Neutral Citation Number: [2008] EWCA Crim 1155

Case No: 200702154 D3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
His Honour Judge Stow QC
Croydon Crown Court
T20067211

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2008

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MR JUSTICE BEAN
and
THE HONOURABLE MR JUSTICE WILKIE

- -

Between :

C	**Appellant**
- and -	
R	**Respondent**

(Transcript of the Handed Down Judgment of
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Richard Wormald for the Appellant
Johannah Cutts QC for the Respondent

Hearing dates: 16 April 2008

- -

Judgment
As Approved by the Court

Lord Phillips of Worth Matravers CJ

Introduction

1. This appeal concerns the scope of section 30 of the Sexual Offences Act 2003. On 22 March 2007 at the Crown Court at Croydon before HH Judge Stow the appellant C, now aged 41, was convicted on count 1 of the indictment of the offence of "sexual activity with a person with a mental disorder impeding choice" contrary to section 30(1) of the Sexual Offences Act 2003.

2. On 27 April 2007 he was sentenced to imprisonment for public protection with a minimum term of 54 months less 307 days spent on remand. He appeals against conviction by leave of the single judge.

3. His co-defendant, TC, was convicted on counts 2, 3, 4 and 5 of the indictment, each being an instance of the same offence. He was sentenced to eight years imprisonment concurrently on each count.

The complainant and her history of mental disorder

4. AK, the complainant, is a 28 year old woman who has an established diagnosis of schizo-affective disorder, emotionally unstable personality disorder (borderline type), an IQ under 75 and is subject to harmful use of alcohol. The schizo-affective disorder typically manifests itself in periods of illness and periods of recovery, depending on the success of treatment. During relapse the sufferer may suffer delusions, hallucinations and affective disorder. This latter is a disorder of mood principally manifesting as depression or mania. Emotionally unstable personality disorder is an intrinsic abnormality of: personality; mood; ability to interact with people; thought processes; and thinking style. It is typified by emotional instability. The sufferer has a tendency to become very upset without a rational cause, to act impulsively without thinking of the consequences, to develop very unstable relationships and to perform repeated acts of self harm. These characteristics are lifelong. Each of these disorders is a mental disorder for purposes of the Mental Health Act 1983.

5. The complainant was first referred to the psychiatric services in December 1997. Subsequently she had at least four admissions to hospital, the last three being periods of detention under the Mental Health Act. Relapses were characterised by lengthy episodes of impulsive and aggressive behaviour and dramatically increased levels of agitation. In March 2003 she was transferred to hospital. During her period in that hospital she was subject to lengthy episodes of apparent relapse and disordered behaviour. After a period of apparent stability, she was discharged to X care home, in June 2006 on a supervised discharge order to live in the community.

6. Louise Hannan is a community psychiatric nurse and care co-ordinator. She worked with the complainant initially towards the end of 2005 when she was at St Andrews and was assigned to her when she transferred to X care home. Initially she saw her

two to three times a week. She would either contact her by phone or go to the Tamworth Road resource centre to see her.

Events leading up to and following the complaint viewed from the perspective of the psychiatric team

7. The complainant's behaviour first appeared to deteriorate around 21 June 2006 following a disagreement with another female resident at the X care home over a small loan. Her level of agitation and distress escalated. On 26 June she threatened to leave the home and spent the night of 26/27th at a friend's house. It was on that basis that Dr Mark Picchoni, a psychiatrist who was part of the Croydon Community forensic team, was asked to assess her on 27 June. Mrs Hannan saw the complainant on 27 June in the morning outside the resource centre. The complainant called her and asked to see her. She was unsettled and distressed. It was difficult to engage with her or find out what was wrong with her. She kept on repeating that she wanted to leave Croydon, that people were after her and that she did not want to die. She could not tell Mrs Hannan what the problem was. Mrs Hannan was concerned and wondered if she was becoming unwell. She asked Dr Picchoni to conduct a mental health assessment to see if she needed to return to hospital. Dr Picchoni saw her. According to Mrs Hannan, she was difficult to engage and was not keen to come in to see the doctor. Eventually she saw him for between 20 and 30 minutes. She was pre-occupied with what was going on and wanted to leave Croydon. She could not tell them what was going on. She was quite guarded, distressed and unable to say why she had to leave Croydon. Dr Picchoni's evidence was that, during the short assessment, she spoke with diminished spontaneity and limited content. She could not answer any questions relating to her mood or emotions, nor what had gone wrong with her relationships. Due to the brevity of the interview, which the complainant terminated leaving the centre, he did not have the opportunity to establish the presence or absence of more frank symptoms of mental illness, in particular, delusions or hallucinations. He concluded, despite the brevity of the assessment, that she was in relapse. He and Mrs Hannan decided to inform the local police so that if she was picked up she would be brought to the Y Hospital or the X care home to complete the assessment. He felt there was evidence of deterioration in her mental health in the light of which, having regard to her past history of deterioration associated with an escalation of risk, he completed the first medical recommendation for admission to hospital for treatment under section 3 of the Mental Health Act.

8. Having left the resource centre the complainant phoned Mrs Hannan a couple of times on her mobile phone. On the third occasion she rang she said she needed to use the toilet. Mr Hannan told her to come back to the centre but she did not see her again that day.

9. Following the events which comprised the alleged offences committed by the appellant and Mr TC, the complainant was found by police in the vicinity of a car park. She was returned to X care home and she was reassessed by Dr Picchoni on the afternoon of 29 June. On that occasion she was more co-operative but she was still ill. Although she had relapsed, in the light of the allegations she was making, he decided not to complete the assessment for her detention under the Mental Health Act. Mrs Hannan saw her on 28 June. She was very distressed and unable to talk. She appeared traumatised and lay on the bed in a foetal position. Mrs Hannan was present when the complainant was video interviewed by the police.

The complainant's evidence

10. The complainant's evidence was adduced in chief, in the form of an interview conducted with the police on 29 June and videoed. The narrative of that interview started with the events of 27 June. In cross-examination she gave evidence about her prior history and the events leading up to the 27th June.

11. She was born and grew up in Croydon. She did not go to school much, did not like it and got bullied. She left school when she was 15. She did her youth training scheme in child care at a nursery for 1½ years but had a nervous breakdown because of things which had happened in the past. She had lived at home with her parents but then got a council flat in New Addington where she lived with her husband P. She had a child Laura and lived with her mother-in-law. She had been in hospital for a while, sometimes in Croydon and sometimes elsewhere. She remembered St Andrews where she was for about 3 years. She had left St Andrews in 2006 and moved to X care home. She moved because she wanted to be more independent and to be nearer her daughter. She thought she would be alright doing her running and fitness. She had a cousin called D who was married to A. One day D called her a nutter when she was shopping and said she would fucking break her head if she saw her again. D had done that because the complainant had grassed her up for stealing her baby's money. The complainant was scared and wanted to get out of Croydon. She had lent some money to someone at the X care home. They had used it to buy cannabis and had not repaid her which made her angry. That was just before D threatened her. She was afraid because of D and A.

12. She had started doing drugs when she was 13, her husband P drank a lot but did not take drugs. She had sometimes run away and taken drink and drugs. She had run away once from Y Hospital. She was upset because she did not like the mixed ward she was on. She sometimes smuggled drugs into hospital and asked friends to bring them in for her including cocaine, amphetamines and cannabis. She did that when she had had enough. When D swore at her she wanted to get out of Croydon, she had had enough, she had a mountain bike.

13. In her video interview she said she left X care home because she was so angry. She got her bike and bag and just left. She was ringing Louise all the time. It was raining, it was really wet. She went to the graveyard and just sat there, it was so peaceful. Louise said to her that she must be soaking wet. The complainant said to Louise that she had better go and started riding her bike. Her phone wasn't working properly because she had it in her pocket and it was all wet. She was riding around and didn't know what to do. She hadn't anything, she was all on her own. She just wanted to get out of Croydon, just wanted to hide so she went round to her mate's house, T, who said that she was welcome to stay there, but she had company round. T and her friend were drinking and smoking and puffing but the complainant did not have any. She declined the offer from T's friend. She said that when she was at T's it was really cold and T told her to go back and get changed, have a shower and then come back. So she went back to the X care home. She had a shower, got changed, got her bag and just ran out. She said she wasn't coming back because she couldn't stay as she had too many memories down there. She went off riding her bike down the road, came off it and got dirty again. She hurt herself. A lady asked her if she was alright to which she said, "yes she was". She went round to T's house again, but T said she was busy and wouldn't let her in. She thought why do people change like this, got really angry and

started thinking about things and wanted to go somewhere. She said that she then went back to the X care home, she was so angry, so pissed off with everything, she didn't have anyone to turn to so she thought she would phone her Dad and she would go there. She thought nobody wanted her so she went round to her Dad's and said that she had nowhere else to go. Her Dad said, "couldn't she stay at the X care home," and she said to him that she couldn't, she had a few problems and couldn't stay there. Eventually, she got to the point where she was in the car park with Louise Hannan and was begging her for help. She said to Louise that she needed to be out of Croydon, she'd got to get out of Croydon fast, she just didn't want to get hurt, she just wanted to hide from people. She was on her way to go in to the X care home when the defendant came out and asked if she was alright. She said "yeah I'm alright but not really". He went "what's up?" She said "do you know anyone who wants to buy my bike". He said "yeah". She said "will you help me, I need help I need to get out of Croydon as quickly as possible, I've got people after me I don't wanna get hurt". He said "yeah, I'll take you out of Croydon". He asked "do you do crack?" She said "no, not really, do you?" He said "yeah" and she said "yeah". Mrs Hannan took her inside the X care home, she saw a doctor, then she just got up and left. She thought to herself "If no one is not gonna help me I'll get someone who can help me so I was riding round Tamworth Road because I didn't want to go to Croydon. I was ringing Louise all the time I was asking, all I ask for is help." She was then riding around outside Tamworth Road and she saw the defendant again. She said "will you help me to get out of here?" He said "I will help you get out of here come come come." Then she said "what am I going to do I haven't got nowhere to go, I don't know what I am going to do." He said that he knew someone to get her help. She said "my phone's not working, I need to go to Vodaphone to sort my phone out." He asked her to sell it, he said "do you want me to sell it?" She said "not really it's on contract," but he just took her phone. He met his mate in Croydon train station and sold it for £20. He took the £20 and that was it. He took her round to his mate's house near St James, he made a few phone calls and said he would help get her out. He got some crack. He said he'd help her, he said he'd get her out of Croydon and she said to him "I aint got nobody, I'm on my own you know, I'm living in X care home, I've just come out of hospital, in nearly 9 years and all I ask for is for help. I'm living in X care home and I can't go back. Everybody is against me." So he took her to his mate's house in St James Road. She thought he was really going to help her. He said "you're gonna be alright here, you're gonna be in safe hands here," so she put her bike in. She went upstairs, there were three blokes, one of whom went. They were doing crack, so she went to the bathroom because she was dying to go to the toilet, she was desperate, she couldn't lock the door. So she went to the toilet and she said "What am I doing, what am I doing, so how am I going to get out of this situation?" She didn't even have a phone. He came in the bathroom and was saying "I'm gonna get you out of here, you're going to be in safe hands from here." He gave her some crack and said, "here, this will make you feel better." She then said that, on their way to his mate's house he had said, "Are you going to sort me out, are you going to give me a blow job?" She said "No I'm not, I don't do things like that, I'm not that kind of person." She asked whether he was going to help or not and he had said yes he was going to help her.

14. When she was in the bathroom and he offered her crack she didn't want to take the crack. He was giving her the crack. It was the first time she had done it. She was out of it, had a head rush, it was horrible, she was spinning. He started pulling his trousers

down, she said “I ain’t done this before”. Before he pulled his trousers down he just kept going backwards and forwards with his mates and bringing crack in, giving her crack. Then she put two and two together, they were up to something. Then he just kept giving it to her and she had a head rush, then he started pulling down his trousers, undoing his belt. She couldn’t get out of the bathroom and couldn’t do anything. Her head was rough, she was really panicky, she said to herself inside “I need Louise am I going to get out of here?” She said she didn’t know how to do it because the last time she had done this she was with her husband “That’s the last time I had done head”. She said she got hold of it, he just wanted it, she didn’t know what to do and he was saying to her to bite it, don’t use her teeth so she did it. Her head was rushed and he was saying “bite it not using your teeth”. She was just saying “I ain't done this before”. She described what she had done as “a blow job, his willie”.

15. She was asked by the police whether she wanted to touch his willie and she shook her head. She was asked how she felt when she was touching his willie and she said “I had a head rush and I was really panicky he just kept making me sucking it”.

16. She then described the activities with the co-defendant which comprised the other counts. At one point she was in the bathroom on her own. She just put her hand over her face and said “What am I doing, I can’t believe I’m doing this, I’m stuck here with crack heads.” Later on during the incidents comprising the other counts she said that she was saying to herself “How am I going to get out, these crack heads they do worse to you, I didn’t want to die I just stayed there, just took it all”. She said she was scared, she didn’t know what to do, all she kept saying to herself was “Louise, Louise help me why have I done this, why am I doing this.” But she didn’t let him see her reactions. She was on the bed, she said it all to herself, she was figuring out how to get out but all he could do is pass her crack and then after he got her mashed he took his clothes off again so she had to take her clothes off. He took his clothes off and she just took her clothes off. She didn’t know what she was doing, all she wanted to do was to get out of the house but she don’t want to die, she was scared of dying so she just did what he wanted her to do. She took her clothes of and he just gave it to her and was saying “I’m gonna get you pregnant.”

17. Later on in the interview when she was describing the events with Mr TC the police asked her how it made her feel and she said “I just felt tense”. She was asked whether she wanted him to do it and she said “No. I just felt rough, my head was rough and I just felt, make out to him I was enjoying it, but I wasn’t, I didn’t want to die, I was scared of dying I didn’t want him to hurt me so I thought if I do as I’m told I thought I’d be alright”.

The expert medical evidence

18. At one stage one of the defendants asked her if he could sell her bike and she agreed to this. He went off and came back and said that he had sold it for a ‘tenner’. He did not give her nay of the proceeds.

19. Dr Harty is a consultant forensic psychiatrist who gave evidence for the prosecution. The complainant had been under her care when residing at X care home. Dr Picchoni worked under her supervision. She had interviewed the complainant before 27 June on at least three occasions. She had not done so on 27 June because she was on annual leave and had last seen her on the 13th. On that date she was stable and taking

her medication. She said she would describe what Dr Picchoni saw on the 27th as a deterioration in the complainant's mental state and it was unlikely that her mental state would have improved dramatically over the subsequent hours after that assessment. She considered it highly unlikely that she would have returned to a calm or rational state in the hours after being seen by Dr Picchoni. She said that, given the deterioration in her mental state prior to the alleged events and her presentation during her assessment by Dr Picchoni, in her opinion her capacity to give consent to sexual intercourse was likely to have been impaired. That would have been her opinion even if she had not had crack cocaine and/or alcohol. The complainant already had difficulty communicating. Her mental health was breaking down against the background of a serious mental illness and impaired functioning. Because of all that Dr Harty did not believe she would have had the capacity to consent to sexual intercourse.

The law

20. Section 30 of the Sexual Offences Act 2003 provides, among other things, as follows:

> "(1) A person (A) commits an offence if –
>
> (a) he intentionally touches another person (B)
>
> (b) the touching is sexual,
>
> (c) B is unable to refuse because of or for a reason related to a mental disorder, and
>
> (d) A knows or would be reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.
>
> (2) B is unable to refuse if –
>
> (a) he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or
>
> (b) he is unable to communicate such a choice to A…."

21. We have been referred in argument to two recent public law decisions of Mr Justice Munby sitting in the Family Division, namely *In the matter of MAB* [2006] EWHC (Fam) 168 and *In the matter of MM an adult* [2007] EWHC (Fam) 2003, the former decided on 13 February 2006 the latter on 21 August 2007.

22. The issue in *MAB* was whether a man lacked the capacity to marry. The judge agreed with the contention that the marriage contract must be understood as providing the parties to the marriage with the right to choose whether to engage in sexual activity within that union. (64) He posed himself the question how was one to assess whether someone had the capacity to consent to sexual relations. (65) He started with the common law rule that it was rape if the woman's "consent" to sexual intercourse was vitiated by a mistake as to the nature and character of the act itself. (66) The judge

reviewed a number of authorities as to what that involved both English and Australian. His conclusion was that an essentially correct summary and statement of the common law rule was that "the question is whether the woman (or man) lacks the capacity to understand the nature and character of the act. Crucially the question is whether she (or he) lacks the capacity to understand the sexual nature of the act. Her knowledge and understanding need not be complete or sophisticated. It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent". (74)

23. Munby J. then considered whether the Sexual Offences Act 2003 affected that common law doctrine. He turned his attention to sections 30 and 31. He identified that, on one view, it was a statutory codification of the common law as the statutory reference to the "reasonably foreseeable consequences" reflected language in certain of the core common law cases. He referred to a contrary view that it reflected a change by focussing on the complainant's knowledge and understanding of the meaning or consequences of sexual relations (Rook and Ward on Sexual Offence Law and Practice Ed 3 at para 7.31) (80).

24. Munby J. declined to come to any concluded view but stated:

> "it may be (I express no views on the point) that there is in the context of the criminal law some difference between these two tests. For present purposes, it seems to me, they come to very much the same thing." (82)."

25. In *MM* the issues were whether a woman lacked capacity in connection with a number of respective transactions including the entry into a contract of marriage. The local authority accepted that she had the capacity to consent to sexual relations (20).

26. Munby J. stated that a number of propositions were well established. First, capacity is "issue specific" so someone may have capacity for one purpose but lack capacity for another purpose. He then enumerated various purposes including capacity to consent to sexual relations (64). Second, capacity is not merely issue specific in relation to different types of transactions but also issue specific in relation to different transactions of the same type so, in principle, a vulnerable adult may have the capacity to consent to one kind of sexual activity whilst lacking the capacity to consent to some other (and to her unfamiliar) kind of sexual activity. (65). Third, the general rule of English law, whatever the context, is that the test of capacity is the ability (whether or not one chooses to exercise it) to understand the nature and quality of the relevant transaction. (67).

27. He then referred to a more focussed test, identified in *Re MB (Medical Treatment)* [1997] 2 FLR 426, where Lady Justice Butler Sloss at page 437 explained the test in terms which closely reflected the test recommended by the Law Commission in 1995, (Lawcom 231, Mental Capacity paras 3.16 to 3.17), as set out in clause (2) of the draft Mental Incapacity Bill annexed to that report (69 and 70). He also referred to other authorities where a same, or similar, test was adumbrated and concluded that:

> "on one level of abstraction each of these formulations is simply a statement of a general theory of what is meant by 'understanding' a problem and having the capacity to decide

> what to do about it and this general theory…applies, in principle, to all 'problems' and all 'decisions' ". (72).

28. Munby J. then stated that the same theory or principle has been given expression in the statutory test of capacity set out in section 3(1) of the Mental Capacity Act 2005 which provides:

> "(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable –
>
> (a) to understand the information relevant to the decision,
>
> (b) to retain that information,
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means)."

Section 2 provides that:

> "(1) for the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

The purposes of that Act appear in the preamble which describes it as:

> "An Act to make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the Office of the Supreme Court called by that name; to make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13 January 2000, and for connected purposes."

Sections 2 and 3 came into force on 1 April 2007 for purposes relating to the independent mental capacity advocate service provided for by sections 35 to 41. (The Mental Capacity Act 2005) Commencement No.1 (England and Wales)

Order [2007 SI 2007 No. 563].

29. Munby J. then returned to the issue specific nature of capacity and, at paragraphs 86 and 87, said, amongst other things, as follows:

> "…The question is issue specific, both in the general sense and, as I have already pointed out, in the sense that capacity has to be assessed in relation to the particular kind of sexual activity in question. But capacity to consent to sexual relations is, in my judgment, a question directed to the nature of the activity rather than to the identity of the sexual partner.

> 87. A woman either has capacity, for example, to consent to "normal" penetrative vaginal intercourse or she does not. It is difficult to see how it can sensibly be said that she has capacity top consent to a particular sexual act with Y whilst at the same time lacking capacity to consent to precisely the same sexual act with Z. So capacity to consent to sexual intercourse depends upon a person having sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse…it does not depend on an understanding of the consequences of sexual intercourse with a particular person. Put shortly capacity to consent to sexual relations is issue specific; it is not person (partner) specific."

He then went on to say:

> "89. Moreover and of equal if not greater importance, there are sound reasons of policy why the civil law and the criminal law should in this respect be the same, why the law should, as it were, speak with one voice and why there should not be any inconsistency of approach as between the criminal law and the civil law. In this context both the criminal law and the civil law serve the same important function: to protect the vulnerable from abuse and exploitation…viewed from this perspective X either has capacity to consent to sexual intercourse or she does not. It cannot depend upon the forensic context in which the question arises, for otherwise, it might be thought, the law would be brought into disrepute.
>
> 90. I remain of the view I expressed in *[MAB]* that the test of capacity to consent to sexual relations must for the purposes of the civil law be the same in its essentials as in the criminal law."

30. The Government was aware of the content of LawCom No. 231 and the terms of the draft bill annexed to it when considering the root and branch reform of sexual offences which resulted in the 2003 Act. The Law Commission submitted to Government, as part of that review process, a policy paper referring to that report and recommending that, for the purposes of any sexual offence, capacity to consent should be described so as to coincide with that recommendation. That policy paper was annexed as an appendix to "Setting the Boundaries: Reform of the law on sex offences", the Government report which set out the outcome of that review and which preceded the Sexual Offences Act 2003. That Act, however, does not reflect, in section 30, the terminology which has now been enacted in the Mental Capacity Act 2005, though it includes the phrase "or for any other reason".

31. In argument we were referred to the case of *Ronald Hulme v. the Director of Public Prosecutions* [2006] EWHC (Admin) 1347. That was an appeal from the magistrates

by way of case stated which concerned a conviction under section 30 of the 2003 Act. The findings of the magistrates were expressed in the case stated as follows:

> "We find that (J) has a mental capacity well below her actual age and she was child like, naive and eager to cooperate in the way that she gave her evidence. We consider that J was a vulnerable lady of limited mental ability or capacity. We were satisfied that she understood the nature of sexual relations but she did not have the capacity to understand that when placed in a situation of being touched sexually she could choose not to agree to it…We found that she was not capable of stopping the appellant from carrying out sexual activity with her due to her mental disorder although she was clearly upset by his actions" (13).

32. Mr Justice Toulson, giving the judgment of the Divisional Court, said as follows:

> "14. As I read those findings, the justices were essentially saying that, although J did not want him to act in the way that he did, she was unable effectively to communicate her choice to the appellant. If that was their finding, and if there was evidence to support it, the conviction was proper…In my judgment there was. It was to be found significantly in the evidence of J herself, when she said that, on the appellant touching her private parts and pressing hard, she did not know what to say, although it made her feel sad, hurt and upset. If the justices accepted that she did not want him to continue but did not know what to say or do, that could only sensibly be because of her mental condition. At the very least that was a conclusion they were entitled to reach.
>
> 15. Similarly, when she said that she touched his penis because he made her and because he wanted her to, although she did not want to, that is again perfectly sensibly explicable on the basis that, because of her mental condition, she was not able effectively in those circumstances to communicate her wishes to him in the way which any woman of her age, not suffering from her disabilities, would have done in similar circumstances."

33. In connection with the adequacy of the summing up we were referred to the case of *Bree* [2007] EWCA Crim 804 where a conviction for rape was quashed because the judge failed to give the jury sufficient assistance with the meaning of capacity to consent to sexual intercourse in the context of intoxication, giving rise to periods of consciousness followed by unconsciousness.

The trial

The submission of no case to answer

34. At the conclusion of the prosecution case counsel for each defendant submitted that the jury should be directed to acquit the defendants on the basis that the prosecution had not made out an arguable case that the offences charged had been committed.

35. The defendants submitted that, although there was evidence that the complainant's capacity to choose was impaired or flawed, there was no evidence that she wholly lacked the capacity to choose in the sense that she lacked sufficient understanding of the nature of the act or its consequences. The judge was inclined to agree with that submission. Similarly, he was inclined to agree with the defence submission that there was no evidence that the complainant was unable to communicate such a choice because there was evidence that she was able to communicate – she had been able to reply to the neighbour Mrs Dempsey who asked her how she was, was able to go to the shops and was able to communicate to Dr Dill.

36. The judge then focussed on the words in section 30(2)(a) "or for any other reason". Having reviewed the medical evidence, he summarised her evidence to the effect that

> "She did not want to consent to the sexual acts which took place. She did not want them to take place, but she was frightened and did not know what to do and, therefore, she simply carried on and did what they told her to"

On that basis and in the light of the expert evidence, he concluded that a jury would be entitled to reach the conclusion that, because of her mental incapacity she was unable to refuse due to an irrational fear. The judge put the matter as follows:

> "I am of the view that this is a proper case to leave to the jury because they are entitled to conclude that [the complainant] lacked the capacity to choose whether to agree to the touching for any reason, namely irrational fear of these men in circumstances where she felt dominated by them and was frightened, particularly as she regarded them as crackheads who might cause her considerable physical harm."

37. He concluded that the jury would be entitled to conclude that it must have been obvious to the defendants that the complainant suffered from a severe mental disability and that they sought to take advantage of it. Thus, there was evidence upon which the jury, if properly directed, could conclude that either or both of the defendants were guilty. Accordingly he rejected the submission of no case.

The summing up

38. At the conclusion of the defence evidence the judge summed up the law. He identified for the jury that one of the major issues between prosecution and defence was whether they were sure that the complainant "was unable to refuse because of or for a reason related to a mental disorder". In relation to that issue his direction to the jury amounted, in total, to the following:

> "Now AK would be unable to refuse if she lacked the capacity to choose whether to agree to the touching, in other words the sexual activity, for any reason, for example, an irrational fear

> arising from her mental disorder or such confusion of mind arising from her mental disorder, that she felt that she was unable to refuse any request the defendants made for sex. Alternatively, AK would be unable to refuse if through her mental disorder she was unable to communicate such a choice to the defendants even though she was physically able to communicate with them."

39. We observe that the judge left the case to the jury on two alternative bases. The first was that they should consider whether the complainant lacked the capacity to choose whether to agree to the sexual touching "for any other reason". The learned judge gave as examples of such incapacity an irrational fear or confusion of mind. That reflected, in relation to the irrational fear, the ruling he had made at the close of the prosecution case. He also left the case to the jury on the basis that they should consider whether she was unable to communicate such a choice to the defendants notwithstanding that she was physically able to communicate with them. This was despite the fact that he had indicated in the same ruling that the prosecution would have very considerable difficulty in establishing guilt because, in his view, on the evidence she was able to communicate a choice.

40. Miss Cutts for the prosecution has indicated that, in the course of argument on the submission of no case, the judge had taken a view that inability to communicate meant inability physically to communicate whereas, in discussion with counsel prior to speeches and summing up, he had canvassed the question whether, notwithstanding that she was able to communicate physically, she might nonetheless be found by the jury to have been unable to communicate her choice to the defendants.

Submissions

41. The submissions advanced by Mr Wormald on behalf of the appellant are two fold. First, the judge was wrong in law to leave the case to the jury. The prosecution had failed to prove that the complainant did not understand the nature or reasonably foreseeable consequences of what was being done. The judge was mistaken in law in concluding that the words "or for any other reason", were wide enough to cover an irrational fear or state of confusion caused by, or related to, her mental disorder, which caused her will to be overborne when in the bathroom with the appellant. Those words should be construed as covering a lack of capacity of a similar nature to an inability to understand the nature of, or the consequences of, sexual activity.

42. The evidence adduced by the prosecution showed only a flawed capacity to choose, rather than a lack of capacity. The complainant's fear in the bathroom, as expressed in her evidence, could not even be said to have been irrational rather than a normal human reaction to the situation in which the complainant found herself. In short, there was no evidence of 'lack of capacity to choose' that could safely be left to the jury.

43. The appellant's second ground is that the judge failed, in summing the case up so briefly on this issue, to give sufficient assistance to the jury on how they should approach the question of lack of capacity, whether arising from "any other reason" or on the basis of an inability to communicate her choice.

44. Miss Cutts for the prosecution contend that the words "for any other reason" are capable of encompassing the circumstances described by the complainant. The fear, from which she described herself suffering in the bathroom, formed part of a continuum under which, having relapsed into a state of illness reflecting her mental disorders, she had an irrational fear that she needed to get out of Croydon because her life was under threat. In these circumstances, having thrown herself upon the mercy of the appellant in order to escape from Croydon, she found herself confined with him, unable by reason of irrational fear either to refuse sexual activity, or to communicate her refusal. The words "for any other reason" could properly be held by the jury to cover this factual situation. The judge's direction to the jury, while short, was adequate.

Discussion and conclusions

The ruling that there was a case to go to the jury

45. We shall deal first with the meaning of section 30 (2) (a) of the 2003 Act.

46. The judge's ruling at the close of the prosecution case was reflected in the short summary of the law that he gave to the jury. Each was capable of suggesting that an offence under section 30 would be committed if the complainant felt unable to refuse the sexual advances of the two defendants because of an irrational fear arising out of her mental disorder and the defendants knew or could reasonably be expected to know that this was the position.

47. Such an approach would have been appropriate had section 30(1) of the 2003 Act not been qualified by section 30(2). Section 30(2) provides, however, a comprehensive definition of the circumstances in which a complainant will be unable to refuse to submit to sexual touching. Those circumstances will exist if the complainant (B):

> "lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or foreseeable consequences of what is being done, or for any other reason)."

48. Such a lack of capacity not merely involves B being unable to choose to refuse to submit to sexual touching; it involves B being unable to choose to agree to such touching. Such lack of capacity, in rendering criminal sexual activity with B on the part of anyone other than a lawful spouse (see section 43), has the consequence if the law is observed that B, if unmarried, will be denied sexual activity. This is a significant interference with B's rights under Article 8 of the European Convention on Human Rights. It can only be justified if B's mental disability is such that the interference is necessary for B's own protection.

49. We agree with Munby J that the test of incapacity to consent to sexual activity should be the same under criminal and civil law. We also agree with him that there is little, if anything, between the test of capacity to choose in section 30 (2) of the 2003 Act and the common law test of capacity to consent that has been applied in the decided cases. The question has normally been whether the person concerned has had sufficient knowledge of the sexual character of the act to be able to give an informed consent to it.

50. The issue, insofar as this part of the appeal is concerned, is what meaning to accord to "or for any other reason". We accept Mr Wormald's submission that these words set a similarly high hurdle for the prosecution to those that go before them. The effect of a mental disorder must necessarily be severe before it will have the effect that a person is unable to choose whether to submit to sexual activity. We doubt if it is very helpful to attempt to exemplify the type of mental condition that might have this effect, notwithstanding that the person suffering from it is able to understand the nature of sexual activity. It is, however, possible to conceive of an acute episode of a mental disorder resulting in an inability to take a rational decision about sexual activity, or indeed other activities, notwithstanding that the person suffering from it has an understanding of the nature of sexual activity. Such a mental condition could fall within the words "or for any other reason". The issues in this case are whether, on the evidence, the complainant's mental condition was capable of falling within these words and whether the test applied by the judge, both in his ruling that there was a case to answer and in his summing-up to the jury was correct in law.

51. The evidence given by the complainant herself suggests that she was suffering from a severe mental disturbance at the time of the sexual activity that gave rise to the charges against the defendants. She had an irrational fear that she had 'people after her' so that she had to 'get out of Croydon as quickly as possible'. She went with the appellant because of this fear. She acquiesced in the appellant selling her mobile phone and later agreed that one of the defendants could sell her bicycle. Finally, although she did not wish to do so she acquiesced in the various sexual activities that the defendants asked her to perform. She said that she was scared of the defendants because they were crackheads and that she did not want to die.

52. Overall this evidence is capable of portraying someone so mentally disturbed as to be unable to make a rational choice about any matter of importance. It is capable of founding Dr Harty's opinion that the complainant lacked the capacity to agree to sexual intercourse. It is not clear that Dr Picchoni was prepared to go quite so far. She spoke of the complainant's capacity to consent to sexual intercourse being impaired. We have concluded that there was none the less a case to go to the jury that the complainant's mental condition fell within section 30 (2) (a) and that the judge was right not to withdraw the case from the jury at the close of the prosecution case.

53. While we find that the judge was right to allow the case to go to the jury, we have reservations about the reasons given by him for his decision, as set out in paragraph 36 above. If the complainant consented to sexual activity against her inclination because she was frightened of the defendants, even if her fear was irrational and caused by her mental disorder, it does not follow that she lacked the capacity to choose whether to agree to sexual activity. It does not follow from that irrational fear that the complainant would not have been capable of choosing whether or not to agree to sexual activity in circumstances which did not give rise to that fear. Irrational fear that prevents the exercise of choice cannot be equated with lack of capacity to choose. We agree with Munby J's conclusion that a lack of capacity to choose to agree to sexual activity cannot be 'person specific' or, we would add, 'situation specific'.

54. Was there a separate case to be left to the jury that the complainant was, as a result of mental disorder, unable to communicate to the defendants that she chose not to indulge in the sexual activities that they were proposing? The judge originally concluded that there was not, because the complainant was plainly able to

communicate with the defendants. Subsequently, he appears to have been persuaded that if she felt unable to say no because of irrational fear, this was capable of amounting to an inability to communicate her choice within section 30 (2) (b).

55. We consider that the judge's first reaction was the correct one. We believe that section 30 (2) (b) is designed to address those whose mental disorders impair their ability to communicate. There was no evidence in this case that the complainant was unable to communicate any choice that she had made.

The summing up

56. The judge was faced with a particularly difficult task when he came to sum up this case and we are conscious that it has been much easier for us to analyse this difficult area of the law at our leisure than it was for the judge who had, after such assistance as counsel were able to give, to formulate his directions to the jury under some pressure.

57. There were three possible explanations for the sexual activity in which the complainant was involved on 27 June 2006.

i) The complainant had the capacity to consent to the sexual activity and did so.

ii) The complainant had the capacity to consent to the sexual activity, but did not do so. She submitted to the sexual activity against her will because she was afraid of the defendants and feared violence or even death if she did not submit.

iii) The complainant took part in the sexual activity in circumstances where she lacked, as a result of her mental disorder, the capacity to choose whether to agree to it.

58. If the first explanation is the correct one, the appellant and his co-defendant committed no offence.

59. If the second explanation is the correct one, the appellant and his co-defendant was each guilty of rape, contrary to section 1 of the 2003 Act, if he did not reasonably believe that the complainant consented to the relevant penetration.

60. If the third explanation is the correct one, the appellant and his co-defendant was each guilty of an offence under section 30 if he knew or could reasonably be expected to know that the complainant had a mental disorder and because of it or a reason related to it was likely to lack the capacity to choose whether to agree to the sexual activity.

61. The prosecution charged the defendants with offences under section 30 alone. Regrettably we have concluded that the short direction that the judge gave to the jury in relation to the ingredients of this offence was not adequate. We have set this out at paragraph 38 above. In the first place, the judge directed the jury that the complainant would be 'unable to refuse' if through her mental disorder she was unable to communicate her choice as to whether to agree to the sexual activity. As we have said, we do not consider that the evidence laid any basis for such a finding. Nor did the judge give the jury any direction as to the evidence upon which it was open to

them to conclude that the complainant was unable to communicate her choice to the defendants.

62. Dealing with what might constitute a lack of capacity to choose whether to agree to the sexual activity, the judge chose as an example "an irrational fear arising from her mental disorder such that she felt that she was unable to refuse any request the defendants made for sex." This could have led the jury to conclude that if the complainant agreed to the defendants' proposals out of an irrational fear arising from her mental disorder, this would, of itself, amount to incapacity to choose whether to agree to the sexual activity. For the reasons that we have given this did not follow.

63. The judge went on to suggest that if, as a result of confusion of mind arising from her mental disorder, the complaint felt unable to refuse the defendants' requests for sex, this could amount to a lack of capacity to choose whether to agree to the activity. This came closer to an adequate direction, but the problem with it was that it was 'person specific'.

64. We consider that the judge should have reminded the jury of the medical evidence as to the complaint's mental disorder and then directed them that if this had left her so distressed or confused that she was not capable of making a coherent decision to agree to or refuse a request for sexual activity, whoever might make the request, it would be open to them to conclude that she lacked the capacity to choose. In this context he could properly have reminded them of her apparently irrational conduct in agreeing to the sale both of her mobile phone and of her bicycle.

65. We have considered whether, despite the deficiencies in the summing up, the appellant's conviction was safe. We have concluded that it was not, and no submission to the contrary was made by Miss Cutts. We think it implicit in the jury's verdict that they were satisfied that neither defendant reasonably believed that the complainant consented to the sexual indignities to which they subjected her. What is not clear is whether this was because they concluded that she was submitting to their requests through fear, or because they concluded that her mental disorder meant that she was unable to choose to say yes or no, or both. If properly presented the facts of this case might have been capable of supporting verdicts of offences under section 1 or section 30 of the 2003 Act. In the event, however, the verdicts of offences under section 30 are not safe and, for that reason, this appeal must be allowed and the appellant's conviction quashed.