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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **21/8/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

OSWALD BROWN

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Before Kerr LCJ, Girvan LJ and Gillen J

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KERR LCJ

Introduction

[1] Although this application has been formulated as one for leave to appeal against conviction and sentence, since the applicant's application for leave to appeal has already been dismissed by this court on 19 February 2002, it is in fact an application for leave to re-open the appeal. A further application for leave to appeal is only viable if leave is granted to re-list or re-open the appeal and it is on that central issue that we must focus.

[2] Before doing so, however, we must make clear that nothing should be reported that would tend to identify the complainant in this case. Mr Brown's identity is well known as his case, for a variety of reasons, has been widely reported. There is therefore no need to – nor would there be any point in – ordering that his identity be concealed.

Factual background

[3] Some factual background should be provided in order that the issues that arise on this application can be fully understood and so that a full picture of the nature of the application and of the circumstances in which it is made can emerge. In the recent reports on this case that members of this court have

seen, many of its critical details have not featured. It may be that this is because those details were not known to the authors of the newspaper articles that we refer to but, whatever may be the reason for their omission, we consider it to be essential that those details are placed firmly on record so that possible misconceptions can be avoided.

[4] In an interview by a probation officer for the purposes of a pre-sentence report, Mr Brown stated that, before he was remanded in custody on the charge that led ultimately to his conviction, he lived with his wife and children in East Belfast. Although he was married, he stated that he was not committed to a monogamous relationship with his wife. He was a regular patron of "Dempsey's" bar in Belfast city centre which he viewed as a location for "picking up" women.

[5] On 17 December 1999, the complainant in this case (whom we shall refer to as 'K') went with her mother (whom we will call 'B'), to Dempsey's for a drink to celebrate Christmas. While there they met Mr Brown. He had previously had sexual relations with B, the complainant's mother. All three left the public house together and walked to K's flat on the Lisburn Road. Mr Brown and B were holding hands during this short walk.

[6] There was initially some conflict in the accounts given by, on the one hand, B and K and, on the other, by Mr Brown, of the circumstances in which he came subsequently to leave the flat. B and K alleged that he had made a "sleazy" comment and that B told him to leave. During interviews by the police, Mr Brown claimed that he and B had ordered a taxi with the intention that they should go to B's house together but that B had left the flat before he did and when he got to the front door she was nowhere to be seen. He maintained to police that he had then gone back to the flat and was admitted by K.

[7] A rather different account was given by Mr Brown during his testimony at trial. Then he admitted that he had been told to leave the flat and that he had done so. He did not leave the building, however, and indeed, he claimed, fell asleep on a landing. After he awoke he returned to K's flat and, according to him, she allowed him to come in.

[8] K gave evidence that Mr Brown had left the flat after being told by her mother to do so. Her mother then left in a taxi. Less than a minute later, Mr Brown returned, saying that he had nowhere to go and asking that he be allowed to stay in her flat. K told him that he could telephone for a taxi but when she let him in, he flopped down on a sofa. He was drunk but not incapable. Reluctantly, she agreed that he could sleep on the sofa. Since the flat was in fact no more than a bed sitting room, her bed was in the same room. K felt so uncomfortable about these arrangements that, according to her, she went to bed fully clothed.

[9] Mr Brown claimed in evidence that everything that occurred after he had been re-admitted to K's flat was consensual. Indeed, he maintained that K had invited him into her bed; that he had performed oral sex on her; that she had responded positively to this; and that she had removed his underwear before they engaged in sexual intercourse. After this, they had chatted amicably for some fifteen minutes before he left.

[10] K's account was dramatically different. She stated that, after going to bed fully clothed, she woke to find herself entirely naked with the applicant lying on top of her with his penis penetrating her vagina. She immediately told the applicant to stop, which he did. Subsequently she gave him a mobile telephone to call a taxi and told him to get out of the flat. He contacted a taxi and left when it arrived. She then sat in bed, weeping, for almost an hour before getting dressed. After this she took a taxi to B's house. She told her mother what had happened and then contacted the police.

The history of the case

[11] On 12 September 2000, the applicant was returned for trial on indictment at Belfast Crown Court for the single count of rape. The trial commenced on 5th February 2001 before His Honour Judge Curran QC sitting with a jury. It ended on 9 February 2001. The jury found the applicant guilty by unanimous verdict. On 29 March 2001 the learned trial judge sentenced him to a custody probation order, comprising 6 years imprisonment and 2 years probation, and ordered that he be placed on the Sex Offender' Register for life. The applicant lodged an application for leave to appeal against conviction on 20 April 2001, but leave to appeal was subsequently refused by the full Court on 19 February 2002.

[12] Mr Brown applied to the Criminal Cases Review Commission (CCRC) on 24 October 2002 to review his conviction in light of a host of reasons including, but not limited to, the trial judge's charge to the jury. CCRC duly considered the application and concluded that it would not refer the conviction to the Court of Appeal. The applicant made a second application to CCRC on 27 September 2004. This was again rejected on the grounds that it raised no new point in respect of the conviction. A third application to CCRC was made by the applicant on 11 December 2006, but was again rejected by the Commission, on 30 March 2007, on the same grounds.

[13] The applicant lodged a fresh Notice of Appeal dated 31 July 2007. Leave was refused by the single judge who observed that there was no irregularity in the trial judge's charge and that the application was "a rerun of the first appeal". As we have said, this application cannot be treated as an application for leave to appeal in the ordinary sense. It is only if the appeal

can be re-opened that the question of leave to appeal against conviction will arise.

The issue of consent

[14] The issue of consent is obviously central to the application to re-open the appeal. The terms in which this matter should be dealt with by a judge charging a jury are set out in a specimen direction in the current edition of the Crown Court Bench Book as follows: -

> "In order that the defendant can be found guilty of rape a number of matters have to be proved. First of all, that the defendant had sexual intercourse with X. This means that his penis penetrated her vagina. It is not necessary that penetration should be complete, provided that some penetration, however slight, took place. Nor is it necessary that there should have been any emission of semen by the defendant. Secondly, that X did not consent to intercourse taking place. Thirdly, either the defendant knew at the time that X was not consenting or he was reckless as to whether or not X consented. The defendant was reckless if he did not believe that X was consenting and could not care less whether X was consenting or not but pressed on regardless."

[15] The learned trial judge dealt with the matter of consent in a number of passages in his charge: -

> "… did he have the consent of this young woman to have intercourse with her, or although Mr. Cinnamond [counsel for the defendant on trial] probably correctly didn't stress it very much, did he believe he had her consent or was he simply reckless, not caring whether she consented or not." [page 2]

> "The prosecution have to show that when he had intercourse with this girl that he knew that she did not consent to it, and the Crown have to show that he didn't believe that she was consenting, even though he had no reasonable grounds to think that. The Crown must disprove any belief on his part that she was consenting. … His belief is vital, and if he did not know, or knew rightly, that she

> wasn't consenting and did not believe that she was consenting even though he had no particular grounds for believing that, then you convict him. If you have any doubt that he either believed that she was consenting or for whatever reason then you must acquit. It is clear that the two things are looked at separately. (1) Did he know well that she wasn't consenting? (2) Even if he knew that she had not said a word, suppose he was in bed with her and she didn't say a word, did he believe that she was consenting, for whatever reason?" [page 10]
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> "I also have directed you and direct you again that you have to still consider, even if you reject that defence out of hand that there is no consent, did this man believe that she had consented – that is a separate issue – but if he believed that she had consented, then he would not be guilty of a crime, he would not have had intercourse against her will knowing that she did not consent or being reckless as to whether she consented or not … he might have thought "Maybe she'll not object." That's a very different thing from believing that she was consenting. Being determined to have intercourse with a woman whether or not she consents is a crime. If he was determined to have sex whether or not she consents is a crime – believing that she consents is a different matter." [page 15]
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> "… [The prosecution] must prove that he did it without her consent. That is an issue in the case. She says that she never consented. The defence say that she did positively and actively. The equally important issue is did he believe that she was consenting. If you believe that she was consenting, he has committed no crime. If he did not believe any such thing, it is a crime." [page 16-17]

[16] During their deliberations the jury sent a question to the judge asking, "In summing up the judge made the following statement: Being determined to have intercourse with someone, even if she consents is a crime. Could we have clarification on this point of law?" It is clear, of course, that the judge did not say that and unsurprisingly he was quick to correct the misapprehension. He brought the jury back and said this: -

> "I must first of all correct that. I didn't say it's a crime if the person consents, it couldn't be. The first point is, if the accused knew perfectly well she wasn't consenting, that's rape. If he knew that, it's rape. The other state of mind is this; if he didn't care less whether she consented or not, was determined to have intercourse whether she consented or not, that's recklessness and that is rape. It's reckless rape if you go on, not being told by the girl she wanted intercourse, not believing she wanted intercourse but just going on regardless: I'm going to have intercourse with this woman whether she likes it or not. Now, in the background to this case, the defence is there was positive consent that she was willing at all times and was a voluntary partner and enjoyed sex with this man. That's what the defence is. The Crown say that's completely wrong. She woke up to find this man had penetrated her. She never consented and he had no reason to think that she was going to consent and in no way did she consent. And he, at the very best, was absolutely reckless. If you slide into bed beside a sleeping woman and stick you penis into her that's utterly reckless. There's no indication whether she wants intercourse and you couldn't even think that she wants intercourse because in that situation your action is you don't care what she wants, couldn't care less what she wants, just going to have intercourse with or without her consent, just going to have intercourse, that's it. And the question of consent doesn't arise in that situation because that's just pure recklessness, just going on without any indication whatever, just going on regardless of whether she wants it or doesn't want it, your going to force yourself on her." [pages 26-27]

[17] On the hearing of this application Mr Brian Kennedy QC, who appeared with Mr Doran for the applicant, suggested that this direction was ill judged both as to timing and to content. He submitted that the introduction of the issue of recklessness at this stage created an imbalance in the charge against the applicant. Moreover, he claimed, the charge on this issue "could have been put more clearly" and, in consequence, there was at least a lurking doubt that the jury's confusion (already apparent from the question that they had asked) had been compounded by the judge's unnecessary and over elaborate disquisition on the issue of recklessness.

[18] Similar arguments had been addressed to the Court of Appeal on the first application for leave to appeal. Carswell LCJ dealt with these at paragraphs [5] and [6] of his judgment as follows: -

> "[5] Mr Cinnamond QC, who then appeared for the defendant, objected that this had given more prominence to the issue of recklessness than was justified and that it unbalanced the charge. The judge quite rightly, in our opinion, rejected that and insofar as this was pursued on appeal it is a worthless point and we disregard it completely.
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> [6] Mr McDonald QC, who appeared on appeal in place of Mr Cinnamond, strove valiantly to make something out of the redirection and the charge, but in our opinion he had nothing on which to base his argument. We consider that the charge was perfectly good. The judge was entirely justified in the way that he redirected them and we see no substance in this application. … We, therefore, dismiss the application for leave to appeal against conviction."

Re-opening an appeal

[19] This court dealt with the circumstances in which an appeal may be re-opened in *R v Christopher Walsh* [2007] NICA 7. We there considered whether the establishment of CCRC by the Criminal Appeal Act 1995 extinguished the power of the Court of Appeal to re-open a case and said this at paragraph [31]: -

> "[31] We have concluded that the power of the Court of Appeal to re-list a case has not been removed by the 1995 Act. The occasion for the exercise of such a power will arise only in the most exceptional circumstances, however. In virtually every conceivable case it is to be expected that where the possibility of an injustice is reasonably apprehended, CCRC will refer the case. If it decides not to refer, however, the circumstances in which a challenge to that decision can be made are necessarily limited – *R v CCRC ex parte Pearson* [1999] 3 All ER 498. Where CCRC has been invited to refer a conviction to the Court of Appeal for a second time and has declined, if this court

> considers that because the rules or well-established practice have not been followed or the earlier court was misinformed about some relevant matter and, in consequence, if the appeal is not re-listed, an injustice is likely to occur, it may have recourse to its inherent power to re-list (or, effectively, re-open) the appeal."

Is an injustice likely to occur if this appeal is not re-opened?

[20] The essence of Mr Kennedy's argument can be distilled into a series of propositions: the jury had already revealed their confusion on the issue of consent by the question that they posed; the further direction given by the judge strayed impermissibly into the territory of recklessness; a direction on that issue was not required to deal with the jury's question; the charge on this issue was, in any event, less than clear and was therefore liable to confuse the jury further; it created an imbalance in the charge by dwelling on factors that were adverse to the defendant; and, in consequence, one could not be sure that the jury were not further misled by the supplementary directions that had been given.

[21] In this context, Mr Kennedy relied heavily on the observations of the European Court of Human Rights in *Condron v United Kingdom* [2001] 31 EHRR 1. In that case the applicants complained that their right to a fair trial was violated on account of the decision of the trial judge to leave the jury with the option of drawing an adverse inference from their silence when interviewed by the police. The applicants had given evidence at their trial and since their case was conducted before a jury a direction by the trial judge was required on how to approach the issue of their silence during police interview. The trial judge drew the jury's attention to their explanation that they had remained silent on the advice of their solicitor. However, he did so in terms which left the jury at liberty to draw an adverse inference notwithstanding that it may have been satisfied as to the plausibility of the explanation. The Court of Appeal found the terms of the trial judge's direction deficient in this respect. ECtHR held that, as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination.

[22] In the *Condron* case ECtHR placed considerable weight on the fact that it was impossible to tell how influenced the jury had been by the refusal of the applicants to answer police questions. Mr Kennedy suggested that it was likewise impossible to know how confused the jury might have been in the present case by the further direction of the judge or whether the imbalance that, he said, that further direction had introduced to the charge might have

unwarrantably adversely affected their consideration of the case against Mr Brown. There was, therefore, he said, at least a doubt as to the safety of the verdict.

[23] We do not accept these arguments. As we have said, the jury plainly misunderstood the judge's original charge. At no point in that charge did the judge intimate that a conviction for rape was possible where there had been consent. On the contrary, as Mr Kennedy sensibly accepted, at several points in his charge the judge painstakingly pointed out that lack of consent was a vital ingredient of the offence of rape and that, unless the jury was satisfied that the complainant had not consented, they could not convict. As soon as the judge became aware of the misapprehension of the jury, he corrected it in commendably direct and unmistakable terms. We are entirely satisfied that the jury was left in no doubt that, if they entertained any reservations as to whether the victim had consented, their duty was to acquit.

[24] As to the suggestion that the judge should not have returned to the theme of recklessness in his further directions we have reached precisely the same conclusions as did the earlier Court of Appeal. The judge was entirely right to deal with this issue at that stage. It was clear that the jury was confused on the issue of consent – their question establishes that beyond peradventure. A comprehensive but succinct review of the issue, including a reminder of what had been said before on the issue of recklessness, was called for and, in our judgment, this is what the judge supplied. Mr Kennedy's claim that this was over elaborate and long-winded is simply not borne out by an examination of the record of the charge – the passage on recklessness occupies no more that thirty four lines of transcript; it does not, in our opinion, introduce any imbalance to the charge and is not unjustifiably adverse to the applicant.

[25] There is therefore no reason to suppose that the jury was misled. Unlike the *Condron* case, there is no cause for concern as to the weight that they may have attached to the direction that the judge gave because, in this case, the direction was not objectionable whereas in the *Condron* case it was. Any suggestion that the jury was misled again by what was a perfectly proper direction involves fanciful and unwarranted speculation.

[26] We are therefore satisfied that no injustice will accrue if this appeal is not re-opened. On the material that has been placed before us there is no reason to doubt the safety of the jury's verdict. On the contrary, it was entirely to be expected that they should have been convinced of the applicant's guilt. This was a man who had had a previous sexual relationship with the complainant's mother; who had walked hand in hand with the mother to the complainant's flat; who had been told to leave the flat and had done so; and who, on his account, had returned to the flat to be welcomed into the complainant's bed. That the jury found his claim to have engaged in

consensual sex with the complainant incredible is not in the least surprising to this court. The application is dismissed.