Directions judgment in relation to aspects of consent in a Rape case.

[2024]GRC065

IN THE ROYAL COURT OF GUERNSEY

Between:

THE LAW OFFICERS OF THE CROWN **Prosecution**

-v-

XY **Defendant**

Decision handed down: 5th September 2024

Before: John Russell Finch, Esq O.B.E. Lieutenant-Bailiff

Counsel for the Prosecution: Advocate S. Watson;
Counsel for the Defendant: Advocate C.A. Tee.

Materials referred to in Decision:

The Sexual Offences (Bailiwick of Guernsey) Law, 2020
The Sexual Offences Act, 2003

Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin)
McNally [2013] EWCA Crim 1051
R (on the application of F) v DPP [2013] EWHC 945 (Admin)
R C on the application of "Monica" v DPP and Boyling [2018] EWCA 3508 (Admin)
R v Lawrance [2020] EWCA Crim 971
R v Linekar [1995] QB 250
R v Jheeta [2007] EWCA Crim 1699

Rook and Ward on Sexual Offences (6th Edition)

Background

1. The Defendant ("D") faces one count of rape. His trial, following a plea of not guilty, is scheduled for four days commencing on 10 September, 2024. On 3 September, 2024 submissions on the law were made on his behalf and the Prosecution ("P") responded. These oral submissions were based on the written skeletons and supporting materials put forward on behalf of D and responded to by P. The short time between the oral hearing and the trial is hardly ideal, but the very crowded state of the Court Calendar at present would likely result in a trial not before February 2025, if the slot was not available.

2. The charge reads that on 29 October, 2023 D raped the Complainant ("C") *"by intentionally penetrating the vagina of that person, without consent and reasonable belief of such consent"*. This is contrary to the relatively new statute, the Sexual Offences (Bailiwick of Guernsey) Law, 2020 ("the Law"). There are many similarities between this Law and the English Sexual Offences Act, 2003, but also some differences. These are helpfully set out in P's skeleton, at Table 1. However, in considering the arguments adduced by counsel, these are not significant

in formulating the decision. As in all cases of this type the facts are paramount, but the legal directions for the Jurats need to be considered first. A number of English cases have been referred to, and these will be treated as highly persuasive authorities, particularly when dealing with the largely corresponding Act.

Relevant Factual Matters

3. These are to be found in P's Statement of Facts, pages 21-25 of P's bundles and in D's Fourth Reiteration of Defence Case Statement, dated 29 August, 2024. The factual background bares considerable similarities with the well-known case of Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin), included in D's bundles at pages 74-80. No set of facts is ever identical with another, but there are considerable similarities between that case and the present matter.

4. P alleges that the parties met after contact on a dating application site and WhatsApp. This was about a week prior to the alleged offence. On 29 October, 2023 they met for a drink and then proceeded to C's home. P states that D initiated sexual conduct without a condom. C said that she would not have sex without a condom and suggested they went upstairs to her bedroom, where some were kept. It is alleged that D wanted to have sex on the sofa and not go upstairs, C, however, insisted upon the use of a condom. They went upstairs. It is alleged that D did not want to use a condom, as he would be unable to climax if one was used. The next allegation is central to P's case: C stated that if he wanted to have sex, he would have to use a condom. D then agreed to wear one if she really wanted him to. (Underlining supplied).

5. D then, it is stated, put on the condom and they began to have sex in the missionary position. D then, it is also stated, moved C onto her front and paused before resuming vaginal penetration from behind her. Another important part of P's case is that C says D removed the condom discretely and without telling her and continued having sex with her without it, and, therefore without her consent (Underlining supplied). Although, as P puts it (paragraph 13 of the Summary of Facts) *"she suspected he had removed the condom, she did not challenge him and they continued to have sex"*. D then removed his penis from C's vagina and moved to perform oral sex on her. C could then see clearly, it is alleged, that D was not wearing a condom and asked D if he had removed it. It is then alleged D responded by saying he had only removed it just then. C then, she says, challenged him saying D had *"clearly taken it off before sex had stopped"*, which was denied. There was then a conversation that C describes in many ways as being *"awkward"*. C says D *"kind of convinced"* her that it did not happen, so sexual contact was resumed. C then performed oral sex on D and alleges that she could *"taste"* that his penis had been inside her without a condom. She put this to D, which he again denied. She then asked D to leave.

6. After D left it is stated that he returned about two minutes later, apologised to C and said that he had taken the condom off. C asked, it is alleged, if D had done this on purpose and C said that he responded *"I didn't mean to do it on purpose"*. After D departed C called her mother and then the Police. Before they arrived D texted C (the message is set-out in P's paragraph 19) saying, inter alia, he was *"sorry for the way things ended"* and *".... I take responsibility. I wish it never happened."* In interview D stated that he only took the condom off after he had finished having vaginal sex with C, and, that he only said afterwards that he had done it in order to appease her.

7. D's Defence Case Statement shows the fundamental factual issues that the Jurats will need to resolve. It is averred that C did not make the wearing of a condom as a condition to her consent to the relevant act by D. It was put forward *"as a mere invitation or request prior to the relevant act to which he agreed"*. So C consented to vaginal penetration *"whether a condom was worn or not, and he reasonably believed she so consented"*. (Underlining supplied). The Defence Case Statement then deals with other factual scenarios. If it is determined on the facts that C

regarded the wearing of a condom as a condition of her consent to the *"relevant act"* by D, he did wear it *"throughout the entirety of the relevant act"* (Underlining supplied) and hence fulfilled this condition, and the Defence Statement adds *"regardless whether he had to"*. So C consented and D reasonably believed she so consented. The Defence Case Statement then puts forward the contention that if it is found C did make the wearing of a condom as a condition of her consent and D did remove it as she alleges, then regardless that she presented the wearing of the condom as a condition of her consent, D's non-fulfilment of the condition *"was not such to vitiate that consent, she still agreed to the relevant act by her own choice"*, and had the freedom and capacity to do so. It is right to observe, when considering these points, that on the facts set-out D stands by the proposition that D did wear a condom throughout the incident, having agreed to C's *"invitation or request to wear one"* and wore it throughout the duration of the intercourse, not removing it until he *"pulled out at the termination of the sexual intercourse"*. It will therefore be seen that at the heart of this case lies in the two starkly different factual accounts provided by the persons involved.

Applicable Legal Principles

8. This is a case where English authorities exist, which will be followed for the reasons that will be given. The considerable similarity with Assange has already been referred to. The case is produced in D's bundle Tab 5. There is a most helpful and detailed analysis of the cases in Rook and Ward on Sexual Offences (6th Edition), which can be found in P's bundle at Tab 5, and shows paragraphs 1.213 to 1.249. (This text is an indispensable guide to dealing with all types of sexual offending). The main point is that the list of cases following Assange does not detract from the Divisional Court`s decision on the facts. It is not necessary to embark upon a minute micro- examination of the cases. The main principles are, with respect, clear. The facts can be stated quite simply: there the Complainant alleged she would only consent to sexual intercourse if the Appellant used a condom throughout, but nevertheless he went on to have unprotected sexual intercourse with her. The Divisional Court (this was an extradition case) held that Section 76 of the English Act (Section 5 of the Law – *"conclusive presumptions about consent"*) did not apply. As Rook and Ward put it (paragraph 1.218) *"The question of consent, and the issue of materiality of the use of a condom, fall to be determined by reference to Section 74"* (Section 3 of the Law – *"Meaning of "consent" "*). Rook and Ward add that *"It would be open to a jury to hold that, if the Complainant had made clear that she would consent to sexual intercourse only if the Appellant used a condom, then there would be no consent, if without her consent, he did not use a condom, or removed or tore it"*.

9. Assange was followed in McNally [2013] EWCA Crim 1051, and R (on the application of F) v DPP [2013] EWHC 945 (Admin). The question of deceptions was, however, mentioned in R C on the application of "Monica" v DPP and Boyling [2018] EWCA 3508 (Admin) – see footnote 209, Page [84] of Rook and Ward. So in the F case the victim had only consented to intercourse on the basis that the Defendant withdrew before ejaculation. There was evidence to that effect, and also, he deliberately ignored the basis of her consent as a manifestation of his control over her. Rook and Ward, at paragraph 1-221 quote some of the observations of Lord Judge CJ, which conclude with the words~:

> *"Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape"* (at [26]).

The full report is in D's bundle at divider 6.

10. The "*narrowing*" cases are the "Monica" case and also R v Lawrance [2020] EWCA Crim 971 (Divider 7 and 8 of D's bundle). The "Monica" case was rather unusual, it concerned a judicial review of the D.P.P's decision not to prosecute a former undercover C.I.D officer for rape and

other offences allegedly committed when he was in a relationship with the claimant, who was an environmental activist. She felt as if she had been abused, as throughout the officer had maintained his false identity, having infiltrated the "Reclaim the Streets" movement. Having considered the authorities, both before and after the implementation of the 2003, Act the Divisional Court (in the words of Rook and Ward 1.226) *"concluded that consent had only ever held to be initiated by deceptions which are closely connected with the performance of the sexual act, or are intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation"*. (the latter being a nod to the classic old cases). The Assange line of cases was accepted. Again, using the words of Rook and Ward (at 1.232) *"It derived from Assange the proposition that deception which is closely connected with "the nature or the purpose of the act", because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, is capable of negating a complainant's free choice for the purpose of Section 74 of the Act. It proceeded to reconcile subsequent cases on consent with this formulation."* Hence, the F case and the McNally case were not disapproved. Later on in Lawrance the Court of Appeal further developed the legal situation. There D had been convicted of rape when the Complainant agreed to unprotected sexual intercourse because of the false representation the Appellant had had a vasectomy. The situations in Assange, F and McNally were distinguished. In the case before it, the Court of Appeal found that the complainant had agreed to sexual intercourse without imposing any physical restrictions. Again, referring to Rook and Ward (as 1.245) *"The deception related to those risks (i.e. of unprotected sexual intercourse) and consequences, rather than the physical performance of the sexual act. It followed the Appellant's lie had not deprived her of the right to choose whether to have sexual intercourse and it was not capable of vitiating consent."* So, whatever criticisms have been made of the later cases, particularly Lawrance, the decisions in Assange and subsequent similar cases remain the law in England.

11. For these reasons the Royal Court rejects this invitation not to follow Assange. English cases, as stated in paragraph 2 above, are of the highest persuasive authority and the Divisional Court`s reasoning has been endorsed by the English Court of Appeal. The alleged facts in the present case, it is repeated, are considerably similar to the situation in Assange, so that any purported distinction on those alleged facts would be artificial and forced. Nor is there any reason to weaponize the "Monica" and Lawrance cases, as they accept the reasoning in the Assange line of cases. If the evidence presented by P is consistent with the written materials that show C's account of the facts, that it follows a direction on the lines of Assange is called for. Advocate Tee, with her customary refreshing realism, observed in her oral submissions that subsequent consensual sexual activity does not legitimise earlier conduct. This is correct, but such evidence may be relevant to credibility which is for the Jurats to evaluate.

12. Some reference was made to the earlier cases of R v Linekar [1995] QB 250 and R v Jheeta [2007] EWCA Crim 1699. In Linekar (of course a case under the old law in England) the appellant had tricked a prostitute into having intercourse with him for a payment of £25. He never intended to keep that promise and made off without paying. On appeal the rape conviction was quashed, as the complainant's consent was not destroyed by the fact that the appellant had never intended to pay her. (D's Bundle Divider 9). In Jheeta (D's Bundle Divider 4) the facts were *"bizarre and unpleasant"* (paragraph 5 of judgment). The appellant enacted a complex scheme whereby the complainant, a student, was induced to have sexual relations with him by pretending she would be liable to a fine if she did not. Earlier there had been a succession of false messages purportedly from police officers offering protection from threats he himself had issued. Sir Igor Judge P stated that the presumptions in Section 76 of the 2003 Act (Section 5 of the Guernsey Law) had no application. The case showed that deceptions outside the ambit of Section 76 may lead to an absence of consent under the general provision on consent in Section 74 (Section 3 of the Guernsey Law). In Jheeta the Appellant`s course of deceptive conduct *"had deprived the complainant of the freedom to choose whether or not to have intercourse with him"* (Rook and Ward 1.216). It was these situations that were clarified in Assange. In the present case, consent and the relevance of the use of a condom fall to be

determined under the general principles set-out in Section 74, and in Section 3 of the Guernsey Law.

Conclusion

13. Depending on how the evidence comes out, it is therefore proposed to direct the Jurats in accordance with Assange and Section 3 of the Guernsey Law. The other directions will draw on the very full guidance in the English Bench Book on the offence of rape. Counsel are thanked for their clear and concise written and oral submissions.

J.R. Finch O.B.E
Lieutenant-Bailiff

5th September 2024

[Verdict: Not Guilty].