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COURT OF APPEAL, ENGLAND & WALES

R

- vs -

Konzani

Coram

LORD JUSTICE JUDGE
MR JUSTICE GRIGSON
HIS HONOUR JUDGE RADFORD

17 MARCH 2005

Judgment

Lord Justice Judge

1. This is an appeal by Feston Konzani against his conviction on 14th May 2004 in the Crown Court at Teesside, before His Honour Judge Fox QC and a jury, on three counts of inflicting grievous bodily harm on three different women, contrary to s 20 of the Offences Against the Person Act 1861. On the judge's direction he was acquitted of a further such count involving a fourth woman.
2. He was sentenced to a total of 10 years' imprisonment on count 2, 4 years' imprisonment on count 3, 3 years' imprisonment, and on count 4, 3 years' imprisonment, all the sentences to run consecutively. His application for leave to appeal against sentence was referred to the Full Court.
3. The appellant was born in February 1976. In November 2000, the appellant was informed that he was HIV positive. On that occasion, and on subsequent occasions, he was specifically informed of the risks of passing the infection on to any sexual partners, and its dire consequences. Thereafter he had sexual relationships the three complainants. He did not tell any of them that he was HIV positive, and he repeatedly had unprotected sexual intercourse with them, knowing, that by doing so, he might pass the infection on to them. In consequence, each contracted the HIV virus.
4. The appellant did not give evidence at trial. He called no witnesses. There was no evidence to contradict the clear statements by each complainant that he had not told them of his condition. It was however formally admitted on his behalf that he acted recklessly by having a sexual relationship with the complainants without using a condom every time he had sexual intercourse with them. It was also admitted that he infected them with the HIV virus, thus inflicting grievous bodily harm on them.
5. Notwithstanding their evidence that he withheld vital information about his condition from them, and that each complainant expressly denied that she consented to the risk of catching the HIV virus from him, counsel on his behalf addressed the jury on the basis that by consenting to unprotected sexual intercourse with him, they were impliedly consenting to all the risks associated with sexual intercourse. He argued that as infection with the HIV virus may be one possible consequence of unprotected sexual intercourse, the complainants had consented to the risk of contracting the HIV virus from him. Accordingly he should be acquitted. By their verdicts, the jury found that none of the complainants consented to the risk of contracting the HIV virus.

6. The significant aspect of the appeal relates to the accuracy in law of the judge's direction to the jury on the issue of consent. We must, however, examine the essential facts in a little more detail.

DH

7. The first complainant was DH. She met the appellant in 2001, when she was 15 years old, when she bumped into him as she was walking down the street. He invited her and two friends, aged 14 years, to a party given by his sister. At the party, the appellant told her that he liked her because she was the eldest of the 3 girls.
8. She saw him a week later, and he asked her to become his girlfriend. She was a virgin. She had sexual intercourse with him. She moved into a house with him. Sexual intercourse took place regularly. She did not have sexual intercourse with anyone else. When they had sexual intercourse he did not use a condom, and ejaculated inside her.
9. There was no discussion about the potential risks, and to begin with she was not even worried about the danger of pregnancy. After two or four weeks, she returned home to her mother. She climbed out of a kitchen window and did not return.
10. After her relationship with the appellant, she had two sexual partners. Both were later tested for HIV, and both tested negative. Thereafter she saw the appellant on a couple of occasions, but ran away from him when she did. At Christmas 2001, she had a blood test, and discovered that she was HIV positive. The appellant had never told her that he was HIV positive. When she found out about her condition, she started crying. She wanted to die.
11. She said that at the time of the relationship she knew about the risks of pregnancy, and indeed of contracting a disease, but the risk of catching HIV never entered her mind.
12. We must refer to the transcript of her evidence. She was asked:

> Q At any time when you were with Feston or after you were with Feston, did he tell you that he was HIV positive?
>
> A No.
>
> Then my doctor came round and told me I was HIV positive.
>
> Q How did that make you feel?
>
> A I wanted to die.

13. When cross-examined the following exchanges occurred:

> Q Did they tell you anything about HIV? Did you know anything about Aids?
>
> A No.
>
> Q Either from those lessons at school or from what you have heard on the news?
>
> A Erm well, they told us about it at school but I didn't really get to grips with what it was about
>
> Q And were you aware that there is an Aids problem in Africa?
>
> A Not really, no.
>
> Q What did you know about him before you agreed to have sex with him?

A Not much
Q Did you realise you were taking a risk of becoming pregnant.

A Yeah.

Q Were you prepared to take that risk?

A Yeah.

Q Did you realise you were taking a risk of catching a disease?

A Yeah.

Q And were you prepared to take that risk?

A Yes, I was, yeah.

14. In re-examination she was asked:

Q When you were having sex with Feston did you think at any time there was a risk of you catching a serious sexually transmitted disease?

A No. If I'd have known that I wouldn't have went with him.

Q You said a little bit about how you feel, having found out that you have HIV.

A Yeah.

Q Have you done anything as a result of it?

A I was self-harming.

Q You were self-harming. What do you mean by that?

A I was cutting my arms.

Q Do you know why you did that?

A Because it took the anger and pain. I couldn't exactly go down the road and punch Feston.

RW

15. The second complainant was RW. She gave evidence that she was from Kenya. She first met the appellant in December 2002, in church. He told her that he was from Malawi. They talked about the Bible. They planned to meet for a prayer meeting. They became friends. She eventually moved in to live with the appellant, and they became lovers.

16. Sexual intercourse occurred on many occasions, sometimes protected, sometimes not. She said that she was not concerned about having unprotected sex with the appellant because she trusted him. He did not tell her he was HIV positive.

17. Gradually the relationship deteriorated. She became pregnant. They separated. When she went to see the doctor to confirm the positive result of her own home pregnancy test, she was told that she was both pregnant and HIV positive. She was devastated.

18. She was 27 years old, and aware of the Aids problem in Kenya and Malawi. She and the appellant never discussed contraception. Later she gave birth to their child who was HIV negative. She agreed in evidence that she realised that she had taken the risk of catching an infection, including HIV, but said that she had not thought about the risk of having unprotected sex with him at the time. She was not concerned because she trusted him. He

did not tell her that he was HIV positive.

19. Again, we must refer to some passages in the transcript of RW's evidence.

> Q When Feston didn't wear condoms were you concerned about any risks?
>
> A No.
>
> Q Why weren't you concerned?
>
> A I trusted him.
>
> Q Did Feston tell you he was HIV positive?
>
> A No.

20. Cross-examined it was put to her that:

> Q You also realise that by having unprotected sex you risk catching an infection?
>
> A Yes
>
> Q That too is a risk that you took.
>
> A Yes.
>
> Q That risk included the risk of contracting HIV didn't it?
>
> A Yes, but I didn't think about it at the moment.
>
> Q That means at the time you had unprotected sex?
>
> A Yes.
>
> Q But there was no discussion about HIV or tests or anything before you had sex?
>
> A Yes.
>
> Q You agree that there was no discussion?
>
> A Yes.

LH

21. The third complainant was LH. She was a voluntary worker who did community work related to Africa. She had a 4 year old son, who suffered a life-threatening condition which was countered by very high levels of hygiene. Before she met the appellant, she and her child's father had both had blood tests. They were HIV negative.

22. She met the appellant through her work in January 2003. She was attracted to him. She told him about her ambition to help orphans in Africa. He told her that HIV was not very common in the part of Africa from which he came. He did not tell her that he was HIV positive. Their friendship developed into a sexual relationship. The first time they had sexual intercourse he used a condom. Afterwards she joked, "I hope you haven't got any disease", to which he replied, "Don't be stupid". She said that she trusted him.

23. As the relationship developed, he stopped using condoms. She said that she did not think that she had a responsibility to ask the appellant whether he had an Aids test. She thought it was his responsibility to tell her. When the relationship came to an end, she took an HIV test which was positive. She was devastated, particularly because of its likely impact on her son.

24. She said that if she had known the appellant was HIV positive, she would have sought medical advice on how best to protect herself and her son. Given his condition she was particularly keen to avoid any serious infection.

25. Her evidence in a little more detail includes the following passages. During her evidence in chief she was asked:

> Q Did you have any conversations with Feston after that [the first occasion of sexual intercourse]?
>
> A Yes. I says to him, joking, joking, I said, 'I hope you haven't got any diseases'.
>
> Q And what did he say?
>
> A He said, 'Don't be stupid'.
>
> Q What was the upshot of the conversations you had after he stopped using condoms?
>
> A Just generally like before, about the children in Africa and people living with HIV and Aids, the effect it has on people and how we can help and just general, general discussions.

26. LH explained how the appellant was arrested after their relationship had come to an end. She was asked her reaction when she heard about the allegations against him. She said that she freaked out.

27. When cross-examined, she was asked:

> Q Did you ask him if he had an HIV test before having unprotected sex with him?
>
> A No.
>
> Q Why was that?
>
> A Because if somebody's got HIV then as an individual I would expect them to tell me the same way I would tell them.
>
> Q Did it not occur to you to ask him if he had ever had a test for HIV?
>
> A No.
>
> Q But you were actually on the subject of talking about HIV in Africa. Would it have been easy for you to ask him if he
>
> A No, it would have been easier for him to tell me. That's what I think. He had I didn't have the responsibility to ask him. He had the responsibility to tell me.
>
> Q So if you had known that he was HIV positive you would have continued to have a sexual relationship with him.
>
> A No. I would have went to the hospital and got advice before I done anything. That's what I would have done. I would have seeked medical advice to see what I needed to do to protect myself and what I needed to do to protect him and what I needed to do if anything to protect my son.
>
> Q Had you had unprotected sexual intercourse after being diagnosed

HIV positive?
A No, protected sex.

28. When re-examined she was asked:

> Q Did you think that when you had unprotected sex that there was a risk of you catching a serious sexually related disease?
>
> A No, never.

Arrest

29. After his arrest, the appellant was interviewed by the police. Initially, he refused to answer any questions about DH, but eventually asserted that she had never stayed at his house, and that she did not know him by his first name, Feston. When it was suggested to him that DH had lived with him and that they had had a sexual relationship, he replied "I think this entire thing is a complete lie". When asked about RW, he declined to answer most of the questions. He did however state that he had had sexual intercourse with her without a condom because "The entire sex thing had happened so fast". He declined to answer any further questions about the relationship. When interviewed about LH, he refused to answer any questions at all.

30. So far as all three complainants was concerned, when he was asked whether any one of them would have had sexual intercourse with him if she had known that he was HIV positive, he refused to comment. He never suggested that he believed that any of the complainants consented to the risk of contracting HIV from him.

31. Complaint was made in the grounds of appeal about the directions given by the judge arising from these interviews, and the appellant's responses. This ground of appeal was abandoned. We can conveniently deal with a further ground of appeal, a complaint that the judge erred when he directed the jury that they could draw adverse inferences against the appellant from his failure to give evidence. We have examined the judge's direction. The judge highlighted the reasons why Mr. Roberts contended before the jury that adverse inferences should not be drawn against his client, and gave accurate directions appropriate to the factual context. This ground fails.

Julian Kotze

32. Evidence was given by Julian Kotze.

33. This witness told the jury that when he learned that he was HIV positive, the appellant had spoken in terms of eradicating women. Objection was taken to the admissibility of the evidence. The judge ruled that it was relevant to the issue of recklessness. It would also have been relevant to the submission that the jury should consider whether the appellant had an honest belief in the complainant's consent. As we shall see, the judge declined to leave that issue to the jury, and once recklessness was admitted, Kotze's evidence had no further relevance. No reference was made to it in the summing up, and given the single issue before the jury, which related exclusively to the state of mind of the complainants, rightly so.

Consent

34. Referring to HIV, the judge directed the jury that they had to be sure that the complainant in each individual case:

> did not willingly consent to the risk of suffering that infection. Note that I use the phrase 'to the risk of suffering that infection' and not merely just

> 'to suffering it'. That is an important point which Mr. Roberts rightly drew to your attention in his speech to you this morning. He put it this way, it is whether she consented to that risk, not consented to being given the disease which is, as he put it graphically, a mile away from the former. That is right, but note that I use the word 'willingly' in the phrase 'willingly consent', and I did that to highlight that the sort of consent I am talking about means consciously.

He returned to the clear and important distinction between "running a risk on one hand and consenting to run that risk on the other", pointing out that the prosecution had to establish that the complainant "did not willingly consent to the risk of suffering the infection in the sense of her having consciously thought about it at the time and decided to run it". He added that the appellant should be acquitted, if, in relation to any complainant, she had thought of the risk of getting HIV, and nevertheless decided to take the risk. In answer to a question from the jury, he returned to emphasise that before the appellant could be convicted, the prosecution had to prove that she "did not willingly consent to the risk of suffering that infection", and he repeated that for the purposes of his direction, "willingly" meant "consciously". He again repeated the distinction between "running a risk on the one hand and consenting to run that risk on the other", adding that the "willing" consent involved knowing the implications of infection with the HIV virus.

35. In short, the judge explained that before the consent of the complainant could provide the appellant with a defence, it was required to be an informed and willing consent to the risk of contracting HIV.

36. Mr. Timothy Roberts QC submitted first, that the judge wrongly declined to leave to the jury the issue whether the appellant may have had an honest, even if unreasonable belief, that the complainant was consenting to the risk of contracting the HIV virus, and second, that he misdirected the jury on the issue of consent as it applied to the present case. Notwithstanding the express and uncontradicted evidence of the complainants, he submitted that as a matter of inference the appellant may have had an honest, even if unreasonable belief, that the complainant was consenting, simply because she had sexual intercourse with him in the circumstances in which she did, and so accepted all possible consequent risks. To support his submission he referred to the decisions of this Court in **Jones** [1986] 83 CAR 375 and **Aitken** [1993] 95 CAR 304. In **Jones** the trial judge declined to direct the jury that the defendants were entitled to be acquitted if the jury decided that they were indulging in "rough" and undisciplined sport or play, not intending to cause harm, and genuinely believing that the injuries which occurred in the course of the horseplay occurred with the victim's consent. **Aitken** was another situation involving robust, high-spirited, "horseplay" which resulted in serious injury. We cannot improve on the analysis of these cases by Lord Mustill in his dissenting speech in **R v Brown** [1994] 1 AC 212, where he said:

> As a matter of policy the courts have decided that the criminal law does not concern itself with these activities, provided that they do not go too far. It also seems plain that as the general social appreciation of the proper role of the state in regulating the lives of individuals changes with the passage of time, so we shall expect to find that the assumptions of the criminal justice system about what types of conduct are properly excluded from its scope, and what is meant by 'going too far' will not remain constant.

37. Mr. Roberts developed a linked complaint that the judge's decision, and his later direction to

the jury, in effect deprived the appellant of the jury's consideration whether he had a guilty mind. For the purpose of establishing the need for *mens rea*, he drew our attention to **R v K** [2002] 1 AC 422. We have no difficulty with the general, indeed obvious, principle that *mens rea* is an essential ingredient of every statutory offence unless it is expressly excluded, or excluded by absolutely necessary implication. We immediately acknowledge the tautology, but it enables appropriate emphasis to be given to the principle. However for the purposes of s 20 of the 1861 Act, the required mental ingredient of the offence is established if the defendant was reckless in the sense formulated in **R v Cunningham** [1957] 2 QB 396, as approved in **R v Savage** [1992] 1 AC 699. In short, if he knew or foresaw that the complainant might suffer bodily harm and chose to take the risk that she would, recklessness sufficient for the purposes of the *mens rea* for s 20 was established. In the result, as we have recorded, recklessness was admitted.

38. To examine Mr. Roberts' submissions, and his criticisms of the directions to the jury, we must turn to **R v Dica** [2004] EWCA Crim 1103, where the issue of consent was addressed

    a. in the context of the longstanding decision in **R v Clarence** (1888) 22 QBD 23 that the consent of a wife to sexual intercourse carried with it consent to the risks inherent in sexual intercourse, including the risk of sexually transmitted disease, and

    b. the trial judge's ruling that the consent of the complainants to sexual intercourse with an individual who was known to them to be suffering from the HIV virus could provide no defence.

39. In **R v Barnes** [2004] EWCA Crim. 3246, Lord Woolf CJ summarised the effect of the decision in **Dica** in this way. An HIV positive male defendant who infected a sexual partner with the HIV virus would be guilty of an offence "contrary to s 20 of the 1861 Act if, being aware of his condition, he had sexual intercourse without disclosing his condition". On the other hand, he would have a defence if he had made the partner aware of his condition, who "with that knowledge consented to sexual intercourse with him because [she was] still prepared to accept the risks involved."

40. **R v Dica** represented what Lord Mustill in **R v Brown** described as a "new challenge", and confirmed that in specific circumstances the ambit of the criminal law extended to consensual sexual intercourse between adults which involved a risk of the most extreme kind to the physical health of one participant. In the context of direct physical injury, he pointed out that cases involving the " consensual infliction of violence are special. They have been in the past, and will continue to be in the future, the subject of special treatment by the law". In his subsequent detailed examination of the "situations in which the recipient consents or is deemed to consent to the infliction of violence upon him", activity of the kind currently under consideration did not remotely fall within any of the ten categories which he was able to identify. **Brown** itself emphatically established the clear principle that the consent of the injured person does not form a kind of all purpose species of defence to an offence of violence contrary to s 20 of the 1861 Act.

41. We are concerned with the risk of and the actual transmission of a potentially fatal disease through or in the course of consensual sexual relations which did not in themselves involve unlawful violence of the kind prohibited in **R v Brown**. The prosecution did not seek to prove that the disease was deliberately transmitted, with the intention required by s 18 of the 1861 Act. The allegation was that the appellant behaved recklessly on the basis that knowing that he was suffering from the HIV virus, and its consequences, and knowing the risks of its transmission to a sexual partner, he concealed his condition from the complainants, leaving them ignorant of it. When sexual intercourse occurred these complainants were ignorant of his condition. So although they consented to sexual

intercourse, they did not consent to the transmission of the HIV virus. **Dica** analysed two different sets of assumed facts arising from the issue of the complainants' consent, by distinguishing between the legal consequences if, as they alleged, the truth of his condition was concealed from his sexual partners by Dica, and the case that he would have developed at trial if he had not been prevented from doing so by the judge's ruling, that far from concealing his condition from the complainants, he expressly informed them of it, and they, knowing of his condition because he had told them of it, consented to unprotected sexual intercourse with him. There is a critical distinction between taking a risk of the various, potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease. For the complainant's consent to the risks of contracting the HIV virus to provide a defence, it is at least implicit from the reasoning in **R v Dica**, and the observations of Lord Woolf CJ in **R v Barnes** confirm, that her consent must be an informed consent. If that proposition is in doubt, we take this opportunity to emphasise it. We must therefore examine its implications for this appeal.

42. The recognition in **R v Dica** of informed consent as a defence was based on but limited by potentially conflicting public policy considerations. In the public interest, so far as possible, the spread of catastrophic illness must be avoided or prevented. On the other hand, the public interest also requires that the principle of personal autonomy in the context of adult non-violent sexual relationships should be maintained. If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant. Equally, her personal autonomy is not normally protected by allowing a defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of the transmission of the HIV virus. Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent. Accordingly, in such circumstances the issue either of informed consent, or honest belief in it will only rarely arise: in reality, in most cases, the contention would be wholly artificial.

43. This is not unduly burdensome. The defendant is not to be convicted of this offence unless it is proved that he was reckless. If so, the necessary *mens rea* will be established. Recklessness is a question of fact, to be proved by the prosecution. Equally the defendant is not to be convicted if there was, or may have been an informed consent by his sexual partner to the risk that he would transfer the HIV virus to her. In many cases, as in **Dica** itself, provided recklessness is established, the critical factual area of dispute will address what, if anything, was said between the two individuals involved, one of whom knows, and the other of whom does not know, that one of them is suffering the HIV virus. In the final analysis, the question of consent, like the issue of recklessness is fact-specific.

44. In deference to Mr. Roberts' submission, we accept that there may be circumstances in which it would be open to the jury to infer that, notwithstanding that the defendant was reckless and concealed his condition from the complainant, she may nevertheless have given an informed consent to the risk of contracting the HIV virus. By way of example, an individual with HIV may develop a sexual relationship with someone who knew him while he was in hospital, receiving treatment for the condition. If so, her informed consent, if it were indeed informed, would remain a defence, to be disproved by the prosecution, even if the defendant had not personally informed her of his condition. Even if she did not in fact consent, this example would illustrate the basis for an argument that he honestly believed in

her informed consent. Alternatively, he may honestly believe that his new sexual partner was told of his condition by someone known to them both. Cases like these, not too remote to be fanciful, may arise. If they do, no doubt they will be explored with the complainant in cross-examination. Her answers may demonstrate an informed consent. Nothing remotely like that was suggested here. In a different case, perhaps supported by the defendant's own evidence, material like this may provide a basis for suggesting that he honestly believed that she was giving an informed consent. He may provide an account of the incident, or the affair, which leads the jury to conclude that even if she did not give an informed consent, he may honestly have believed that she did. Acknowledging these possibilities in different cases does not, we believe, conflict with the public policy considerations identified in **R v Dica**. That said, they did not arise in the present case.

45. Why not? In essence because the jury found that the complainants did not give a willing or informed consent to the risks of contracting the HIV virus from the appellant. We recognise that where consent does provide a defence to an offence against the person, it is generally speaking correct that the defendant's honest belief in the alleged victim's consent would also provide a defence. However for this purpose, the defendant's honest belief must be concomitant with the consent which provides a defence. Unless the consent would provide a defence, an honest belief in it would not assist the defendant. This follows logically from **R v Brown**. For it to do so here, what was required was some evidence of an honest belief that the complainants, or any one of them, were consenting to the risk that they might be infected with the HIV virus by him. There is not the slightest evidence, direct or indirect, from which a jury could begin to infer that the appellant honestly believed that any complainant consented to that specific risk. As there was no such evidence, the judge's ruling about "honest belief" was correct. In fact, the honest truth was that the appellant deceived them.

46. In our judgment, the judge's directions to the jury sufficiently explained the proper implications to the case of the consensual participation by each of the complainants to sexual intercourse with the appellant. The jury concluded, in the case of each complainant, that she did not willingly or consciously consent to the risk of suffering the HIV virus. Accordingly the appeal against conviction will be dismissed.

Sentence

47. We must consider the sentence. In relation to one of the cases, (we need not identify it specifically), the complainant is extremely compassionate and forgiving, and would support, indeed seeks a reduction of the sentence on the appellant in her case.

48. We have, of course, reflected on her position. It seems to us, however, that while the sentencing court should always take account of the impact of an offence on its victim, the appropriate sentence should not normally be influenced by the wishes of the victim. Otherwise, there would be wild sentencing inconsistency, and the eventual outcome after compassion or mercy. It is elementary that this could not form the basis for a sentencing decision, or for that matter for sentencing policy.

49. The sentences in each of these individual cases, and the total sentence imposed on the appellant were neither manifestly excessive nor wrong in principle

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Cases

Jones [1986] 83 CAR 375
Aitken [1993] 95 CAR 304
R v Brown [1994] 1 AC 212
R v K [2002] 1 AC 422

R v Cunningham [1957] 2 QB 396
R v Savage [1992] 1 AC 699
R v Dica [2004] EWCA Crim 1103
R v Clarence (1888) 22 QBD 23
R v Barnes [2004] EWCA Crim. 3246

Legislations

Offences Against the Person Act 1861: s.20

Representations

T.D. Roberts QC for the appellant
F. Muller QC and I. Skelt for the Crown