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Intent to harm

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Case Comment: R v Daryll Rowe (Lewes Crown Court, 15 November 2017)

Daryll Rowe was convicted of offences against section 18 of the Offences Against the Person Act 1861 (OAPA) at Lewes Crown Court on 15th November 2017. The prosecutor's case was that he deliberately infected (or attempted to infect) a total of 10 men with human immunodeficiency virus (HIV) during sexual encounters. It was alleged that he exerted pressure on partners to engage in unprotected sex and, if they refused, he tampered with condoms. Rowe became the first person to be convicted of causing grievous bodily harm with intent in a case of this nature in England and Wales, but, I argue, an alternative prosecution could have been brought under section 1 of the Sexual Offences Act 2003 (rape). Both offences carry the same maximum sentence of life imprisonment but the issues are particularly important in this context because, unlike a conventional attempted assault case, sexual violation did occur in relation to every one of Rowe's victims, even those who were not in fact infected with the virus.

It is relatively settled law that the reckless transmission of HIV via sexual intercourse amounts to an offence under section 20 OAPA, but not to rape (*R v Dica* [2004] 3 ALL ER 593; *R v Konzani* [2005] EWCA Crim 706; *R v B* [2006] EWCA Crim 2945). The judgments in the above cases were clear: the failure to disclose HIV status did not vitiate consent as the parties were acting for the same purpose – i.e. sexual gratification; the ancillary risk of transmission of HIV did not fundamentally alter the nature or purpose of the act to the extent that consent was no longer present. As part of the judgement in *Dica*, the court stated (*obiter*):

> "We repeat that the Crown did not allege, and we therefore are not considering the deliberate infection, or spreading of HIV with intent to cause grievous bodily harm. In such circumstances, the application of what we may describe as the principle in *Brown* means that the agreement of the participants would provide no defence to a charge under s 18 of the 1861 Act." (Para 58)

The decision of the Crown Prosecutor to charge s.18 OAPA in was undoubtedly influenced by those decisions, and is entirely logical given the nature of the evidence.

However, since those decisions, the courts have developed two lines of reasoning which mean that it would have been possible, in my view, to charge Rowe with rape (ignoring issues about duplicity in the indictment, and the fact that several victims indicated that they felt significant pressure to engage in sexual activity). The first line of argument revolves around issues of deception, and the second, which is connected to deception, around an understanding of conditional consent.

It is, however, worth stating at the outset that, in *B*, the court noted (in considering Temkin, J and Ashworth, A 'The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent' [2004] *Crim. L.R.* 328) that

> "the Sexual Offences Act 2003 does not expressly concern itself with the full range of deceptions other than those identified in section 76 of the Act, … this leaves, as a matter of some uncertainty, the question of, for example, as it is put: "What if D deceives C into thinking that he is not HIV positive when he is? … The consequence seems to us to be matter which requires debate, not in a court of law but as a matter of public and social policy, bearing in mind all the factors that are concerned including the questions of personal autonomy in delicate personal relationships. … the extent to which such activity should result in charges such as rape, as opposed to tailormade charges of deception in relation to the particular sexual activity, seems to us to be a matter which is a matter properly for public debate." (Para 40)

Deception

Under s.76 Sexual Offences Act 2003 (SOA) it is conclusively presumed that consent was absent (and, therefore, rape has been committed) in circumstances where the victim has been deceived about the nature or the purpose of the act, and the defendant is not entitled to call evidence in rebuttal of that presumption. The provisions of s.76 developed via a long line of cases in which victims had been deceived about the nature of the act they were engaging in. For example, in both *R v Flattery* (1877) 2 QBD 410 and *R v Williams* [1923] 1 KB 340, the complainants were erroneously led to believe they undergoing some sort of medical procedure. The SOA took a more restrictive approach (perhaps consequent of the conclusive nature of provisions) to the type of deceptions that would vitiate consent, in that it removed the offence of procurement of a woman by false pretences under s.3 Sexual Offences Act 1956. However, the SOA does explicitly state that a deception about the nature or ***purpose*** of the act vitiates consent.

It is possible to take a broad approach to the interpretation of 'purpose', such as in *R v Devonold* [2008] EWCA Crim 527. In that case, it was a deception as to purpose when the defendant encouraged the victim to engage in sexual activity in front of a webcam, the victim believing he was doing so for a woman's sexual gratification and the defendant planning to use the pictures obtained to punish the victim (who had ended a relationship with the defendant's teenage daughter). It seems that, where one party (the victim) believed he was acting for the purpose of sexual gratification, but the other party (the defendant) had another purpose, the court was prepared to accept that the victim had been deceived about the purpose of the act and, therefore, consent was not present. Could that reasoning be applied in the case of *Rowe*? In my view, it can. It appears, from the facts that are in the public domain, that Rowe set out with the purpose of infecting the victims of his actions with HIV. Furthermore, the acts of deliberately tampering with condoms suggests that, at least one of his purposes was to spread the disease, and the convictions confirm this. As such, the victims may well have been deceived about the purpose of the acts within the remit of s.76: they believed they were engaging in acts for sexual pleasure, while the defendant's purpose was to spread disease. There may be complicated arguments to be had about whether the ability to transmit HIV gave him sexual pleasure, to which we do not know the answer, but, in either instance, the victim is deliberately deceived about the defendant's motivating purpose. Such deception was sufficient to vitiate consent in *Devonold*.

<u>Conditional consent</u>

In the Administrative Court case of *Assange v Sweden* [2011] EWCH 2849; the court was tasked with considering whether Assange's actions would amount to rape in English law, which would then affect the extradition decision. The allegation in this case was that sexual intercourse would take place upon condition that Assange wore a condom. He did not do so. The court was tasked to determine whether an active failure to follow the condition upon which intercourse would occur was capable of vitiating consent, and therefore capable of amounting to an offence of rape in English law. The court said:

> "…it is not an allegation that the condom came off accidentally or was damaged accidentally. It would plainly be open to a jury to hold that, if AA had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act 2003."

While the court was not prepared to state that the failure to comply with a condition of condom use would fall foul of the conclusive presumptions (that consent was absent) under s.76 SOA, the court did hold that the complainant's capacity to make a free choice (under the definition of consent found in s.74 SOA) was undermined by the deliberate removal of the condom.

Adding support to the decision in *Assange*, in the case of *R (F) v Director of Public Prosecutions* [2014] 2WLR 190, F sought Judicial Review of a Crown Prosecutor's decision not to prosecute a case in which the central issue was conditional consent. The complainant had been involved in a difficult relationship with a man, and had only agreed to sexual intercourse on condition that he would not ejaculate in her vagina. When he in fact did so, F felt that the terms upon which she had consented had been violated, and reported the matter to the police. The Crown Prosecutor declined to prosecute. However, on Judicial Review, the High Court concluded that rape occurred when:

> "… he decided that he would not withdraw at all… she was deprived of choice relating to the crucial future on which her consent to sexual intercourse was based. Accordingly her consent was negated…" (Para 26)

Section 74 SOA (upon which both of the above decisions were based) makes clear that consent is only present when the parties agree by choice, and have the freedom and capacity to make a choice. In both decisions, the courts took the view that the complainant had been deprived of her choice about the circumstances in which sexual intercourse would occur. The crux of these decisions is that the failure to abide by a condition upon which the complainant consented to sexual intercourse vitiated their consent.

As above, the case against Rowe included allegations that he had deliberately tampered with condoms when partners insisted that they be used, and he assured at least one victim that he was not HIV positive before they engaged in sexual intercourse. Although neither *Assange* nor *F* were in fact cases before criminal courts, they provide a strong indication that the Crown Prosecutor would have been justified in charging Rowe with rape in these circumstances, on the basis that their ability to choose how sexual relations would occur had been vitiated in such a way that consent was not present.

<u>Conclusion</u>

It seems to me that it would have been feasible in law to legitimately charge Daryll Rowe with rape. Given the notorious difficulties obtaining convictions for rape, it was perhaps a sensible tactical decision on the part of the Crown Prosecutor to charge s.18 OAPA. A charge of assault is also, arguably, less likely to be subject to appeal (although it remains to be seen) and so *may* better serve the victims' interests. It does also, however raise interesting questions about the gender binary issues involved in prosecuting cases which include an element of sexual activity, evidenced by, for example, the insistence on a distinction between rape and assault by penetration based on penile penetration, and by the decision in *R v McNally* [2014] 2 WLR 200. I wonder, entirely speculatively, whether the Crown Prosecutor would have been more likely to charge rape had the relationships been of a heterosexual nature. Regardless of those issues, which there is not scope to examine in more detail here, perhaps the case of Rowe highlights the need, set out in paragraph 40 of *B* (above) to (re)address issues of deception and HIV in the context of sexual offending.