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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 28 January 2020

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LORD JUSTICE FULFORD

MRS JUSTICE CHEEMA-GRUBB DBE

MRS JUSTICE FOSTER DBE

R E G I N A
v
TONY RICHARDS

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Mr J Rees QC and Mr J Evans appeared on behalf of the **Appellant**

Mr J Price QC appeared on behalf of the **Crown**

Mr J Bunting appeared on behalf of the **Intervener**

J U D G M E N T
(Approved)

THE VICE PRESIDENT: On 24 April 2019 in the Crown Court at Cardiff, before Judge Rees, the appellant, who is aged 39, pleaded guilty to three counts of possession of indecent photographs of a child, contrary to section 160(1) of the Criminal Justice Act 1988 (counts 3, 4 and 5). On 15 July 2019, before Judge Lloyd-Clarke and a jury, he was convicted of two counts of voyeurism, contrary to section 67(3) of the Sexual Offences Act 2003 (counts 1 and 2).

On 2 August 2019 he was sentenced as follows. On counts 1 and 2, the offences of voyeurism, he received concurrent sentences of nine months' imprisonment. On count 3, possession of indecent photographs of a child, there was a consecutive sentence of six months' imprisonment, and on counts 4 and 5, again possession of indecent photographs of a child, there were two concurrent sentences of three months' imprisonment. The total sentence therefore was 15 months' imprisonment.

Having been convicted of an offence listed in schedule 3 of the Sexual Offences Act 2003, the appellant was required to comply with the provisions of Part 2 of that Act, notification to the police for 10 years. He was also made subject to a Sexual Offences Prevention Order pursuant to sections 104 and 106 of the Sexual Offences Act 2003 for a period of 10 years and ordered to pay a surcharge of £140. An order was made for the forfeiture and destruction of the indecent material.

He appeals against his two convictions for voyeurism by leave of the single judge.

The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. No matter relating to the two complainants shall, during their lifetime, be included in any publication if it is likely to the public identification of either of them as a victim of these offences.

The appellant came to the attention of the police through his possession of indecent photographs

of children. As part of that investigation, the appellant's Samsung mobile telephone was seized and its contents were accessed. It contained videos of sexual acts in relation to which the police suspected the three women participating had not consented to being filmed. Two of the three women were identified and questioned by the police. They both subsequently made a complaint and the appellant was prosecuted for the offences of voyeurism.

The appellant accepted that the recordings were made for his own sexual gratification and formed part of a sexual fantasy. The two complainants worked as escorts or prostitutes and had had intercourse with the appellant in their bedrooms in return for payment. The prosecution case was that although the appellant was participating in the sexual acts, the filming occurred in a place that could reasonably be expected to provide privacy from the two women being filmed.

Instead of playing the two video recordings, given their explicit nature, the prosecution relied on evidence from a police officer as to their content. For count 1, the appellant had his mobile telephone in his hand before he placed it on a bedside table. During sexual intercourse the appellant looked over at the telephone, but the woman (SD) did not and indeed appeared to knock it over. SD said in evidence that she enjoyed being filmed and charged a higher price if this occurred. This had not been agreed with the appellant and she had not given her consent. For count 2, there was no mention in the footage that filming was taking place. The woman (JW) said in evidence that she had not consented to being filmed by the appellant and would not have done so as she would be worried about any footage appearing online.

The appellant's case at trial was that both women had agreed to the filming and that he had been charged a higher price for this additional service. As the case was left to the jury, the

principal issue was whether there had been on each occasion a private sexual act which involved a reasonable expectation on the part of SD and JW of privacy from being filmed.

On a submission of no case to answer, the judge ruled that the offence of voyeurism under section 67(3) of the Sexual Offences Act 2003 could be committed by a participant in the private act as defined in section 68. The judge left as issues for the jury to determine whether there was a reasonable expectation of privacy and whether the act of intercourse was private.

The appellant, in written and oral submissions from Mr Rees QC, accepts that SD and JW had an expectation of privacy. However, he argues that section 67(3) and section 68 would only provide protection if the filming occurred in a place that could reasonably be expected to provide privacy and in the instant case the relevant place was the respective bedrooms of the two women which, as he contends, could not provide them with privacy from the appellant who was present with their consent, and participating in the activity that was filmed. Thus, it is the appellant's contention that privacy for the purposes of sections 67 and 68 is to be assessed, certainly in part, in relation to the location of the person alleged to have observed or recorded the complainants. Put another way, it is argued that as regards the appellant, this was not therefore a private act because the venue in relation to him was not private.

It is suggested in the grounds of appeal that the heading of section 67, voyeurism, reveals the kind of activity which the section is designed to capture. The offence, it is submitted, is aimed at protecting an individual from a voyeur or 'peeping Tom' who will necessarily be observing or recording another's private act and that, for the purposes of the offence under section 67(3), the offender could never be a participant in the act being recorded.

We are additionally cautioned in the grounds of appeal against criminalising activity that it had

not been intended should come within the offences created by section 67(3). In this regard, we are reminded of the observations of Lord Diplock in DPP v Bhagwan [1972] AC 60 at page 82 that the constitutional function of the courts in relation to a statutory offence is limited to interpreting and applying it and that it is not a function of a judge to add to the derogation of rights which subjects previously enjoyed at common law. Similarly, in DPP v Withers and others [1975] AC 842, it was emphasised that the courts had no power to create new offences: see for example at page 860. We are urged not to criminalise activity that on a proper reading falls outside section 67(3) and in this regard Mr Rees emphasises that this section does not criminalise a breach of trust and Parliament did not legislate simply to criminalise filming with a lack of consent which he argues reflects the true position in the instant appeal.

For the Crown, it is submitted there was a reasonable expectation of privacy given the two complainants had not consented to what was a private instance of sexual intercourse being filmed. In those circumstances, it is suggested that the issue of privacy was properly left to the jury and the appellant was properly convicted of voyeurism. Furthermore, it is emphasised that these events occurred in a bedroom which is a highly private place and that there would arguably be a strong expectation that what occurred at that location would not be capable of being viewed on a later occasion. Mr Price QC on behalf of the prosecution submits that in a case such as the present this will involve detailed consideration of the place where, and circumstances in which, the observation occurs. We return to the submissions of Mr Price a little later in this judgment.

Emily Hunt, who is the applicant in a linked judicial review claim - in the sense that many of the same issues arise in her case which will be heard after this appeal - was allowed, without objection, to intervene on general issues through Mr Bunting of counsel. He submitted

that Parliament focused in implementing these provisions not only on the place where the activity occurred, but also on the circumstances. He emphasises that section 67 does not provide that the relevant act must be private from the person making the recording for the purposes of the offences created by subsections (2) and (3). He emphasises that the statutory purpose was to protect those who suffer nuisance and distress when they are observed or recorded doing an intimate act in a private place. This is in part based on the Home Office publication "Setting the boundaries" July 2000, which preceded the implementation of the present act of Parliament: see paragraph 8.3.1.

Mr Bunting submits that the provisions of Article 8 of the European Convention underpin the suggestion that a person can have a reasonable expectation of privacy even in respect of a place in which other people are consensually present. Furthermore, under the relevant jurisprudence a person's image and the control of it is a chief attribute of an individual's personality which, he submits, should enjoy protection: see Reklos and Davourlis v Greece [2009] EMLR 16 at paragraph 40.

Additionally, we were taken to R v Ryan Jarvis [2019] SCC 10, a decision of the Supreme Court of Canada in which many of the present issues were the subject of discussion.

Section 67 includes the following:

> "Voyeurism.
>
> (1) A person commits an offence if—
>
> (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
>
> (b) he knows that the other person does not consent to being observed for his sexual gratification.
>
> […]

(3) 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 provides the following definition of voyeurism:

"(1) 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, and—

(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,

(b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

[…]"

Many of the issues arising on this appeal were considered in R v Bassett [2008] EWCA Crim. 1174, [2009] 1 Cr.App.R 7. The accused in that case took a video camera secreted in a bag into the male changing room at a public swimming pool. He was discovered observing and either filming or intending to film a man taking a shower. The man was wearing swimming trunks and the shower had no door and was thus open to the general space of the changing room. He did not dispute that he was observing the man for the purposes of sexual gratification and that the man did not consent to being observed for such a purpose. The principal questions in that case were, first, whether he was doing a private act, in the sense that he was in a place and in circumstances which could reasonably

be expected to provide privacy, and second, whether because he was bare-chested his 'breasts' were exposed for the purposes of section 68(1)(a). The court determined that the circumstances could afford a reasonable expectation of privacy; that was a matter properly left to the jury, save that there was a question as to the precise directions the judge had given. The court did not resolve the issue of the adequacy of the directions because the appeal was allowed on the separate basis that 'breasts' did not refer to the male chest.

As Hughes LJ observed, it is possible to be engaged in an activity at which others are present whilst nonetheless having an expectation of privacy for the purposes of this offence. He put the matter as follows:

> "7. It is clear that it is perfectly possible to have a reasonable expectation of privacy without being wholly enclosed or wholly sheltered from the possibility of being seen. The marathon runners in Swyer [2007] EWCA Crim. 204, who had gone behind a hedge or into a shrubbery to urinate, had an expectation of privacy from being pursued and watched. They did not need to be in an enclosed lavatory cubicle to have that expectation. Indeed the reason why they had gone where they had was to find a degree of privacy. We agree therefore with the judge's ruling in this case that the absence of a door to the shower does not conclude the issue.
>
> 8. That however leaves open the real question of how far for the purposes of this very particular statutory definition the expression 'privacy' is relative and begs the question 'Privacy from what?' Privacy generally means and is defined by the Shorter Oxford Dictionary to mean 'The state of being withdrawn from the society of others or from public attention ... freedom from disturbance or intrusion or public attention ... absence or avoidance of publicity or display.'"

For the purposes of this appeal, we emphasise the ingredient of being withdrawn from public attention and the absence of publicity or display.

Hughes LJ continued:

> "9. The marathon runners had a reasonable expectation of being undisturbed by Mr Swyer loitering to watch them relieving themselves and with or

without the hidden camera that he in fact had with him. It does not follow that the runners had an expectation for privacy, reasonable or otherwise, from someone such as a walker of his dog who happened unexpectedly and unwittingly upon them. It seems to us that they did not have any expectation of privacy, reasonable or otherwise, from that kind of chance encounter. They took the risk that such an innocent encounter might occur. If such a hypothetical innocent dog walker had happened to derive some sexual gratification from what he or she saw, there would still be no voyeurism because there is no reasonable expectation of privacy from a casual and unintended encounter with a stroller. It is clear from the statute that it is not voyeurism simply to derive sexual gratification from observing something which is not a private act. If, on the other hand, the hypothetical dog walker did not walk on by but loitered for many minutes, closely watching the runners relieve themselves, it is possible that the point would be reached at which the runners had a reasonable expectation of privacy from the kind of observation that was now going on.

10. In the context of changing rooms and similar places the layout of them no doubt varies considerably from place to place. It may be that there are some more or less conventional differences between the layout of the majority of men's changing rooms and those that are provided for women, at any rate where the premises are open to the general public. Even in such places however the layout may well vary considerably from place to place and certainly it is likely to vary as between private clubs, sports or health facilities, places of work and similar places. However, unless such changing rooms consist almost entirely of separate wholly enclosed cubicles, it is normally inevitable that those who use them must expect to be observed unclothed, for some at least of the time, by other people who are also using the changing rooms. Consistently with the statutory policy which we have described it is clear that no offence of voyeurism is committed if that kind of observation takes place and even if in fact the observer derives sexual gratification from what he or she sees. There is, in short, no reasonable expectation of privacy from casual observation by other changing room users. By contrast, the fact that a number of men or women are standing naked at a row of unenclosed showers in a men's or women's changing room, and thus can be seen by anybody else passing through the changing room and using it, does not mean that those in the showers do not have a reasonable expectation of privacy from being spied upon by someone outside who has drilled a hole in the wall for the purpose.

11. The range of possible circumstances which exists between those comparatively plain cases shows 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. That in turn may mean that the question of expectation of privacy may have an indirect link to the purpose of the observer. It is however plain that it is the nature of the observation rather than the purpose of the observation which may be relevant to the expectation of privacy. As we have already said, the presence of sexual gratification in the observer does not ipso facto mean that the observation is one from which there is a reasonable expectation of privacy."

In the present case, two things were taking place simultaneously. The first was a consensual and private act of sexual intercourse involving the appellant and the two women, SD and JW. Self-evidently no offence of voyeurism under section 67(1) occurred in those circumstances. The second was the deliberate and covert filming of the sexual activity. We need to consider whether this secret recording met the particular requirements of the offence created by section 67(3). This involves asking the questions as to whether it was open to a jury to find that the appellant had recorded another person i) doing a private act for the purposes of section 68, ii) with the intention that he, or someone else, would, for the purpose of obtaining sexual gratification, "look at an image" of SD or JW doing the act, iii) knowing they had not consented to his recording what occurred with that intention.

It was accepted that the appellant recorded the act of intercourse for the purpose of obtaining sexual gratification when replaying the recording. There was a clear issue for the jury to resolve as to whether the two women had consented to the filming. It follows that the only element of the offence that requires more detailed consideration is whether he had recorded a private act for the purposes of section 68, given he was one of the participants.

The approach taken in Bassett significantly assists in answering this question. 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. With the two groups of the runners relieving themselves and those using communal changing rooms, there would have been an expectation of privacy, albeit this would not have applied to observation by the

other runners passing water or those also using the changing rooms, or by someone who chanced upon either of those two scenes. What occurred in the present case between the appellant and the two women was a private act at which they were the only people who witnessed what occurred while the intercourse was taking place. 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. The presence of the appellant 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 the appellant.

It may, at least initially, be an unexpected result that a defendant can be guilty of an offence of voyeurism in relation to sexual activity in which he participated. But in our judgment, this reflects the clear terms by which the offence in section 67(3) has been created. Returning to the Bassett example, there was no reasonable expectation of privacy from casual observation by other changing room users, even if one of them derived sexual gratification from what he or she saw. But if one of the other users ceased being a casual observer and, as in Bassett, used or intended to use a video camera secreted in a bag in the changing room to record those present, this was arguably occurring in a place which, in the circumstances, would reasonably be expected to provide privacy from that kind of activity, and the individual was at risk of committing or attempting to commit an offence under section 67(3) (depending on whether the other ingredients of the offence were, *prima facie*, made out).

Thus, as observed by David Selfe in his commentary in the Criminal Law Review 2009, 193, 2-4 on Bassett, the expectation of privacy may vary depending on the precise relationship between the person observed and his or her observer. A person naked in a communal

changing room clearly does not have an expectation of privacy as regards other genuine users, even if one of the other users coincidentally gains sexual gratification from the other person's nakedness. But the person observed has an expectation in respect of some unknown person who is secretly observing him or her from outside. We would add that similarly 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.

Mr Price for the respondent in addressing the importance on focusing on the particular circumstances of the alleged offence, has provided the telling example of a patient who removes his or her clothes in a doctor's surgery in order for the latter to perform a legitimate and intimate medical examination. There will be two participants to this activity. The patient would reasonably expect that his or her body, revealed purely for the doctor's examination, will be viewed only once, that is during the consultation. Clearly such an event could not constitute an offence under section 67(1). In contrast, it would be open to a jury to conclude there was a reasonable expectation of privacy against the secret filming of that examination enabling the doctor to view what occurred afterwards for his or her sexual gratification. We consider this example persuasively illustrates how, in this second and markedly different context, a participant to certain activity can be guilty of a section 67(3) offence if he or she secretly records what is otherwise a lawful event in which they 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 and we accordingly reject Mr Rees's ably-made submission that the case should have been halted at half-time

because the bedrooms of the complainants did not and could not reasonably be expected to provide them with **privacy from the appellant.** That latter suggested limitation is not, explicitly or implicitly, to be found within the criminal offence created by section 67(3).

In conclusion, we are of the view that it was right for the judge to leave the case to the jury, even though the appellant was a participant in the sexual activity that he covertly filmed.

There is no substantive complaint as to the summing-up or any other aspect of the course of the trial. This appeal is accordingly dismissed.

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