APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 9
HCA/2020/000217/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal against Conviction

by

AA

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson, Sol Adv; Paterson Bell (for Ron McKenna, Defence Solicitors, Glasgow)
Respondent: A Edwards, QC AD; Crown Agent

9 February 2021

[1] The appellant was convicted after trial of two charges of sexual assault contrary to section 3 of the Sexual Offences (Scotland) Act 2009; first, on 11 August 2018 in respect of A, while she was intoxicated through consumption of drugs and alcohol, by unfastening her clothing, touching her on the vagina and attempting to cause her to touch his penis; second, on 14 December 2018 in respect of B, while she was sleeping, and thus incapable of giving or

withholding consent, by entering her bed, unzipping her clothing and touching her on her vagina. A co-accused was also convicted on a charge of raping A at the same time and place referred to in the first charge.

[2] There is a single ground of appeal, namely that the learned trial judge misdirected the jury by failing to address the issue of reasonable belief that complainer A was consenting, it being asserted that this was a live issue in relation to charge 1. The trial judge in his report explains that in his view the matter of reasonable belief was not on the evidence a live issue in the case of charge 1.

[3] The ground of appeal, prepared by the solicitor advocate who conducted the trial, asserts that certain directions relating to absence of reasonable belief as applying to the circumstances of charge 1 were necessary, "given the content of the appellant's evidence that this was a live issue". The case and argument, prepared by the solicitor advocate in the appeal, who was not present at the trial, states:

> "The appellant gave evidence about consensual acts initiated by the complainer. In addition the complainer for charge 1, … gave evidence from which it could be inferred that the appellant could have had a reasonable belief that the complainer was consenting. The jury would be entitled to believe some aspects of the evidence of the appellant and some aspects of the evidence of [A].
>
> There was evidence that [A] got into bed with the appellant, that she was cosying up to him. There was evidence from the complainer from which it could be inferred that the appellant could have had a reasonable belief about consent. The jury were entitled to accept parts of the evidence and reject other parts."

[4] There was no further specification of the evidence upon which these assertions were based, nor any engagement with the summary of evidence provided by the trial judge. It was suggested that the court might be assisted by a transcript of A's evidence and this was obtained, along with a transcript of the evidence of the appellant.

[5] The transcripts show, as had been narrated by the trial judge in his report, that the assertions that the appellant "gave evidence from which it could be inferred that the appellant could have had a reasonable belief" in consent were erroneous. The appellant's evidence was not that there had been circumstances which he might wrongly have interpreted or mistaken for consent, which were such as to give him a reasonable belief in consent, but that there had been active and willing participation, and thus overt consent.

[6] When asked, in evidence in chief, whether anything physically had happened between them, he said yes, "she went down and grabbed my, ehm, grabbed me on my crotch …. I touched her on her vagina, on top of her jeans." Asked whether matters progressed from there, he said: "Yeah …. she went down, put her hand on my dick, eh, underneath, sorry, on my penis, and then I went to go under, like, her jeans and touched her on her private parts as well."

[7] In cross examination the following exchange took place:

> "You put your hand down her [A's] trousers and put your hand on her vagina, didn't you? … Yeah, with, with her consent.
>
> And you took her hand and you placed it on your penis rather than the other way round. - No."

Accordingly, the appellant's defence in the present case was that the complainer initiated a sexual encounter between the two which was consensual throughout. His evidence described what is referred to in para 17 of *Maqsood* v *HMA* 2019 JC 45, as "a situation in which the complainer is clearly consenting and there is no room for a misunderstanding". It was not suggested by him that he had a reasonable belief that the complainer was consenting, nor was it suggested to the complainer that the circumstances were such as to leave room for a misunderstanding on the part of the appellant. The case was wholly presented on the basis, as the trial judge notes in his report, that the complainer's consent

was demonstrated to him not by passive submission or other circumstances, which he might conceivably have mistaken for consent, but rather by her active and willing participation, touching him sexually as he touched her, over a period of a couple of minutes. There is no basis for the assertion that reasonable belief in consent was a live issue in the trial in this case and the appeal must be refused.

[8] It was submitted that, on the assumption that reasonable belief was a live issue in the case, the trial judge required to direct the jury that an absence of reasonable belief in these circumstances required to be corroborated, relying on paragraphs 31 and 34 of *RKS* v *HMA* 2020 JC 235. We recognise that, as the court in *Maqsood* remarked in relation to *Graham* v *HM Advocate* 2017 SCCR 497, those two paragraphs of *RKS*, in isolation, are capable of being interpreted that way. However, paragraph 35 states in terms that

> "Nothing which has been advanced on the appellant's behalf causes us to think that what the court said in either of the cases of *Graham* or *Maqsood* ought to be reconsidered."

[9] In *RKS* the court held that the question of reasonable belief had not arisen as a live issue, thus the question of the directions which might be needed where this was a live issue did not arise for determination in the case, and the reference to corroboration, made *per incuriam* as the first sentence of paragraph 35 clearly shows, was *obiter*. The law continues to be as stated clearly in *Maqsood* paragraph 16:

> "In *Graham* v *HM Advocate* the court (Lord Justice-General (Carloway), para 23) explained that, although an absence of belief was an essential element of the crime of rape, it did not require "formal proof". This latter expression was intended to mean that it did not require to be established by corroborated evidence. Whether an accused had, or did not have, a reasonable belief was an inference to be drawn from proven fact (eg the use of force or, in this case, signs of obvious intoxication). The accused's mental element did not require to be supported by corroborated testimony. Thus far, the matter ought to have been clear. That clarity ought to have been heightened by the model directions (para 26) that it was only intentional penetration and lack of consent that required corroborated evidence. However, the court recognises that the phraseology of the opinion in *Graham* (para 24) may have been

interpreted as meaning that in some cases, in which reasonable belief was a live issue, there did require to be corroborated evidence of a lack of reasonable belief and thus a direction on that matter. That is not what was intended. Rather, the court was simply attempting to say that no direction on reasonable belief was required unless that issue was live. It so happened that the specific direction in *Graham*, with which the court was dealing, was one relating to corroboration."