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Watching you, watching me: Liability for voyeurism when the voyeur is also a participant in a private act

***R v Richards* [2020] EWCA Crim 95, Court of Appeal**

Key words – Voyeurism; secret filming of ‘private act’ by participant in the act; reasonable expectation of privacy

Tony Richards (R) had filmed himself on his mobile phone having sex with two prostitutes, SD and JW, in their own bedrooms. The recordings came to the attention of the police whilst they were investigating R for possession of indecent photographs of children. The police had seized the phone and found the recordings, which the police suspected had been made without the consent of the women. R claimed that both women had agreed to being filmed and that he had paid more for the privilege. The two prostitutes contradicted his version of events. SD gave evidence that she enjoyed being filmed and charged more when being filmed; but on this occasion, she had not known about the filming and hence was not consenting to it. JW, on the other hand, did not agree to being filmed at all, as she was worried about recordings ending up on the internet.

R was charged with two counts of voyeurism, contrary to s.67(3) of the Sexual Offences Act 2003 (the 2003 Act). This provides that ‘a person commits an offence if (a) he records another person (B) doing a private act, (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and (c) he knows that B does not consent to his recording the act with that intention.’ Section 68 of the 2003 Act adds that ‘For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy.’

R appeared before HHJ Lloyd-Clarke and a jury at Cardiff Crown Court in July 2019. During the trial, R submitted that there was no case to answer to a charge under s.67(3) where R was himself a participant in the private act. This was rejected by the trial judge. The jury was directed to determine whether JD and SW were in a place which would provide a reasonable expectation of privacy, and whether the acts of intercourse with R were ‘private acts’. R was convicted on both counts. R appealed, contending that JD and SW were not doing a ‘private act’ as far as he was concerned. He argued that they were not in a place which ‘would reasonably be expected to provide privacy’ from him, because he was not only in the same place (their bedrooms) with their consent but was participating in the allegedly private act.

HELD, dismissing the appeal, that a defendant ‘can be guilty of an offence of voyeurism in relation to sexual activity in which he participated... It follows that section 67(3), which protects against the recording of another person doing a private act, is not limited to protecting the privacy of the complainant from secret filming by someone who was not present during the private act in question.’

Commentary

As the New Zealand Law Commission put it, in their Study Paper, 'Intimate Covert Filming' [2004] NZLCSP 15, 'covert filming of people in intimate situations violates the arguably fundamental desire of human beings to control exposure of their own body' (at 2.10). In *Richards*, the jury and the Court of Appeal were asked to decide whether it made any difference whether or not the person doing the 'covert filming' was simultaneously an active participant in the 'intimate situation'. Put another way, could R say that JD and SW were not in a place which 'would reasonably be expected to provide privacy' at the time of the filming, purely because he was there too?

The answer was 'no', and the Court of Appeal was undoubtedly correct to say so. The court in *Richards* derived substantial assistance from the decision in *Bassett* [2008] EWCA Crim 1174, [2009] 1 WLR 1032. In that case, Hughes LJ, giving judgment for the Court of Appeal, drew a distinction between a person (V) being observed by another person (D) who chanced upon V in a 'casual and unintended' encounter, on one hand, and V 'being spied upon' by D, on the other hand. The former would not give rise to the offence of voyeurism, whereas the latter would do so. In other words, the fact that D observed V doing a particular act would only give rise to voyeurism in certain contexts.

To illustrate his point, Hughes LJ suggested that people using changing rooms in public swimming baths 'must expect to be observed unclothed, for some at least of the time, by other people who are also using the changing rooms'. This would not be voyeurism: 'There is, in short, no reasonable expectation of privacy from casual observation by other changing room users' (*Bassett* at [10]). Conversely, the same people in the same public swimming baths would 'have a reasonable expectation of privacy from being spied upon by someone outside who has drilled a hole in the wall for the purpose'. This would be voyeurism. The case of *Turner* [2006] EWCA Crim 63, [2006] 2 Cr App R (S) 51, illustrates this proposition perfectly. The accused in that case, T, was a sports centre manager who was charged with voyeurism, to which he pleaded guilty. His offending came to light after a female customer who was taking a shower in the changing rooms noticed a displaced ceiling tile and a camera lens in the gap. T pleaded guilty and was sentenced to 14 months' imprisonment, reduced to 9 months on appeal.

Returning to *Bassett*, Hughes LJ continued his analysis by stating that:

The question of whether the person observed had a reasonable expectation of privacy *from the kind of observation which ensued* is one for the jury in each case. We accept that that may well mean that in many cases the question of whether there is or is not a reasonable expectation of privacy will be closely related to *the nature of the observing* which is under consideration (*Bassett* at [11]; emphasis added).

Applying this analysis to the situation in *Richards*, Fulford LJ emphasised the importance of context. He said:

Whether a person is doing a private act in a place which, in the circumstances, would reasonably be expected to provide privacy will depend inevitably on the context... What occurred in the present case between [R] and the two women was a private act... There was a case for the jury to consider that this act of intimacy occurred in a place which, in the circumstances, would reasonably be expected to provide privacy from, for instance, a secret observer or a secret recording.

This proposition – that participants in intimate sexual activity are reasonably entitled to expect privacy from a ‘secret observer’ – can be illustrated by a Canadian case, *Keough* 2011 ABQB 312, a decision of the Court of Queen’s Bench of Alberta. In that case, the accused (K) had filmed a couple having sex in his spare bedroom. One of the participants knew about, and had agreed to, the filming; however, the other did not. K was convicted of voyeurism contrary to s.162 of the Canadian Criminal Code. This is worded in very similar terms to the 2003 Act. It provides, *inter alia*, that ‘Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy’ (s.162(c)). It hardly needs saying that the same conduct in this jurisdiction would lead to a conviction under s.67(3) of the 2003 Act.

Returning to *Richards*, Fulford LJ continued his analysis as follows (emphasis added):

The presence of [R] as one of the participants in the intercourse does not lessen the reasonable expectation of privacy in this sense, namely that what occurred would not be available for later viewing, even if only by [R]... A person who is engaging in an act of sexual intercourse alone with another in a bedroom is engaged in a private act in a place which, *prima facie*, would reasonably be expected to provide privacy from secret filming *on the part of the other participant*.

To reinforce this point, Fulford LJ cited with approval a hypothetical example provided by counsel for the Crown. In the example, a patient removes their clothes in the presence of a doctor. This would not amount to voyeurism (under s.67(1) of the 2003 Act). However, if it transpired that the doctor was secretly filming the patient, in order to watch the recording later for his own sexual gratification, then the offence under s.67(3) would have been perpetrated.

Another case cited by Fulford LJ in *Richards*, but only in passing, was the recent judgment of the Canadian Supreme Court in *Jarvis* [2019] 1 SCR 488. In that case, the Supreme Court explained the meaning of privacy in the context of the voyeurism offence in s.162 of the

Criminal Code. Wagner CJ (giving judgment on behalf of Abella, Moldaver, Karakatsanis, Gascon and Martin JJ) said, albeit obiter:

In my view, a typical or ordinary understanding of the concept of privacy recognizes that a person may be in circumstances where she can expect to be the subject of certain types of observation or recording but not to be the subject of other types. An obvious example is that of a person who chooses to disrobe and engage in sexual activity with another person and who necessarily expects to be observed by that other person while she is nude and engaging in that activity. *Her privacy would nonetheless be violated if that other person, without her knowledge, video recorded the two of them engaging in the activity* (para [38]; emphasis added).

Although this was undoubtedly obiter (Jarvis involved a very different situation to the emphasised words in the above quote), the collective judgment of six members of the Supreme Court of Canada provides strong support for the decision in *Richards*. Moreover, there is further Canadian authority to back up the decision in the present case. In *Mahabir* 2010 ONCJ, a decision of the Ontario Court of Justice, the defendant (M) was convicted of voyeurism and given a suspended sentence and probation for 18 months for surreptitiously videotaping consensual sexual acts in a Toronto hotel room in which he and the complainant (X) were participants. Although the couple had separated, and X was not only in a new relationship but engaged to be married, M persuaded her that he would have 'closure' if they had one last 'romantic date'. She agreed to spend the night with him in the hotel, and to be blindfolded whilst they had sex. However, after about an hour, the blindfold slipped and X saw that M was recording her with a camcorder. She demanded that he hand over the tape, which he did, and she took it to the police. At the end of trial, De Filippis J convicted M of voyeurism under s.162 of the Criminal Code.

Indeed, *Richards* is not even the first case involving this situation to have been dealt with by a court in England. In 2010, Benjamin Wilkins (W) pleaded guilty to 11 counts of voyeurism at Camberwell Magistrates' court. Five of those counts related to W having secretly filmed himself, using a camera hidden in a smoke alarm above his bed in his London flat, having sex with five different women. The camera was linked to a computer in his living room, which enabled W to transfer the recordings to DVDs. The offending came to light when W's girlfriend found the DVDs hidden in the loft. The case was transferred to the Inner London Crown Court for sentencing. There, Judge Roger Chapple said that 'Parties to consensual sexual activity give consent to sexual activity in privacy, not for their very private acts to be covertly filmed for your later gratification.'

Therefore, the law, both in this jurisdiction and in Canada, is now settled: a participant in intimate, sexual activity is reasonably entitled to expect privacy. That means that he or she is entitled not to be covertly or surreptitiously filmed either by a 'secret observer', as in *Keough*, or by the other participant, as in *Mahabir*, *Wilkins* and now *Richards*.