**CLW/20/28/7**

**7. Consent (sexual offences)** — *R. v Lawrance* [2020] EWCA Crim 971, unreported, 23 July 2020, CA.
  A positive lie by the defendant to the complainant about having had a vasectomy, where the complainant would not have consented to unprotected sexual intercourse had she thought him to be fertile, did not vitiate consent for the purpose of section 74 of the Sexual Offences Act 2003. The question is whether a lie as to fertility is so closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it that it is capable of negating consent. A lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so, and different from engaging in sexual activity having misrepresented one's gender. The consent here was given without any physical restrictions and the deception was one that related not to the physical performance of the sexual act but to risks or consequences associated with it. There was force in an analogy with *R. v B* [2006] EWCA Crim 2945, [2007] 1 W.L.R. 1567, CA, where the accused failed to disclose that he was HIV-positive prior to having sexual intercourse with the complainant. The transmission of the disease through sexual intercourse was not part of the performance of the sexual act but a consequence of it. It makes no difference to the issue of consent whether, as in this case, there was an express deception or, as in the case of *B*, a failure to disclose. The appellant's lie was not sufficiently closely connected to the performance of the sexual act and his convictions for rape in respect of this complainant were unsafe.
  **Key cases cited**: Distinguished – *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), [2013] 4 Archbold Review 7, DC; *R. (F) v DPP* [2013] EWHC 945 (Admin), [2014] Q.B. 581, DC; *R. v McNally* [2013] EWCA Crim 1051, [2014] Q.B. 593, CA. Considered – *R. (Monica) v DPP* [2018] EWHC 3508 (Admin), [2019] Q.B. 1019, DC.
  ***Archbold* 2020 reference**: 2003 Act, s.74, § 20-23.

**Date of judgment:** 23 July 2020

**Judges:** Lord Burnett CJ, Cutts J, Tipples J

Comment

  The courts have struggled to develop a consistent approach to the circumstances in which deception will negate consent under the 2003 Act. This latest case has applied the brakes to emerging concepts of conditional consent and active deception, opting for a narrow interpretation of section 74 over a broader view of consent that would take greater account of sexual autonomy.
  Section 76 of the 2003 Act created two conclusive presumptions of non-consent where a defendant either impersonates someone known personally to the victim, or deceives the victim as to the nature or purpose of the relevant act. It is well-established that section 76 is to be strictly construed (*R. v Jheeta* [2007] EWCA Crim 1699, [2008] 1 W.L.R. 2582, CA).
  Section 74 provides that "a person consents if he agrees by choice, and has the freedom and capacity to make that choice". The appellate courts had indicated that section 74 should be interpreted in a "broad commonsense way" (*F* at [26]; *McNally* at [25]), such that deceptions that fell outside the narrow confines of the section 76 presumptions might nevertheless negate consent if they deprived the complainant of the "free choice" required by section 74.
  However, in *Monica*, the Divisional Court emphasised (at [80]) that "an appeal to 'broad common sense' … does not relieve a court from the obligation of identifying the boundaries within which a jury will be asked to bring to bear their common sense and experience of life". Previous cases had suggested that the following considerations were relevant.

*Deception plus pressure*
  It has long been established that fraud accompanied by pressure can vitiate consent (*Jheeta*). Indeed, pressure may negate consent in the absence of any deception, because "consent must be freely given" (*R. v Kirk*, [2008] EWCA Crim 434, unreported, 4 March 2008, CA, at [88]).

*Conditional consent*
  In *Assange*, the Divisional Court held (at [86]) that, where a complainant "made clear that she would only consent to sexual intercourse if [the defendant] used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom…". In *F*, the complainant expressly stated that she did not wish the defendant to ejaculate during sexual intercourse. The defendant was liable for rape when he did so because he had "deliberately ignored the basis of [the complainant's] consent" (at [25]).
  *Assange* and *F* are often described as cases of "conditional consent", though these decisions gave rise to questions about whether – and how – the courts would limit the types of condition that would, if breached, result in sexual offence liability.

*Active deception*
  In *McNally*, the defendant, who identified as male at the relevant time and "presented as a boy" (at [7]), engaged in sexual activity with a 16-year-old girl who was unaware of the defendant's biological gender. Upholding McNally's conviction for assault by penetration, the Court of Appeal referred (at [21]) to the distinction drawn in *Assange* between non-disclosure and "active deception". While the case of *B* had decided that a defendant's failure to disclose his HIV-positive status could not give rise to liability for rape, the court in *McNally* noted (at [24]) that "*B* … was not saying that HIV status could not vitiate consent if, for example, the complainant had been positively assured that the defendant was not HIV-positive: it left the issue open".
  As with conditional consent, the concept of active deception required the court to delineate deceptions that would negate consent. After all, "[w]e may think it sleazy if a male lies about his marital status, affections or intentions in order to get a particular woman into bed, but many do not think that this is a particularly serious matter" (Alan Wertheimer, *Consent to Sexual Relations*, Cambridge University Press, 2003, p.193).

*Close connection with nature and purpose*
  The case of *Monica*, which concerned deceptions by undercover police officers, required the Divisional Court to address the parameters of "active deception". In so doing, that court abandoned the concepts of both active deception and conditional consent, and suggested that previous cases in which deception had vitiated consent under section 74 could be assigned to two categories: (a) conduct involving pressure or coercion (at [69]); or (b) deception "closely connected with the nature and purpose of the sexual act" (at [80]). As for *McNally*, the court in *Monica* suggested (at [80]) that gender deception was "intrinsically so fundamental, owing to that connection, that [it] can be treated as [a case] … of impersonation". Now, in *Lawrance*, the Court of Appeal has endorsed that view and ruled that a lie about having had a vasectomy is insufficiently connected to the nature and purpose of sexual intercourse to negate consent. It appears that the deceptions that vitiate consent are now limited to deceptions about condom-use (e.g. "stealthing"), deceptions about an intention to ejaculate (which may give rise to significant evidential hurdles), and deceptions as to gender. Deliberate deception as to HIV-positive status has effectively been ruled out as a basis for sexual offence liability (at [41]).
  The judgment in *Lawrance* was delivered by Lord Burnett CJ, who had co-authored the judgment in *Monica*,so in that respect the decision to adopt the "close connection" test is unsurprising. That approach also avoids the difficulties of having to decide on a case-by-case basis what conditions can be placed on consent and what constitutes "active deception". However, it is problematic for four key reasons.
  First, it is not clear why a lie about a vasectomy is insufficiently closely connected to the nature and purpose of sexual intercourse. Defence counsel had argued that *Assange* and *F* could be distinguished because "but for the deceit … the accused's ejaculate would have been prevented from entering the complainants' vaginas" (at [11]). In relation to the latter case, this assertion is medically questionable at best; withdrawal does not prevent ejaculate entering the vagina. Nevertheless, the court appears to adopt this reasoning by saying that the complainants in those cases imposed "physical restrictions" on sexual intercourse, whereas the lie in the present case went to "the nature or quality of the ejaculate" (at [37]). Yet it remains unclear why deception as to the quantity of the ejaculate (as occurred in *F*) should negate consent, while deception as to its quality does not. Both go to the risk of pregnancy and so it is arguable that both are closely connected to the nature and purpose of the sexual act. Distinguishing the present case from *Assange* also appears inconsistent considering that, had she known Lawrance was fertile, the complainant would have asked him to wear a condom (at [1]).
  The Court of Appeal was not persuaded that deception as to the risks associated with sexual intercourse was relevant to the issue of consent. In this respect, the decision is out of step with the position in Canada. In the case of *R. v Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, Supreme Court of Canada, the defendant sabotaged a condom and was convicted of sexual assault. The Canadian Supreme Court dismissed his appeal on the basis that "depriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy" gave rise to a "'significant risk of serious bodily harm' … and therefore suffices to establish fraud vitiating consent" (at [70]). Following *Lawrance*, the same facts would be likely to give rise to liability in England and Wales on the basis that the defendant's deception related to a "physical barrier", rather than due to the risk of pregnancy his conduct entailed. The Court of Appeal has made clear that deception as to the "risks and possible consequences of unprotected intercourse" is insufficient to vitiate consent (at [37]).
  Secondly, the shift away from "active deception" makes the decision in *McNally* increasingly difficult to justify. In that case, the court acknowledged (at [26]) that "in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female". It is difficult to understand how a belief about the gender of one's sexual partner is so "intrinsically fundamental" due to its "close connection with the nature and purpose of the sexual act" that it negates consent, while a belief that pregnancy is impossible does not.
  Thirdly, the Court of Appeal expressed concerns that, if a lie about a vasectomy were to negate consent, then "a woman who lied about her fertility in circumstances where the man would not otherwise have consented to sexual intercourse would be in the same position, albeit guilty of a different sexual offence" (at [37]). This observation misses the fundamental point that, in the latter case, the woman would be pregnant by choice. For the deceived woman, there are implications for both individual autonomy and bodily integrity, as the complainant may be forced to undergo pregnancy or a termination (as happened in *Lawrance*). That is not to say that liability should not attach if a woman is deceitful as to fertility, but that is a debate for another day and the two scenarios are not equivalent.
  Fourthly, section 74 refers to the "freedom and capacity" to choose, and the approach to these two concepts is now inconsistent. "Capacity" requires an understanding of the nature and character of the activity and its reasonably foreseeable consequences (*R. v A (G)* [2014] EWCA Crim 299, [2014] 1 W.L.R. 2469, CA). A woman who lacks the capacity due to a mental disorder to understand that sexual intercourse may result in pregnancy is protected by the 2003 Act. A woman who is deliberately deceived as to the reasonably foreseeable consequences of intercourse is not.
  The court in the instant case seeks to justify its narrow construction of section 74 and "free choice" by explaining (at [40]) that "deceit and deception are very slippery concepts which, at one end of the spectrum, may result from a clear short lie, through more obscure utterances, obfuscation or evasion, to conduct designed to convey an unspoken false impression. In this area it is difficult to draw clear principled lines which could distinguish a deceit resulting from one course from another". Yet in prioritising "close connection", while seeking to accommodate *McNally*, the court may well have replaced one "slippery concept" with another.

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