



[2022] EWCA Crim 412

Case No: 202102857 B2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM CROWN COURT PLYMOUTH**  
**HIS HONOUR JUDGE MOUSELEY QC**  
**Ind. No. T20200123**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Monday 28<sup>th</sup> March 2022

**Before :**

**LORD JUSTICE HADDON-CAVE**  
**MRS JUSTICE MAY**  
and  
**MRS JUSTICE COLLINS RICE**

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**Between :**

**ABDULNASRI ABDULAH**  
**- and -**  
**REGINA**

**Appellant**

**Respondent**

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Mr Nicholas Lewin (instructed by Woolcombe Yonge LLP) for the **Appellant**  
Ms Francesca Whebell (instructed by the Crown) for the **Respondent**

**Hearing date: Thursday 10<sup>th</sup> March 2022**

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**Approved Judgment**

**This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 9am on Monday 28<sup>th</sup> March.**

## **REPORTING RESTRICTIONS**

***This is a case in which the following restriction(s) will apply:*** The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. [See para.2.1 of the Practical Guide to Reporting Restrictions in CACD]. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

### **Lord Justice Haddon-Cave:**

1. On 17<sup>th</sup> August 2021 in the Crown Court at Plymouth before His Honour Judge William Mouseley QC, the appellant (then aged 24) was convicted of sexual assault, contrary to section 3 of the Sexual Offences Act 2003 (Count 1) and common assault, contrary to section 39 of the Criminal Justice Act 1988 (Count 2). The appellant is awaiting sentence.
2. The appellant appeals against conviction on Count 1 by limited leave of the single judge. We are grateful to Counsel, Mr Lewin and Ms Whebell (both of whom appeared below) for their able arguments and assistance in this appeal.

### **The Facts**

3. Shortly after 8am on 20<sup>th</sup> March 2020, the appellant was taken into custody having allegedly attempted to punch a pedestrian near Plymouth's main railway station. He was observed to be behaving oddly, with behaviour some described as grandiose and flamboyant or simply drunk and unable to stand unaided. As a result, at the custody centre he was examined by a nurse, CS, who determined his blood sugar level to be 2.1 millimoles per litre (mmol), as opposed to the normal range of between 5 and 8 mmol. She prescribed that he be given some glucose gel and provided with food and drink and she would return later and reassess him.

4. CS returned to assess the appellant some four hours later. She re-tested his blood sugar levels and found them by this stage to be 6.0 mmol, *i.e.* within the normal range. She then proceeded to examine him. She described how during what followed, the appellant lifted his hand and deliberately touched her breast. She later reported the incident to the police.
5. The appellant was interviewed on 20<sup>th</sup> March 2020 about the assault on the pedestrian. He denied the offence and said it could have been anyone. He was asked if he had been under the influence of anything or had any diagnosed medical issues or had taken any medication that might have affected his behaviour at the time. He declined to answer.
6. The appellant was asked to attend a second interview on 28<sup>th</sup> April 2020 about the incident involving CS. He provided a prepared statement in which he denied intentionally or deliberately reaching out or touching CS's breast or in that area. He accepted he may have moved his arms around and accidentally brushed against her. He had no specific recollection of doing that, but if there was any touching, he said it would have been accidental.
7. The Prosecution case was that the appellant sexually assaulted CS when he intentionally touched her breast (Count 1) and committed common assault when he deliberately attempted to strike the pedestrian (Count 2).
8. To prove the case on Count 1, the Prosecution relied on the evidence of CS about the incident and the statement of a colleague who gave evidence of first complaint by CS who told him the appellant had grabbed her breast and she had said something along the lines of, "What are you doing?" The defence case on Count 1 was a denial that the appellant intentionally or deliberately reached out or touched CS on the breast or in that area. The appellant accepted that he may have moved his arms around and accidentally brushed against CS, but denied any sexual assault. The appellant further relied on non-insane automatism on the basis of his low blood sugar level.

9. In relation to Count 2, the defence case was a denial that the appellant tried to strike the pedestrian as alleged or at all. He could not remember any confrontation with the pedestrian, but may have been unable to control his actions by reason of low blood sugar (as was subsequently found), unrelated to any alcohol intoxication.

## **Evidence**

10. CS, who had worked as a Healthcare Professional at the custody centre for a number of years, gave evidence that the appellant was brought into the examination room by two officers. She described him as ashen in colour, sweating profusely, fidgety and acting in a weird manner. He was very excitable and had no idea why he was in the medical room or who CS was, despite her introducing herself. He had previously signed the consent form but had no idea that it was his signature on the form. At the time, she was not sure whether the appellant was suffering from a medical condition or was under the influence of drugs or alcohol, so she did a routine set of observations, which included checking his blood sugar levels. Those levels turned out to be very low (2.1 mmol when the normal range was between 5 and 10 mmol) and would have accounted for the way he was acting. The low reading meant the appellant was medically unfit and she was not able to carry on with the examination.
11. She said that during the examination the appellant lay down on the couch but could not keep still and was rolling about. Concerned that he would fall off the couch, she stood right next to it. As the appellant rolled around, his knee came into contact with her chest, however, she did not believe it was intentional because he was unwell. She gave the appellant some Glucagon and asked the detention officers to give him some food and sugary drinks and left him to rest.
12. About four hours later, CS returned to re-examine the appellant. His blood sugar reading at that point was back within the normal range at 6.4 mmol. He presented as much better, not confused. He could answer questions and acknowledged his signature on the consent form. She said he was acting normally. She had no concerns about him and he was fit for her to carry on with the examination.

13. CS was required to examine and take samples from the appellant and, therefore, she and the appellant were separated from the officers by a screen. The screened-off area was fairly small. She conducted a visual examination of the appellant's body. On her request, the appellant sat on the edge of the couch and removed his top so she could examine his chest and back. Having put his top back on, she asked the appellant to face the wall and drop his trousers so she could examine his bottom and the backs of his legs. She said the appellant was very compliant and she remained satisfied that he was fit to be detained.
14. Following the examination, the appellant was sat on the couch facing her. She was stood approximately 18 inches in front of him. She thanked him for his co-operation. He made no reply and then, without warning, he raised his left hand and placed the back of it on her right breast. She said it was not a grab, it was a definite touch which lasted for a matter of seconds. Nothing was said. She described herself as being completely shocked. The appellant was looking at her while he did it. When asked whether it could have been accidental, she replied "No, definitely not".
15. She did not say anything to the two officers on the other side of the screen. She explained she was in shock and did not know what to do. She did, however, tell a colleague at the end of the shift when they were handing over and subsequently reported the matter to the police.
16. During cross-examination, she confirmed that when she first saw the appellant it was obvious to her that he was either medically unwell or under the influence of something making him behave in an extremely bizarre way. He was flamboyant in his behaviour, was waving his arms around a lot and saying all sorts of weird and strange things. She concluded his behaviour might have been due to something other than drink or drugs so she took a blood sugar reading from him. She explained that someone with hypoglycaemia should start to recover once they had been given sugar and there was no delay between the recovery of the blood sugar level and the recovery of the normal motor functions.

17. When she examined the appellant the second time, it was obvious that he was much better. His blood sugars were 6.4 mmol. His mannerism had not changed and he was still being very flamboyant and saying odd things. However, she said he looked better, was able to communicate with her and understood why he was in the medical room.
18. She said the appellant touched her breast, he did not grab it. It was a touch to the right breast with the back of his hand. At that time the appellant was sitting still on the couch. He was looking directly at her face as he touched her. There was no doubt in her mind that the appellant had sexually assaulted her.
19. During cross-examination, the appellant admitted that the day before the 20<sup>th</sup> March 2020 he had been drinking alcohol, but could not remember how much he had consumed. He accepted that his legs, knees and arms were moving around and may have accidentally brushed across the nurse.

### **The Statutory Provisions**

20. Section 3(1) of the Sexual Offences Act 2003 provides:

“A person (A) commits an offence if—

- (a) he intentionally touches another person (B),
- (b) the touching is sexual,
- (c) B does not consent to the touching, and
- (d) A does not reasonably believe that B consents.”

21. Section 3(2) provides:

“Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.”

22. Section 78 provides:

“78. For the purposes of this Part (except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that —

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.”

23. “Touching” is defined in section 79(8) as follows:

“79 (8) Touching includes touching —

- (a) with any part of the body,
- (b) with anything else,
- (c) through anything,

and in particular includes touching amounting to penetration.”

### **Summing up**

24. The judge, His Honour Judge William Mousley QC, withdrew the defence of non-insane automatism from the jury’s consideration of Count 1 on the basis that the appellant’s blood sugar levels had returned to normal levels by the time of the alleged sexual assault. He directed the jury as to their approach to Count 1 as follows:

“Count 1, a person commits the offence of sexual assault if he or she intentionally sexually touches another person without that person’s consent and not reasonably believing that person consented. Touching is sexual if a reasonable person would consider it so, because of its nature alone or by its nature and the circumstances and purposes of it. In this case the only question to be answered by you is whether the Defendant intentionally touched [CS]’s breast over her clothing.”

25. The judge, therefore, directed the jury on the basis of section 78(a) to the effect that if they found the appellant had intentionally touched CS’s breast over he clothing, they must find him guilty.

### **Submissions**

26. On behalf of the appellant Mr Lewin originally raised two points by way of appeal on Count 1. First, that the Judge erred in withdrawing the defence of non-insane automatism from the jury. Second, that the Judge ‘overly simplified’ the issues for the jury as to whether the assault was sexual.
27. Mr Lewin rightly pursued only the second ground. He submitted that the judge was wrong to direct the jury that there was just a single question which they had to answer, *i.e.* as to the *actus reus* of (intentional) touching. He submitted that the judge should have directed the jury on the basis of section 78(b), and that they had to be satisfied as to both limbs: (i) that by its nature the touching may be sexual and (ii) that because of its circumstances or the purpose of any person in relation to it (or both) it was sexual. He submitted that the question of whether or not any touching was sexual was not clear cut, given the appellant continue to behave oddly following his earlier hypoglycaemic episode, and the judge should have directed the jury to consider what the appellant’s purpose was when he touched CS’s breast with the back of his hand.
28. Ms Whebell submitted on behalf of the Crown that the nature of the act itself, the touching of a woman’s breast, was by its nature sexual and the judge was right to approach the matter on the basis of section 78(a). The Judge was correct in the question he posed for the jury, namely whether it was an intentional touching of her breast. The Crown’s case was that it was a deliberate touching, the defence advanced that it did not happen or, if it did, it was accidental. The single question was therefore entirely appropriate based on the evidence and case advanced.

### **Analysis**

29. The single judge, Stacey J, succinctly summarised the issue in this appeal as follows: whether it should have been left to the jury to decide if the touching was sexual and whether the reduction of the issue in the case to the single question of whether the touching had been intentional was insufficient as regards Count 1.
30. The terms of section 78(a) are clear: the question whether or not a reasonable person would consider a touching or other activity is “*because of its nature sexual*”



must first be answered by reference to the nature of the act itself, *i.e.* “whatever its circumstances or any person's purpose in relation to it”.

31. The nature of the touching was explored in detail during CS’s oral evidence. During examination-in-chief by Ms Whebell, CS described how the appellant placed his left hand onto her right breast without warning. She was asked to describe his hand movement: “It just literally came up and, and touched my breast. It wasn’t a grab, it was a definite touch. ... A matter of seconds.” She said the appellant said nothing but was looking at her. She said she was completely shocked. She said there was no possibility that it could have been accidental.
32. During cross-examination by Mr Lewin, CS accepted that, although the appellant looked better and communicated better once his blood sugar levels had returned to normal, he was still excitable and behaving quite oddly. She described again how the appellant’s hand came up and with the back of it, touched her right breast before going down again. She was then asked:

**Mr Lewin:** ... Were you immediately sure that he had sexually assaulted you?

**CS:** Yes.

**Mr Lewin:** So there was no doubt in your mind at all at the time?

**CS:** No.

33. The Judge asked CS if she could describe how far the appellant’s hand travelled in order to touch her. She explained that he was sitting on the edge of the couch with his hands down by his sides:

**CS:** And it just came up, left hand came up and went onto my right breast.

**HHJ William Mousley:** So he raised his hand from, as it were, on the couch –

**CS:** .... [His hand] went from the couch straight up to my breast. It wasn't up and down or anything like that, it was straight, straight onto my breast.

34. In further cross-examination by Mr Lewin, CS was asked again whether she was immediately sure it was deliberate:

**CS:** I was so shocked that it'd happened that I, I really had to think, but I know the way from his hand movement it was deliberate.

35. In the light of this clear evidence, the Judge was entitled to take the view that a reasonable person would consider the nature of the act itself, *i.e.* the deliberate touching of a woman's breast in the manner described, was obviously and inevitably sexual (*c.f.* *R. v H (Sexual Assault: Touching)* [2005] EWCA Crim 732; [2005] 1 W.L.R. 2005, Lord Woolf at [8]). He was right to conclude that this was a case which fell under section 78(a) and there was only a single question which had to be left to the jury as to whether the touching was intentional. It is noteworthy that no point or objection was raised by counsel at the time as to the Judge's proposed direction.

36. Mr Lewin's argument – that the jury should have been allowed to consider the possibility that the appellant's continuing odd behaviour offered an alternative characterisation of the touching as 'non-sexual' - seeks illegitimately to import an extraneous consideration into the simple question posed by section 78(a), namely *whatever* its circumstances or his purpose in relation to it, the touching was because of its nature sexual. Section 78(a) was, in our view, designed to obviate just this sort of extraneous argument as to motive or other considerations.

37. CS was immediately sure she had been sexually assaulted. The Judge took the view that a reasonable person would have been sure too. On the facts of this case, the nature of the act spoke for itself.

38. Accordingly, we consider the conviction safe. The appeal is dismissed.