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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

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REGINA

-v-

WILLIAM WILKINSON

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Before: Girvan LJ, Coghlin LJ and Hart J

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GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal against conviction on one count of rape and one of attempted rape both contrary to common law. Leave to appeal was granted by the single judge on 12 January 2011. The appellant was charged on count 1 with rape and on count 2 attempted rape in respect of M ("the complainant"). The facts giving rise to the charges arose out of an incident which occurred on 21 August 2008. The appellant pleaded not guilty to the charges at Antrim Crown Court and was tried before His Honour Judge Miller QC ("the trial judge") and a jury. On 26 May 2010 he was found guilty on count 2 by a unanimous jury verdict. On 27 May 2010 he was found guilty on count 1 by a majority verdict (10 to 2). On 30 June 2010 the trial judge sentenced the appellant to seven years imprisonment on the charge of rape and seven years imprisonment (concurrent) on the charge of attempted rape. The trial judge also made an order under Article 26 of the Criminal Justice (Northern Ireland) Order 1996 and he also made a Sexual Offenders Prevention Order pursuant to Section 107 of the Sexual Offences Act 2003.

[2] Leave was also granted in respect of an application to appeal against sentence. On the hearing before this court on 6 June 2011 submissions were made only in relation to the appeal against conviction. The appeal against sentence will have to be dealt with at a later date.

The offences

[3] The charges arise from allegations made by the complainant in the context of sexual activity occurring between her and the appellant in the bedroom of her home in Coleraine in the early hours of 28 August 2008. She alleged a course of sexual activity by the appellant involving, firstly, the sexual penetration of her without her consent and, secondly an attempt by the appellant to penetrate her again without her consent. It was the appellant's case that while he had sexual intercourse with the complainant he did so with her consent and that his sexual actions thereafter were consensual.

The general factual background

[4] It was not in dispute that the parties had for a period of over a year been in a relationship which had from the outset involved sexual relations.

[5] During the currency of that relationship the appellant was also involved in a more serious longer term relationship and had in fact become engaged to another woman who was unaware of the relationship between the appellant and complainant.

[6] Throughout their relationship the complainant had regularly and repeatedly expressed to the appellant her disapproval of his drinking to excess verbally and in text messages up to and including 21 August 2008.

[7] Having arrived at the complainant's home at approximately 8.30 pm the appellant consumed 2 or 3 bottles of beer over a period of some 30 minutes. The complainant also had a number of sips of his beer at her home.

[8] The appellant and the complainant then went to McNulty's Bar in Coleraine arriving there about 9.00 pm. He consumed between 2-4 pints of Harp beer and the complainant had two vodkas.

[9] The appellant and the complainant then went to Kelly's Nightclub in Portrush arriving at some point between 10.00 pm and 11.00 pm. He there consumed a further 2-3 pints of beer and a vodka and Red Bull drink. The complainant had 2-3 vodkas over approximately 2½ to 3½ hours. They left together for the house at approximately 1.25 am after the complainant complained of feeling ill, the taxi journey home taking about 10-15 minutes.

[10] Dr Stevenson, a police forensic officer observed the appellant between 5.00 am and 5.52 am. He considered him unfit for interview noting a strong smell of alcohol, increased pulse and a slightly unco-ordinated staggering gait.

[11] The complainant accepted that the appellant was drunk and that she too was quite drunk.

[12] The evidence of a toxicologist established that both parties would have considerably been under the influence of alcohol at the time of the alleged sexual activity. He concluded that the appellant would have been approximately three times over the drink driving limit and the complainant would have been approximately twice that limit. The expert gave evidence that these results placed both parties into a specific range in which the individual would tend to go to extremes, either becoming very depressed or very giggly with a loss of critical judgment, impaired perception, memory and comprehension, decreased sensory response, increased reaction times, sensory motor inco-ordination and impaired balance and drowsiness.

[13] The evidence of the participants placed a number of matters in issue:

(a) The complainant claimed that she had changed from her social clothing to her nightwear before she got into bed and before any sexual activity commenced. The appellant however claimed that they had initially lain on the bed in their clothes which were then gradually and mutually removed during evolving sexual activity. She claimed that he had removed her lower clothing by force. The appellant denied that. The appellant complained that the complainant had only put on her nightwear after the sexual activity had ceased at a time when he had left the bedroom to obtain a bottle of beer from the utility fridge.

(b) It was the appellant's evidence that he and the complainant had consensual increasingly intimate sexual relations starting with kissing and hugging developing into mutual touching and culminating in full consensual sexual intercourse. The complainant claimed that he had initiated uninvited forced sexual activity which she had attempted to reject through continuous physical resistance and verbal protest. It was her case that she had expressly told him that she did not want sex.

(c) The complainant suggested that the appellant, having initially penetrated her, slipped out of her and got off her then getting on top of her again, attempting to penetrate her this time using his hand in the second failed attempted penetration. He denied any second attempted sexual intercourse had taken place.

(d) The complainant in her evidence said that during the second alleged attempted penetration she grabbed a bedside phone and tried to phone the police by dialling 999. This would have involved a right-handed grab of the phone and the pressing of

the digit 9 three times. It was the defence case that the locating of the phone and the pushing of the number 9 followed by the subsequent depression of a separate green button occurring as it did in the hours of darkness at a time when the complainant was under the influence of alcohol, was not possible. This allegedly occurred at a time when on her account she was being sexually assaulted by the appellant on top of her. The complainant in her evidence said that the phone was dropped and she was unaware as to whether contact had been established. The evidence established that in fact contact with the emergency services had been established and there was a recording of what was heard at the receiving end. The complainant was heard to continuously repeat an exhortation to "get off me". This recording was played to the jury in the course of the trial.

(e) It was the complainant's evidence during her evidence-in-chief that she kept shouting and telling the appellant that she did not want to have sex and to "stop, stop, stop" after she had dropped the phone. The recording of the conversation during that 999 call does not contain reference to those words. Nor was there reference to the appellant calling her "a dirty bitch", as she claimed he had said during this second attempted rape incident. The recording did not record the sound of struggle or activity.

(f) The complainant said that after the sexual activity had stopped she was alerted to a dead tone on the dropped phone prompting her to seek to grab it with the appellant then grabbing her and bending her fingers forcibly back. The appellant denied the finger bending allegations and claimed that the only time he saw the complainant with the phone in her hand was after the termination of the sexual activity and after the assault on the bed at a time when the complainant had threatened to call the police if he did not leave the house before she stormed out of the bedroom.

(g) The appellant's case was that there was no 999 call at any time in his presence during the sexual activity in the bedroom.

(h) The appellant's case was that the phone call was a contrivance. The complainant had made it at a time when she was alone from some other place in the house or its immediate environs after she had left the bedroom. He claimed that it had been a staged event to bring about the removal of the appellant from the house.

(i) The appellant's case was that this stratagem was carried out in the immediate aftermath of an increasingly bitter exchange of words punctuated by an actual physical assault by the complainant on the appellant.

(j) After the police arrived at her house, the complainant asserted that nothing had happened and that she just wanted the appellant out of her house. Subsequently she alleged that after the couple got into bed she told the appellant that she was not prepared to have sex and she said that he had forced her. In response to a query from PC McGonigal as to whether "penetration" had occurred she asserted that he had penetrated her. She rehearsed that assertion in a repetition of the question and answer exchange at the officer's request before PC Hutchinson. Some time later, while still in her house, she gave her account in front of her friend H. She again used the word "penetration". It was the appellant's case that the leading question by PC McGonigal had put the word penetration into the mouth and mind of the complainant.

(k) The complainant later at about 6.00 am told a CID officer that the appellant had "tried" to rape her and "tried" to have sex with her.

(l) The complainant claimed that she had physically resisted during the sexual activity and scratched the appellant on his back, neck and arm. His injuries were observed by Dr Stevenson. The appellant attributed those injuries to the physical exchange between the parties which had occurred during a bitter argument after the sexual activity had long concluded. He claimed that the argument was due to the fact that he had gone to the kitchen to get a bottle of beer after the sexual activity on the bed which he claimed had annoyed the complainant again about his excessive alcohol consumption. The complainant confirmed that she had on previous occasions scraped the appellant.

(m) Dr Hall, a police forensic medical officer, noted no genital injury or trauma to the complainant but did note some bruising to the complainant's right arm and left forearm which were considered typical of fingertip pressure. It was the appellant's case that this was consistent with both the complainant's version and the appellant's version about the physical exchange between the parties after the termination of the sexual activity.

(n) It was the appellant's case that the Command and Control entries proved by the ex-police officer Mr Clarke suggested that sexual relations had begun consensually but the complainant had changed her mind and then tried to fight him off. His entry was later corrected after Mr Clarke spoke to PC Hutchinson who denied that such a claim had been made by the complainant to the officers initially at the scene.

Grounds of appeal

[14] In the opening the appeal Mr McCrudden QC who appeared with Mr Kearney for the appellant, abandoned a number of grounds of appeal originally put forward. He dealt with two separate main issues. Firstly he contended that the trial judge's directions to the jury were inadequate in dealing with the issue of mens rea and in particular in his directions relating to the question of recklessness. Secondly it was argued that the summing up failed to fairly and adequately put the defence case in relation to the evidence relating to the telephone call.

The issue of mens rea and recklessness

[15] Counsel argued that the trial judge correctly identified three primary general issues which fell for determination by the jury (whether sexual intercourse had taken place in respect of count 1 or was attempted in respect of count 2, whether the complainant consented to it and whether the appellant knew that she did not consent or was reckless whether she did or did not consent.) No question arose in relation to the first two issues on which the direction was accepted to be correct. In relation to the way in which the trial judge dealt with the state of mind of appellant counsel contended that the trial judge had misled the jury. The trial judge simply directed the jury without the further amplified definition, explanation and guidance necessary to appropriately inform them for the discharge of their collective responsibility that there had to be penile penetration of the vagina at a time when the complainant did not consent and the appellant either knew that she did not consent or was reckless as to whether she consented or not. Counsel argued that the trial judge did not seek to relate that general direction to any consideration of the relevant evidence. Since the ultimate outcome of the case may well have been reached on the basis of jury satisfaction about recklessness (as opposed to knowledge) the failure of the judge to properly legally define and explain recklessness created a vacuum in which the jury may well have applied their own lay definition of recklessness. There could be no safe presumption that the jury properly knew and applied the law of recklessness in relation to rape without proper instruction. It was unlikely that the jury would have followed the correct determinative path to a properly arrived at conclusion. Furthermore, counsel argued that the trial judge did not direct the jury on the issue of possible genuine mistaken belief

in consent. They were not advised that they must acquit if they found that he may genuinely have believed that she was consenting. Neither did the trial judge invite the jury when considering whether the appellant may have held this genuine belief to consider the presence or absence of reasonable grounds for such belief with particular reference to the communication difficulties caused by the considerable alcohol consumption by both parties. The undisputed expert prosecution evidence put both parties in a range whereby they were likely to be suffering from impaired perception, comprehension, memory and from a loss of critical judgment.

The judge's summing up

[16] Dealing with the charges set out in the Bill of Indictment the trial judge said to the jury:

> "The first (count) is a charge of rape contrary to common law and it alleges that the defendant raped, had unlawful sexual intercourse with M on 21 August 2008 and at the time the offence was committed she did not consent and that he either knew that she did not consent or was reckless as to whether she consented or not."

Having dealt with the question of what in law constituted sexual intercourse and whether the complainant consented to it he went on to refer again to the third element thus:

> "I am going to go through with you what her evidence was, but in short form she says at no stage did she consent. Thirdly, that he either knew that she didn't consent or was reckless as to whether she consented or not. With regard to that, he is quite unambiguous because he says relations took place, sexual relations took place and that throughout they were consensual. So we have diametrically opposed views, but the legal definition of rape is that there has got to have been penetration to the slightest degree of the vagina by the penis at a time when the injured party did not consent and that the defendant knew that she didn't consent or was reckless as to whether she consented or not. That is rape."

He then went on to turn to the conflicting cases of the complainant and the appellant and said:

> "Now as I have said to you there are two diametrically opposed views expressed in this case by M on the one part and Mr Wilkinson on the other. She says that not only did she not consent at any stage to having sexual relations with him on the night in question but that she expressed that refusal both vocally and physically throughout. He, however, adamantly asserts that all intimacy was with her full consent and that any arguments or fights between them took place after the consensual activity was completed. It will be for you to determine the core factual issues and reach your collective conclusion on the charges in the light of both the directions I have given and your findings of fact."

[17] Having outlined the accounts given by each party the judge later stated:

> "It is quite clear as I have said that they are diametrically opposed on these central issues with M asserting that the defendant raped her by having intercourse against her will and then by attempting to do so again. Mr Wilkinson however makes the case that all acts of intimacy were with her full consent and that discord only broke out after these acts had concluded."

[18] As has been stated clearly in a number of authorities there is no general requirement applicable in all rape cases that a direction should be given to the jury that the defendant was not guilty of rape if he genuinely believed the plaintiff was consenting although such a belief might have been mistaken. As Lord Lane CJ pointed out in R v Taylor [1985] 80 Cr. App. R 327:

> "The nature of the evidence and, of course, particularly the evidence given by the complainant and the defendant will determine whether or not such a direction is advisable and whether to give such a direction would be fair. There must be room for mistake in the case before such a direction is required."

In R v Adkins [2000] 2 All ER 185 at 191 Roch LJ said:

> "In our judgment the cases demonstrate that (counsel) is wrong in his primary submission that whenever the

> issue of consent arises there must be a direction as to honest belief. Such a direction need only be given when the evidence in the case is such that there is room for the possibility of a genuine mistaken belief that the victim was consenting. In our view this accords with the basic principle that the jury should not be subjected to unnecessary and irrelevant directions. Similarly, it is only when the issue of honesty arises on the evidence that the requirements of Section 1(2) of the 1976 Act apply. We also reject the alternative submissions. The question of honest belief does not necessarily arise where reckless rape is in issue. The defendant may have failed to address his mind to the question whether or not there was consent or be indifferent as to whether there was consent or not, in circumstances where, had he addressed his mind to the question he could not genuinely have believed that there was consent.
>
> Accordingly, the question we have to ask ourselves is whether on the evidence in this case it was open to the jury to reach a verdict that the defendant could honestly but mistakenly have believed that there was consent. We are satisfied this was not a possible inference on the facts."

[19] In the present case the Crown case was that the complainant did not consent, the appellant knew that she did not consent and proceeded notwithstanding. The defence case was that the complainant did consent at all material times to the appellant's sexual conduct. On the run of the evidence in this case, as in R v Adkins, it was not open to the jury to reach a verdict that the defendant could honestly or mistakenly have believed there was consent from a non-consenting woman. That was not a possible inference on the facts before the jury. As in the case of R v Adkins:

> "It was never his case that he believed she was consenting to intercourse. His case was that she had not merely consented: she had actively facilitated him having intercourse with her."

[20] Analysed in that way and having regard to the actual issues arising in the case it was unnecessary for the judge to raise the issue of recklessness at all. Inasmuch as he did, what he said to the jury was correct as far as it went. The terminology used followed the wording of the indictment which reflects the common law definition of rape. However, Mr McCrudden has some justification in his criticism of the lack of guidance to the jury as to what was

meant by recklessness, a term which is not free from ambiguity in a legal context. The trial judge in R v Adkins in an admirably succinct and clear direction which the Court of Appeal did not criticise stated that "a man is reckless as to whether the woman consented to sexual intercourse if you are sure that he neither knew nor cared whether she was consenting or not. In other words his state of mind was that he could not have cared less." The lack of definition in the trial judge's direction, however, does not call into question the safety of the verdict since the jury's finding demonstrated that they must have been sure that the complainant's account was reliable.

The telephone call

[21] The judge in his summing up dealt with the question of the phone call as recorded in three passages. Firstly at page 15 of his summing up he stated:

> "On the second occasion (the complainant) grabbed the phone which was located on the base of her side of the bed – and if you look at Exhibit 21 Photograph 6 and 7 you can see the bedside table and you see that there is a phone in a base. ….. She said that she pushed the numbers, she was not sure if the call had connected as she couldn't see the phone properly to see what she was doing and the struggle was still going on. At some point the phone dropped from her hand. She believes it was at this stage that she scraped Mr Wilkinson including once which she thinks was extremely hard. She also believes that she tried to bite him at one point and is uncertain as to whether she succeeded in doing so. He then got off her and she was able to put her pyjama shorts back on. At this point she could hear the tone from the phone indicative of a phone that had been left off the hook. She went to grab the phone again and he then grabbed her hand and bent her fingers back. She said 'Get off me please just get off me'. …"

At page 18 of his summing up dealing with Mr McCrudden's cross-examination of the complainant as to the mechanics involved in her grabbing the phone he said:

> "Mr McCrudden cross-questioned M as to the mechanics involved in her grabbing the phone and hitting the keypad so as make the 999 call as she alleged. He suggested that she had not made the call in the presence of the defendant or indeed in the bedroom. You will recall his questions of the

> toxicologist about the effects of drink and on fine movements such as thumb movements and he has made his submissions to you in that regard. You will bear those in mind. It was argued that the ongoing concern about Mr Wilkinson's drinking led M to effectively crack when he came back into the bedroom with the beer and prompted the attack by her on him. He put it to her in terms that the 999 call was a fit up designed to get the defendant out of the house. Then it was stated that later when the police arrived this fit up was then developed into the false accusation of rape. …"

At page 19 of his summing up the judge went on:

> "Now, the matter remains, however, for you to determine whether you consider that you are satisfied so that you are sure that the 999 call which you have heard played was made in the circumstances described by M. Is it the call made by a distraught woman fighting off a man who is attacking her as she says or is it a call made perhaps by a distraught woman but one who has deliberately manipulated the situation to create a wholly false impression as the defendant asserts? It is a matter for you, members of the jury, but you might consider that your answer to that question will have a very real and direct bearing on your assessment of the central issues you have to determine in this case. You will bear in mind the particular submissions made by Mr Connor with regard to the call and by Mr McCrudden on behalf of the defendant to you this morning."

[22] The trial judge's summing up followed on the closing speeches of counsel in which defence counsel had the last word before the trial judge directed the jury. The defendant had a full opportunity to deploy all the points he wished to rely on to undermine the telephone evidence. The judge drew the jury's attention to the thrust of the prosecution and the defence case on the issue. The appellant has not persuaded us that the summing up was deficient or that it failed to set out fairly the appellant's case on the issue.

Disposal of the appeal

[23] For these reasons we dismiss the appellant's appeal against conviction.