JUDICIARY OF ENGLAND AND WALES

R ON THE APPLICATION OF F
-V-
DIRECTOR OF PUBLIC PROSECUTIONS

HIGH COURT (DIVISIONAL COURT)

24 APRIL 2013

SUMMARY TO ASSIST THE MEDIA

The High Court (Lord Chief Justice, Mr Justice Fulford and Mr Justice Sweeney) has today allowed a judicial review of a decision by the Director of Public Prosecutions (DPP) not to prosecute a man for rape. The Court also confirmed the Divisional Court's view in *Assange v Swedish Prosecution Authority* that 'choice' is crucial to the issue of 'consent'.

Introduction

Lord Judge, the Lord Chief Justice, on behalf of the Court said:

"This is an unusual, but not unique, application for judicial review of the refusal of the Director of Public Prosecutions ("the defendant") to initiate a prosecution for rape and/or sexual assault of the claimant by her former partner, ("the intervener"). (para 1)

Background

The allegations by F against her former partner ('the intervener') and summary of evidence available to the DDP, which was reviewed by Alison Levitt QC, the DPP's Principal Legal Advisor, is set out in paragraphs 7 - 19.

Discussion

Lord Judge said:

"In relation to the incident in February 2010, the question Miss Levitt asked herself was whether ejaculation without consent could transform an incident of consensual intercourse into rape. She could find no authority that dealt directly with this problem. She noted that as a matter of law a person could withdraw consent to intercourse even after penetration had begun, but she was "not clear at which point it could be argued that (the intervener) should have ceased to have intercourse with her". She suggested "were it possible to prove that he had embarked on the act intending to ejaculate it is arguable that he knew that she would not have consented to it, but as a matter of evidence it would be in my view be impossible to prove that it was not a spontaneous decision made at the point of ejaculation". (para 20)

The Court notes that, at the time when the review was written Ms Levitt QC did not have the advantage of the judgment of the Divisional Court in *Assange v Swedish Prosecution Authority* [2011] EWCH 2849. (para 22)

In relation to the case before the Court, Lord Judge said:

"We must emphasise that we are not addressing the situation in which sexual intercourse occurs consensually when the man, intending to withdraw in accordance with his partner's wishes, or their understanding, nevertheless ejaculates prematurely, or accidentally, within rather than outside his partner's vagina. These things happen. They always have and they always will, and no offence is committed when they do. They underline why withdrawal is not a safe method of contraception. Equally we are not addressing the many fluctuating ways in which sexual relationships may develop, as couples discover and renew their own levels of understanding and tolerance, their codes of communication, express or understood, and mutual give and take, experimentation and excitement. These are intensely private matters, personal to the couple in question.

"The facts suggested by the evidence in this case are quite different. … Consensual penetration occurred. The claimant consented on the clear understanding that the intervener would not ejaculate within her vagina. She believed that he intended and agreed to withdraw before ejaculation. The intervener knew and understood that this was the only basis on which she was prepared to have sexual intercourse with him. …. In short, there is evidence that he deliberately ignored the basis of her consent to penetration as a manifestation of his control over her." (paras 24 – 25)

"In law, the question which arises is whether this factual structure can give rise to a conviction for rape. Did the claimant consent to this penetration? She did so, provided, in the language of s.74 of the 2003 Act, she agreed by choice, when she had the freedom and capacity to make the choice. What *Assange* underlines is that "choice" is crucial to the issue of "consent", and indeed we underline that the statutory definition of consent provided in s.74 applies equally to s.1(1)(c) as it does to s.1(1)(b). The evidence relating to "choice" and the "freedom" to make any particular choice must be approached in a broad commonsense way. If before penetration began the intervener had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because "penetration is a continuing act from entry to withdrawal" (see s.79(2) of the 2003 Act) he decided that he would not withdraw at all, just because he deemed the claimant subservient to his control, she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape."

<u>Conclusion:</u>

Lord Judge, on behalf of the Court concluded:

"The entire body of evidence, both in relation to the nature and history of the relationship between these two people, and as it applies to each of the individual, specific occasions of complaint, requires re-examination in the light of these observations. This decision should be reviewed in the light of the legal principles explained in this judgment. This is an appropriate case in which to order a judicial review." (para 27)

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