further when ruling that consent would be negated by deception as to the nature or “quality” of the act. Section 76(2)(a) was drafted to reflect this slightly broader approach, and consent is now presumed invalid if a defendant deceived the complainant as to the “nature or purpose” of the act. While there was no deception as to the nature of the act by UCOs, the court does not appear to have considered the possibility that there was deception as to purpose. The court was referred to the “Tradecraft Manual” issued to UCOs by the notorious Metropolitan Police’s “Special Demonstration Squad” (SDS). This document provided advice on how to deflect suspicion, instructing UCOs that “[i]f you have no other option… you should try to have fleeting, disastrous relationships with individuals who are not important to your sources of information” (at [8]). However, it appears the court accepted that a jury would be likely to conclude that Mr Boyling and “Monica” had “a genuine relationship based on mutual attraction” (at [16]). It remains unclear if this approach would be maintained in the case of a UCO whose purpose was to maintain his cover. However, case law suggests that deception as to purpose will be construed narrowly (*R. v Bingham*, CLW/13/32/7, [2013] EWCA Crim 823, [2013] 2 Cr.App.R. 29, CA; *cf*. *R. v Devonald*, CLW/08/32/6, [2008] EWCA Crim 527, [2008] 10 Archbold News 6, CA).

Deception as to identity (now found in s.76(2)(b)) was initially confined to “husband impersonation” cases (*Dee*; *Criminal Law Amendment Act* 1885, s.4). The rule came to encompass defendants who impersonated unmarried partners (*R. v Elbekkay* [1995] CrimL.R. 163, CA). The 2003 Act extends the scope of fraud as to identity to encompass impersonation of any person known personally to the complainant. There can be no suggestion that the UCOs were engaging in the sort of impersonation envisaged by these rules, having assumed the identities of dead children.

While the section 76 presumptions have been strictly construed, they are not necessarily determinative of consent where deception is involved. A deception that does not fall within the narrow scope of section 76 may nevertheless vitiate consent if it deprived the complainant of the freedom to choose whether to consent under section 74. Under section 74, “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. In contrast to the conclusive presumptions in section 76, the courts have adopted a broad approach to the concept of free choice enshrined in section 74. On the basis that Mr Boyling did not deceive “Monica” in either of the senses described in section 76, the question thus became whether a jury would be likely to conclude that “Monica” had consented, applying the “common sense” approach to consent required by pre-2003 Act case law, and the concept of “free choice” under section 74. Indeed, the claimant argued for just such a broad approach to deception and “choice”, arguing that consent ought to be considered invalid where “the deception went to a matter which the woman regarded as critical or fundamental to her decision-making in line with her individual autonomy”. “Monica’s” evidence was that “[t]he fact she believed [Mr Boyling] shared her core beliefs was central to her decision to enter into a relationship with him” (at [3]).

In attempting to synthesise the deception cases and derive some core principles, the court suggested that deception may negate consent in the following categories of case. First, where deception was accompanied by pressure or coercion (e.g. *R. v Jheeta*, CLW/07/27/2, [2007] EWCA Crim 1699, [2008] 1 W.L.R. 2582, CA) (at [69]). Secondly, where the deception was “closely connected to” the performance of the sexual act (at [80]). The court held that Mr Boyling’s deception did not fall into these categories. There was certainly no suggestion of any pressure or coercion, but it is unclear precisely what is required for a deception to be “closely connected with” the sexual act. The court considers the cases of *Assange* (removal or tearing of a condom) and *R. (F)* (where the defendant ejaculated inside the complainant’s vagina, contrary to her express wishes), each of which involved a deception we suggest altered the physical act, although not so as to engage s.76(2)(a). However, it is more difficult to see how the test applies to *McNally*, a case involving “deception as to gender” (at [75]). In the latter case, the Court of Appeal expressly acknowledged that the physical nature of the acts in question (assault by penetration) was not altered by the defendant’s deception. In analysing *McNally*, the court in the present case appears to take the view that “biological gender” is so fundamental, so “closely connected” to the performance of the sexual act, that deception as to gender, although not engaging section 76(2)(b), can be treated as a type of impersonation that negates consent (at [77]). The difficulty is that this reasoning is only sensible if one takes a narrow, traditional view of gender being assigned at birth, and it risks the courts creating their own controversial “exception” where fraud as to gender negates consent while other frauds do not.

Recent cases have demonstrated that the courts continue to struggle with examples of deception that are not covered by the section 76 presumptions. Their approach has been to expand section 74 and the concept of “free choice”. *McNally* is an uncomfortable outlier that has expanded the boundaries of consent where deception is involved, but the present case suggests that the courts will not be willing to expand it further. After the ruling, “Monica’s” lawyer stated: “It is most regrettable that such a much needed opportunity to clarify the law on deceit around consent in sexual relationships has been lost. As matters stand, on the one hand young women with mental health problems are prosecuted and imprisoned for deceiving as to gender while undercover officers who construct entirely false personas and enter into long term, intimate, sexual relationships in order to spy can continue to do so with impunity.” ([https://policespiesoutoflives.org.uk/monica-disappointed-by-todays-dismissal](https://policespiesoutoflives.org.uk/monica-disappointed-by-todays-dismissal/)).

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