IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR 2017/0078

REGINA

V

KJ

APPEARANCES

Ms Rilys Adams for the Crown.

Mr Warren Cassell for the defendant.

2018: MAY 18

RULING

On consent to a sexual act

1 **Morley J**: KJ aged 40 falls to be tried on an allegation that on 06.06.16 when aged 38 he raped IN, then aged 16. A preliminary point has arisen on the meaning of consent in rape[1].

2 The allegation is that in the afternoon of 06.06.16, IN took her friend TO aged 18 to the home of KJ. As KJ and IN had been sexually involved before, KJ allowed IN to bring others to his house. While there, she began sexual intercourse with TO. KJ was hiding and emerged with a phone in hand, saying he had videoed the event. He threatened he would post the video on

[1] All parties are anonymized as the matter has not yet completed as a trial, and in any event, whatever the outcome, the complainant would always be entitled to lifelong anonymity.

facebook to cause IN social embarrassment unless IN agreed to have a 'threesome' with him and TO. She refused, KJ repeated his threat to upload the video, TO relented, and so she **'gave in'**, as she says in her statement, because she did not want the video exposed. Both had sexual intercourse and fellatio with her, alternately and simultaneously together, KJ using a condom. Afterwards, IN was non-responsive to TO and angry with KJ, and later alone was tearful, making a complaint to her mother at around 4pm. In interview, KJ agreed he had created the impression he had made a video, which, without threat, she had worried he might upload, agreed to sex to avoid this, and at all times he believed she was consenting to sexual intercourse.

3 On IN's account, the question arises in law whether, if she 'gave in', she was consenting to sexual intercourse and so the offence of rape cannot arise. In consequence on 10.05.18, I heard argument supported by written submissions as a preliminary point prior to trial.

4 On Antigua & Barbuda, rape is defined by **s3 Sexual Offences Act no. 9 of 1995** which says:

> (1) A male person commits the offence of rape when he has sexual intercourse with a female person who is not his wife either –
>
> (a) without her consent where he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; or
>
> (b) with her consent where the consent - (i) is extorted by threats or fear of bodily harm to her or to another…
>
> (2) A male person who commits the offence of rape is liable on conviction to imprisonment for life.

5 KJ is charged specifically under s3(1)a), namely it is alleged that he had sexual intercourse with IN knowing that she did not consent or being reckless as to whether she consented.

6 However, in this ruling I will also consider s3(1)(b), as it was argued, namely whether it can in law alternately be alleged that he had sexual intercourse with IN with her consent where the consent was extorted by threats or fear of bodily harm to her or to another.

S3(1)(a) – no consent

7 The first question to address is under s3(1)(a), namely whether 'giving in' amounts to consent.

8 To '*give in'* is variously defined online as *'to cease fighting or arguing, to admit defeat'*[2], '*to finally agree to what someone wants, after refusing for a period of time'*[3], and *'to cease opposition; to yield'*[4]. Synonyms include to back down, capitulate, cave in, cede, comply, concede, submit, and surrender[5]. In my judgment, to give in means reluctant agreement, such that the agreement is not freely given but under a measure of compulsion and lack of choice. If so, then reluctant agreement to have sex may not be said to be freely given consent.

9 It is well-established in law that unless consent is 'freely given by choice', so that the complainant has had the freedom to exercise autonomy, then it is not consent to a sexual act. It is of assistance to note that in the UK, **s74 Sexual Offences Act 2003** has legislated, for clarity, of persuasive application here in the sister Common Law jurisdiction of the Eastern Caribbean Supreme Court, that *'…a person consents if he or she agrees by choice and has the freedom and capacity to make that choice'.* In **Blackstones 2017** at B3.19, it is noted that to have freedom to make a choice a person must be free from physical pressure, but it remains a matter of fact for a jury as to what degree of coercion has been exercised on a person's mind before he or she is not agreeing by choice with the freedom to make that choice. And further, at B3.20, it reads, of relevance to this case:

> 'Consent covers a range of behaviour from whole-hearted enthusiastic agreement to reluctant acquiescence. Context is critical. Submission to a demand that a complainant feels unable to resist may in certain circumstances be consistent with reluctant acquiescence, per **R v Watson 2015** EWCA Crim 559. There are circumstances where a jury will require assistance with the distinctions between reluctant but free exercise of choice, especially but not exclusively in the context of a long term loving relationship, and unwilling submission due to fear of worse circumstances.'

10 In sum, although the allegation is that IN 'gave in', it does not follow that by giving in she consented so that the proceedings under s3(1)(a) must stop. There is a jury issue. The

[2] Oxford living dictionary: https://en.oxforddictionaries.com/definition/give_in.
[3] Cambridge dictionary: https://dictionary.cambridge.org/dictionary/english/give-in.
[4] Free dictionary: https://www.thefreedictionary.com/give+in.
[5] Thesaurus.com: http://www.thesaurus.com/browse/give%20in.

question may distil to, *'in giving in, in the context of this case, did she acquiesce or submit?'* It is important to note that this analysis *de jure* does not suggest that KJ must be guilty, but merely that in due course a jury will be directed on consent, as appropriate, to determine what facts they find proved and whether they are sure *de facto* there was no consent. As such, the current count on indictment remains good in law.

11 Though the argument at Bar on 10.05.18 concerned the offence of rape, this analysis of consent in rape will be equally applicable to consent to an act of serious indecency, contrary to **s15 1995 Act supra**, which is a second count KJ faces, as representing whether IN consented to his putting his penis in her mouth.

S3(1)(b) – extorted consent

12 Submissions continued in the alternative that if giving in was consent, then the Crown argued that the law allows for consent to be vitiated as extorted by threat under s3(1)(b). To extort is 'to obtain by threat or force'[6]. The defence responded that in the section the 'or' must be read conjunctively. If right, this would mean that the *'threats'* must be as to *'bodily harm'*, but as the threat was as to acute embarrassment caused by internet upload then such a threat does not apply.

13 More narrowly stated, the argument of defending counsel was that in the expression *'threats or fear of bodily harm'*, the 'or' is conjunctive, meaning the bodily harm is either threatened or feared, so that the words 'threats' and 'fear' are conjoined as both pertaining to bodily harm. The argument of Crown counsel was the 'or' is disjunctive, meaning the threats stand apart from fear of bodily harm, and can be any threat at all, threatening a consequence which is not limited to bodily harm, and can therefore include a threat to cause acute embarrassment.

14 The first point to consider is whether acute social embarrassment can amount to 'bodily harm'. In theory, if it is capable of giving rise to a recognisable psychiatric illness, supported by expert evidence, then there is authority that a threat to cause such embarrassment is indeed a threat to cause bodily harm, whether the 'or' is conjunctive or disjunctive. This is because bodily harm has been defined as any injury which is calculated to 'interfere with the health or comfort of the

[6] Oxford living dictionary: https://en.oxforddictionaries.com/definition/extortion

victim', per **R v Miller 1954** 2QB 282, where in common sense acute embarrassment can in theory so interfere. Moreover, in **R v Dhaliwal 2006** 2CrAppR 348, while it was said that distress, grief, anxiety or other psychological harm, not amounting to any recognisable psychiatric illness, is not bodily harm, the reverse follows, so that if it can so amount it is bodily harm, providing it is supported by an expert explaining the potential psychiatric illness.

15 An example of the terrible harm that showing others a video of a person's sexual activity can cause is the tragic and worldwide reported case from 2010 of *Tyler Clementi*, from New Jersey, USA, who at 18 committed suicide the day after his college roommate secretly filmed and broadcast him by the internet with another man in a sexual relationship[7].

16 The second point to consider is whether the word 'threats', plural, means there has to be more than one threat. In my judgement, one threat will do, because if the legislation contemplates threats, there has to be at least one, so that one threat is contained within the set of all threats contemplated. Moreover, it would be out of reason to imagine one very serious threat would not count, while two minor threats would.

17 In addition, in any event, on the facts alleged, the threat to upload was made twice, so that there were threats, plural, rendering the point moot for the purposes of the hearing.

18 The third point to consider is whether indeed the 'or' is conjunctive or disjunctive. As a matter of simple statutory interpretation, I find it is disjunctive, pursuant to the **s58 Interpretation Act cap 224** of the 1992 Revised Edition of the Laws of Antigua & Barbuda, which states*: "In an enactment the expression… "or", "other" or "otherwise" are, unless contrary intention appears, to be construed disjunctively…"*

19 The reason I do not find a 'contrary intention appears' is twofold.

a. First, a threat of bodily harm will cause fear of it, and so is otiose if conjunctive, which cannot be the intention of the language.
b. Second, a threat to deny a parent access to a child, or to drain someone's bank account, or burn down their house when away, or to make a false allegation to police, may not

[7] See https://en.wikipedia.org/wiki/Suicide_of_Tyler_Clementi.

involve bodily harm, but could imaginably create the sort of pressures contemplated as vitiating consent. It would seem illogical for the threat of a mere slap to vitiate consent, being bodily harm, which if delivered would stop stinging a little time later, yet the threat of lifetime separation from a loved one, or lifetime penury, or homelessness, or lifetime loss of reputation and standing (even if acquitted or the allegation is dropped after being made public) - where any of these scenarios can cause far greater long term damage to someone - would not count at all as a reason to consent under such a threat to sexual intercourse.

20 In sum, analyzed in this way, in my judgment, the intention of the legislation must be that a threat or threats stand alone and are to be construed as separate from fear of bodily harm.

21 However, it might be said that s3(1)(b) is mostly redundant in light of how consent, as discussed above, must be freely given by choice, because any threat (or fear of bodily harm) must necessarily constrain that freedom. As such, it makes for good prosecution practice that this case will proceed under s3(1)(a), without need on the indictment for a redundant alternative count under s3(1)(b).

A possible anomaly

22 Finally, *obiter*, there is a possible anomaly to mention. Under s3(1)(b), there appears at first glance no need to examine the *mens rea* of a defendant, as the offence seems made out once a jury is sure there was vitiated consent. Under s3(1)(a), there is a requirement to prove the defendant knew a complainant was not consenting or did not care; it seems not so for s3(1)(b).

23 This appears to lead to a situation where KJ may be acquitted under s3(1)(a) as the jury assess that he may have subjectively believed IN was consenting, but be convicted under s3(1)(b) as his subjective belief seems irrelevant. This could lead to a situation where in theory, for example, a jury could be sure that he thought she was freely agreeing to sex, in his mind having only playfully encouraged her with a faux threat of video upload, having been involved together before, but find he was merely mistaken to think it, convicting him of rape, notwithstanding he has no *mens rea*.

24 The situation would be worse if the consent was vitiated by fear of bodily harm, where a complainant was in fear, but irrationally, without knowledge of a defendant. This could mean he would be guilty of rape despite having no idea that the complainant was only agreeing to a sexual act because of a mistake or misunderstanding, or even conceivably owing to suffering a psychiatric delusion, not known to the defendant, who otherwise subjectively thinks consent freely given.

25 The solution to this anomaly may lie in the use of the word 'extort'. The legislation requires that the consent must be extorted. Extortion suggests *mens rea*. To extort consent is to do an act or utter words which import deliberateness of consequence. In other words, there is a double intent: first, the intent to utter a threat or raise fear of bodily harm; and second, an ulterior intent that by uttering threat or raising fear it shall cause consent to be given. Concerning what type of intent, logically it would seem this must be a specific intent as to the first, and a basic intent as to the second. Basic intent embraces recklessness. It would follow that if the basic intent of the second limb of extortion was to obtain consent to a sexual act, then the *mens rea* pertaining to the *actus reus* would be that a defendant (i) intended to threaten or raise fear, being deliberate, as a matter of specific intent, and then (ii) knew the consent which was obtained was by reason of the extortion or did not care. In this way, the *mens rea* under s3(1)(b) would be almost identical to the *mens rea* under s3(1)(a), in that both require a basic intent concerning what the defendant thought of whether there was consent.

26 I should like to thank counsel for their excellent hard work in researching the law and their submissions. For the reasons explained, I direct that the trial shall proceed under s3(1)(a), as per the present count on the indictment.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

18 May 2018