

JASON LAWRENCE

[2020] EWCA Crim 971

The search for the guiding principle on deceptions

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UCL Webinar

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- S.74 of the Sexual Offences Act 2003 (SOA 2003) provided the basic definition of consent for the purposes of non-consensual sexual offences:
“For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.”
- SOA 2003 repealed the old deception offences, but it failed to address the issue of the impact of express or implied deceptions upon consent apart from the limited circumstances under s.76 (the irrebuttable presumptions.)

Sexual Offences Review

Setting the Boundaries 2000

- “in the most private and difficult area of sexual relationships, the law should be as clear as possible so the boundaries of what is acceptable, and of criminally culpable behaviour, are well understood.”

Context. No guiding principle on deceptions

- S.74 (the first statutory definition of consent) has been interpreted widely in other spheres of activity . For example in relation to the impact of grooming upon the young and vulnerable (See *Ali (Yasir) Afran* [2015] EWCA Crim 1279)
- Until *R(Monica) v DPP* [2018] EWHC 3508 (Admin) there was nothing approaching a guiding principle in respect of deceptions. Only some general parameters.
- The idea that any deceptions that fell short short of s.76 could not vitiate consent had been swept away by *Assange*.
- It was clear that the “but for” test was not sufficient.

Assange

- *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin)

If deception did not fall within S.76 (the very limited circumstances covered by conclusive presumption), that did not preclude reliance on s.74. Choice is crucial to the issue of consent. Deceit as to whether A was using a condom or one that was damaged capable of vitiating consent.
- *R(F) v DPP* [2013] EWHC 945 (Admin)

Consent can be vitiated by promise to withdraw before ejaculation ie a promise that fertile sperm would not be ejaculated into C's vagina.
- *McNally v R* [2013] EWCA Crim 1051

Prosecution under s.2 SOA 2003. Deception as to gender sufficient. No further light shed. It must be an active deception.

***Assange* as interpreted in *Monica* - Not a leap**

- **Deception closely associated with the nature or purpose of the sexual act because it relates to the sexual intercourse itself rather than the broad circumstances surrounding it is capable of negating C's free exercise of choice under s.74.**
- This may represent a relatively modest extension of the way the law examines "consent" in the context of sexual offending. Consent under s.74 a matter for statutory interpretation.
- It did not support what would be a profound change in approach to the law of consent advanced by the claimant in *Monica* ie that the determination of consent required solely a focus on the complainant's state of mind. State sponsored deception as to Mr Boyling's role as an undercover officer (however fundamental to C's decision-making) was simply part of the surrounding circumstances.

Lawrance - The facts

- Appellant met a woman on a dating website
- In sexually explicit conversation A indicated he had “had the snip”.
- Pros case that upon meeting before SI C sought assurance that A had had a vasectomy. She made it clear that she did not wish to take the risk of pregnancy.
- A had provided that reassurance.
- They had SI 2x without contraception.
- Next day A revealed he was fertile.

Lawrance - The arguments

- **Prosecution**

- C's consent was vitiated by A's deception as to fertility. A's deceit was sufficiently closely connected to the act of SI to be capable of negating C's agreement. (One of the fundamental purposes of SI is procreation.) Even if A genuinely believed C was consenting, it was an unreasonable belief

- **Defence**

- *Assange* and *R (F) v DPP* could be distinguished. Consent had been obtained upon the basis that ejaculate would be prevented from entering the complainant's vagina whereas in this case that was not sought to be avoided. Ejaculate entering the vagina was related to an integral part of the sexual act and was therefore "so closely connected with it." In *Lawrance* the deceit went to the consequences ie the risk of pregnancy and so was NOT sufficiently connected with the sexual act. C had consented to every aspect of the physical act.

Lawrance – the conclusion

- “But for” test insufficient

- *Monica* tested applied and refined:

“ Whether a lie as to fertility was so closely connected to the nature or purpose of SI rather than the broad circumstances surrounding it so that it is capable of negating consent. IS IT CLOSELY CONNECTED TO THE PERFORMANCE OF THE SEXUAL ACT?”

Assange, R (F), McNally all distinguished.

Here C had agreed to SI without physical restrictions. She was deceived about the nature and quality of the ejaculate ie the risks and consequences if unprotected SI.

C not been deprived by A’s lie of her freedom to choose.

Analogy with *R v B* [2007] 1 Cr. App. R. 29

Do express deceptions have a different impact?

- *R v B* established that a failure to disclose HIV status did not vitiate consent. Approved in *Lawrance*.
- *Assange* left open whether an express deception re HIV status could negate consent
- *McNally* established that there must be an active deception operating upon the complainant's mind.
- *Lawrance* holds that there is NO difference whether there was an express or implied deception. The test is the same.

Social and Public Policy

- Burnett LCJ in *Lawrance* referred to Latham LJ 's approach in *R v B* when deciding that undisclosed HIV was not relevant and admissible to consent :

“We echo the observations of Latham LJ that the issues require debate as a matter of social and public policy.”

Lawrance – Reaction

- Divided
- Many regard the vasectomy / condom distinction as wholly artificial
- Exposure to the risks of pregnancy are fundamental to a woman's integrity and so to woman's right to choose. C had to undergo the trauma of a termination – the very thing she had sought to avert by making inquiries. A violation of her physical integrity.
- Many would have given a wider meaning to both nature and purpose
- At last a guiding principle?
- Arguably some greater clarity. But at what cost? Are the public going to find condom/ vasectomy distinction very clear?

Lawrance – the future

- Supreme Court
 - Prosecution could lose the *Assange* point
- Need for a fresh look. Law Commission.
- Primary legislation?
- Is there culpable conduct that should be within the scope of criminal sanction? See Professor J.R. Spencer. *Sex by deception, Archbold Review*, Issue 9. Nov 14, 2013 pp 6-9 The 2003 Act, in repealing the offence of procuring a woman to have false representations to have sexual intercourse in any part of the world, has left a gap in the criminal law governing sexual misconduct.
- In 1995 the Law Commission recommended extending s.3 to procuring any form of deception by deception. (1995) , para 5.45. The Sexual Offences Review recommended that there should such an offence which would include a deception such as going through a sham marriage ceremony. *Setting the Boundaries* , 2000, para 2.18.7.
- SOA 2003 delivered no replacement offence. Was it feared that the continued existence of such an offence would dilute the definition of rape and a hope that S.74 would cover a wide range of deceptions? Has the time now come?