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Sexual assault

R. v Abdulahi

Court of Appeal (Criminal Division): Haddon-Cave LJ.; May and Collins Rice JJ.: March 28, 2022; [2022] EWCA Crim. 412

Sexual assault - Sexual Offences Act 2003 s.78(a) - whether judge gave appropriate directions to the jury

The appellant was convicted of sexual assault and common assault (counts 1 and 2). On 20 March 2020, he was taken into custody having allegedly attempted to punch a pedestrian (count 2). He was observed to be behaving oddly, with behaviour some described as grandiose and flamboyant or simply drunk and unable to stand unaided. He was examined by a nurse, CS. During the examination CS said the appellant lifted his hand and deliberately touched her breast (count 1). She later reported the incident to the police. The appellant 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 so, but if there was any touching, he said it would have been accidental. The judge directed the jury on count 1 on the basis of the Sexual Offences Act 2003 s.78(a)):

> "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".

On appeal, the appellant argued that the judge "overly simplified" the issues for the jury as to whether the assault was sexual. He said 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) of the 2003 Act, 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. The question of whether or not any touching was sexual was not clear cut and the judge should have directed the jury to consider what the appellant's purpose was when he touched CS's breast. The prosecution argued 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 s.78(a) of the 2003 Act.

Held, dismissing the appeal, the terms of s.78(a) were clear: the question whether or not a reasonable person would consider a touching or other activity was "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". The nature of the touching was explored in detail during CS's oral evidence (during examination-in-chief and under cross-examination). She described how the appellant placed his left hand onto her right breast without warning; she said there was no possibility that it could have been accidental; and she was immediately sure that he had sexually assaulted her. In light of DS's 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. 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.
Case considered: *R. v H (Sexual Assault: Touching)* [2005] EWCA Crim 732; [2005] 1 W.L.R. 2005

N Lewin appeared for Appellant
Ms F Whebell appeared for the Respondent

Commentary

Section 78 of the Sexual Offences Act 2003 sets out the circumstances in which a touching qualifies as "sexual" for the purposes of the offences delineated in that Act. Touching is sexual if a reasonable person would consider that one of two limbs applies. The first, section 78(a) applies where whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual. The second, section 78(b) only applies if section 78(a) does not. Section 78(b) applies where 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. One important difference between the two limbs is that while the second limb, section 78(b), requires the courts to consider the defendant's state of mind, the first limb, section 78(a) does not.

In *Abdulahi* the appellant touched CS's breast without her consent. The trial judge directed the jury on the basis of section 78(a). He decided, in other words, that the touching of a woman's breast is *because of its nature* sexual, and that the test in section 78(b) did not apply. As stated above the test in section 78(a) is objective, and the defendant's state of mind is not relevant. This meant that the jury were not directed to consider the appellant's state of mind in this case, an omission that the appellant later argued on appeal affected the reliability of the conviction.

The Court of Appeal therefore had to determine: is the touching of a woman's breast inevitably sexual? It answered in the affirmative, and has since been criticised for this conclusion. The facts of this particular case, while they appear straightforward, gave the Court of Appeal a dilemma. In order to properly understand its predicament, it is necessary to appreciate the significant shortcomings of section 78(a).

In *R v Court [1989] AC 28* Lord Ackner considered what touching could be considered 'sexual' for the purposes of what was then 'indecent assault'. He established (at [593]) the following framework:

> "On a charge of indecent assault the prosecution must prove (1) that the accused intentionally assaulted the victim, (2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent, (3) that the accused intended to commit such an assault as is referred to in (2) above."

Lord Ackner thus constructs a gateway - holding that the first question to ask, once an assault has been established, is whether or not that assault, in its context, is capable of being indecent. Only for those cases which are capable of being indecent does a consideration of the defendant's intent become necessary.

Lord Ackner also observes (at [590]) that assaults passing through this initial gateway will fall into one of two groups. Some will be inherently indecent; they will be "clearly of a sexual nature" And some will be only *capable* of being indecent; they will "have only sexual undertones". The exact boundary between assaults that are inherently indecent and assaults that are only capable of being indecent is not demarcated in the judgment as it is not a significant boundary in the context of how Lord Ackner conducts his enquiry.

The Sexual Offences Act 2003 was introduced to the House of Lords as the Sexual Offences Bill on 28 January 2003. Interestingly, the definition of "sexual" in the first iteration of this Bill is closer to the framework devised by Lord Ackner and set out above. Section 80 of the Sexual Offences Bill originally defined sexual as follows:

> "For the purposes of this Part, penetration, touching or any other activity is sexual if –
> (a) From its nature, a reasonable person would consider that it may (at least) be sexual, and
> (b) A reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations."

Section 80(a), had it been passed, would thus have operated as Lord Ackner's gateway. Would the reasonable person be able to consider that the touching might be sexual? Only if that question is answered in the affirmative does section 80(b) become relevant, which converts Lord Ackner's two groups - the assault that is 'clearly of a sexual nature' and also the assault that 'has only sexual undertones' - into three separate enquiries. Lord Ackner's first group is left more or less intact and becomes an abstract enquiry: (1) what is the nature of the act? The second group becomes two further, contextual enquiries: (2) what are the circumstances of the act? (the second enquiry) and (3) what is the purpose of the defendant? The boundary between activities that are by their nature sexual (the first enquiry), and activities that require contextual analysis (the second and third enquiries) - is not especially important (as indeed is the case in Lord Ackner's judgement).

However, the Sexual Offences Act 2003 contains a different definition of "sexual". At first blush the differences do not seem significant. The three types of enquiry identified previously are still included, but are split between a mutually exclusive section 78(a) OR section 78(b). Touching is sexual if a reasonable person would consider:

> (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.

Section 78(a) therefore consists of the first, abstracted enquiry. Is the activity because of its nature sexual? Only if the activity is not because of its nature sexual does 78(b) then introduce the gateway, and finally incorporate enquiries (2) and (3). Might the activity (because of its nature) be sexual? If yes, then do the circumstances of the assault or the purpose of the defendant make it so?

While the differences do not appear significant their unfortunate effect is brought into sharp relief by the facts of the current case. Section 78(a) allocates too much significance to the first, abstracted enquiry - and it cannot bear that much weight. The fact that it makes little

sense did not matter so much when the boundary between activities that are by their nature sexual and those that require further contextual analysis was of less importance. With the currant configuration of section 78, however, it is only if the activity is *not* 'by its nature sexual' that the judge must direct the jury to go on and consider the circumstances of the assault and the purpose of the defendant.

Section 78(a) explicitly does not require a consideration of the defendant's state of mind: indeed that is the point. If the defendant's state of mind is relevant then by definition the facts do not come within section 78(a). It was this question that the Court of Appeal was asked to consider in *R v Abdulahi* – whether the touching of CS's breast was 'because of its nature sexual'- an enquiry that does not require or take into account any context. The trial judge had found that it was, and directed the jury accordingly. This meant that the court did not need to consider the appellant's purpose when he touched CS's breast. The Court of Appeal confirmed that the trial judge was right. But does this make empirical sense? Where would this leave a medical examination such as a mammogram?

Furthermore, the Court of Appeal seemed to consider context even as it purported to reject it. Lord Justice Haddon-Cave, supporting the direction given by the trial judge, said at [55]:

> "In the light of the 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."

The question asked by Lord Justice Haddon-Cave, then, is not whether the nature of the act (the deliberate touching of a woman's breast) is obviously and inevitably sexual, it is in fact whether the touching of *this* woman's breast *'in the manner described'* is obviously and inevitably sexual. If Lord Justice Haddon-Cave is considering the manner in which this particular woman's breast was touched, then he is not considering the touching objectively and separately from any of the facts of the case before him. By considering "in the manner described" as relevant, Lord Justice Haddon-Cave is illustrating that this particular touching does not fall within section 78(a) even as he is stating that it does.

The explanatory notes to section 78(a) do not offer much by way of assistance. They give two examples of activity that a reasonable person would always consider to be sexual for the purposes of section 78(a): sexual intercourse and oral sex. Indeed these are arguably the only two activities that survive all abstraction from context and remain definitively sexual. If the activity in question is sexual intercourse or oral sex without consent, then the court would be considering section 1 of the 2003 Act, which defines rape. The actus reus of rape is the penetration of the vagina, anus or mouth of another person with his penis without consent. There is no statutory requirement for the penetration to be "sexual" in the context of rape - this is because penetration of the vagina, anus or mouth with a penis *can only be sexual*. The draftsman did not consider the inclusion of "sexual" necessary as an actus reus component for the purposes of a section 1 rape charge. This renders section 78(a) redundant: the only circumstances where it might apply (intercourse, oral sex) are those where it is not legally relevant.

This was the dilemma facing the Court of Appeal in *R v Abdulahi*. In order for section 78(a) to be meaningful, it understandably decided that some consideration of context is necessary. This is because complete severance of circumstance from the act renders all acts short of penetration with a penis outside section 78(a). Touching that does not involve penetration

with a penis is rarely *inevitably* sexual by nature; it is almost always - to a degree - dependent on context. By considering what happened, and by allowing a degree of context (the deliberate touching of a woman's breast *in the manner described*), Lord Justice Haddon-Cave was able to move back towards the analysis that was originally intended by Lord Ackner. In so doing he correctly concluded (at [37]) that 'on the facts of this case, the nature of the act spoke for itself'.

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