No. 9701123 X3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Friday 1st May 1998

B E F O R E :

LORD JUSTICE ROCH

MR JUSTICE SACHS

and

MR JUSTICE COLLINS

- - - - - - - - - - - -

R E G I N A

- v -

THOMAS PATRICK MALONE

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Computer Aided Transcript of the Handed Down Judgment of
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MR R GERMAIN appeared on behalf of the Appellant
MR AE WILLIAMS (23.4.98) & MR AGEROS (1.5.98) appeared on behalf of the Crown

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JUDGMENT
(As Approved by the Court)

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Friday 1st May 1998

JUDGMENT

LORD JUSTICE ROCH: On the 5th February 1997 following a trial lasting six days at the Chelmsford Crown Court before Mitchell J, the applicant was convicted of rape, Count 1 in the indictment and sentenced to 6 years imprisonment with an order under s. 44 of the Criminal Justice Act 1991. The jury were discharged from returning a verdict on Count 2 a charge of indecent assault.

At the trial there were the following issues for the jury to decide:

First, whether the appellant had had sexual intercourse with the complainant a girl of 16.

Second, whether, if the jury concluded that sexual intercourse had occurred, the prosecution had proved that the sexual intercourse took place without the complainant's consent.

Third, if the jury were satisfied as to the occurrence of sexual intercourse without the complainant's consent, it was proved that the appellant at the time knew that she was not consenting or was reckless as to whether she was or was not consenting.

The single judge refused the appellant's application for leave to appeal his conviction. Leave was given by the full court on a renewed application on the 20th February this year.

The complainant, Catherine Wallace lived with her mother in a maisonette in Basildon. She was friendly with the appellant and his common law wife Charlene and their two children and would from time to time baby sit for them. The appellant and his family lived close to Mrs Wallace's maisonette.

There was evidence, that when at the appellant's home, the complainant had been shown pornographic books and videos together with nude photographs of the appellant, by the appellant, and that the appellant had made suggestive remarks to the complainant. The complainant's evidence was that she had shown no interest in the pornographic material and that she had not said or done anything to encourage the appellant, because she was not interested in him. The appellant's evidence was that

the complainant had behaved as though she was interested in him.

On Saturday 11th November 1995 the complainant's mother was away for the day. She was not expected to return home until the late evening. During the early evening the complainant met various friends and according to the evidence of two of those friends, Sarah Jewell and Vicki Kately had said that she was pregnant by her then boyfriend, a twenty year old bus driver called "Danny". One of those witnesses, Vicki Kately added that the complainant was concerned as to how she could tell her mother that she was pregnant.

During the course of the evening the complainant acquired bottles of wine and drank so that she became incapable of walking. She had to be taken to her home by those two of her friends assisted by Sarah Jewell's step-father in his motor car. It was the evidence of Sarah Jewell that in the car the complainant called out "Tom" and gave the number of the appellant's house. In the street where the complainant lived, the car was stopped and Sarah Jewell went to the appellant's house and asked him to come to help carry the complainant into her home. He did so and with Sarah Jewell's step-father carried the complainant into the maisonette where she lived and up the stairs into her bedroom laying her on her bed. The two men then returned downstairs and the complainant was undressed on her bed by her two female friends. She was left wearing panties and a bra lying on her bed covered with the bed quilt.

At that point the two girl friends and Sarah Jewell's step-father left the maisonette. The appellant went up to the complainant's bedroom, he said, for the purpose of seeing that she was not being sick and not likely to vomit and choke According to his evidence he heard the complainant calling his name and her state he described as "sort of in and out of consciousness". She asked for water and he brought her some water and helped her to drink it. She started gagging and fearing she was going to be sick he fetched a towel from the bathroom which he placed on the floor beside the bed.

The complainant denied that the appellant had been asked to bring her a glass of water or that he had helped to drink it or that she had called his name. Her account was that she was aware of someone sitting on her bed but not aware that it was the appellant. That person had started to stroke her face and had then pulled the quilt away from her. She had pulled the quilt back to cover herself and the person on the bed had said something about only seeing her body when she was drunk. It was when this was said that she realised the person on her bed was the appellant. The appellant again pulled back the quilt and removed her knickers. The complainant said that she did not consent to that but on account of her condition she was not able to resist. She then heard the applicant undoing his zip and then undoing his belt. The applicant climbed onto the bed and put two fingers into her vagina. It was that action which formed the basis of the charge of indecent assault in Count 2 in the Indictment. The appellant, according to the complainant's evidence, then inserted his erect penis into her vagina. That caused her considerable pain and as a reflex action she kicked out with her left leg against the appellant's chest and began to call out the name of the appellant's common law wife Charlene. She did that to frighten him off. She remembered seeing the appellant pulling up his trousers. There was a knock at the front door and she heard Charlene's voice. She started screaming for Charlene. Charlene came into her room and she told Charlene that the applicant had tried to get on top of her. A short while later the complainant's mother returned home and as a result of speaking to her daughter and to Charlene she telephoned the police.

The evidence of the complainant's mother was that her daughter did not complain that she had been raped or indecently assaulted. Her daughter had repeatedly said that her mother had not been there and would not have understood. She had, at the police's suggestion, got her daughter to dress so that she could be taken to the hospital. Having dressed the complainant went back to bed and fell asleep again so that the suggested visit to a hospital came to nothing.

No medical examination of the complainant occurred until the 15th November. That medical examination revealed a bruise on the inside of the complainant's thigh, which in the light of the evidence of how the complainant had fallen down when drunk and had had to be manhandled to get her home and on to her bed, was of no significance. The doctor was not able to say whether the complainant had had sexual intercourse on the 11th November. The complainant told the jury that she had had sexual intercourse with a man whom she would not name, but who was not the appellant and who was not Danny, on the evening of the 14th November; a curious thing for her to do when she knew she was to be medically examined the following morning.

We turn now to the appellant's account both in his interviews and in his evidence. In some ways the appellant's account agreed with the evidence of the complainant with regard to her condition on the evening of the 11th November. His account of what occurred in her bedroom, however, was markedly different from that of the complainant, although it did agree with her account on some details.

The appellant described seeing the complainant in the back seat of the car. Spit was coming down from her mouth. She was slouched. "She appeared to be out for the count". He helped take her up stairs and put her on her bed.

After Sarah Jewell and her step-father and Vicki Kately had left he went up stairs to check that the complainant was all right. He described her as being "sort of in and out of consciousness". He told the jury that he sat on her bed and just chatted to her. The complainant asked him for water and he brought her a glass of water and helped her drink some of it. The complainant had started gagging so he went to find a bucket but could not find one and ended up obtaining a dirty towel from the bathroom and placing it on the floor beside the bed. As he did that the complainant was fumbling under the blankets. The next moment he had a pair of knickers flung at him. The complainant at that stage was

giggling. He sat on the bed and the complainant took his right arm and put his fingers in her mouth. She sucked his fingers which he understood to be a sexual advance. She then took his hand and put it under the quilt and guided it onto her vagina giggling at him. At that stage he thought that sex could be on the menu. And then he told the jury "The state she was in it was like me taking advantage. It crossed my mind to have sex. That is why I undid my belt." He went on to say that her pubic hair felt damp and he believed that she had had sex with someone earlier that evening. She kept calling him "Danny". He kept saying "No it is Tom" That happened three or four times. She put her arm round him and tried pulling him towards her and at that moment he pulled his right hand away from her vagina. The complainant was saying "On me. On me." The first time she pulled him towards her he leant over and kissed her on the forehead and the second time she did that he kissed her on the lips. His evidence to the jury was that the complainant knew it was him and that the complainant wanted sex with him. After kissing her on the lips he had stood up undone the belt on his trousers and undone the top two buttons of his trousers. He then sat on the bed and kissed her again. At that point he got a kick in his right side. At no time had he had an erection. At no time had he got his penis out of his trousers. When he was kicked in the side he thought that the complainant had been teasing him and he said "Fuck you" and left the bedroom. At no time had he put his fingers inside her and at no time had he put his penis inside her vagina. Once he left her bedroom he could hear Charlene at the door of the maisonette. Charlene was shouting "Tom. Tom".

The first ground of appeal advanced by Mr Germain on behalf of the appellant is that the judge was in error on the law applicable to the issue of consent in this case. That led to the judge ruling at the end of the prosecution's evidence that there was a case for the appellant to answer when on the law properly understood there was not, and led the judge in his summing-up to misdirect the jury on the issue of consent.

Mr Germain's argument is that the decisions of this court in *R -v- Howard* 50 Cr App R 56 and

R -v- Lang 62 Cr App R 50 are still good law and should have been followed and applied by the judge. These decisions have not been superseded by the case of *R -v- Olugboja* 73 Cr App R 344 which merely stated that the actus reus of the offence of rape was an act of sexual intercourse to which the complainant did not consent at the time it occurred. The cases of *Howard* and *Lang* were concerned with the issue of consent and what the complainant must do if she is to be taken as not in fact consenting. In a case such as the present where there was no force used by the defendant, no threat made by the defendant and no deceit there has to be evidence that the complainant offered some resistance to the advances made either by speech or by physical conduct. There must have been some demonstration of the absence of consent. Here there was no such demonstration on the complainant's own evidence and consequently the judge's ruling that there was a case for the appellant to answer was wrong and the direction he gave the jury on the actus res the Crown had to prove in order to establish the guilt of the appellant on Count 1 was a misdirection.

The judge's ruling on the defence submission that there was no case was :

> "What is clear to me is that this girl has made it crystal clear in the witness box that in her thoroughly inebriated state whilst lying on her bed the defendant got on top of her and penetrated her and in doing that she did not consent. There can be no doubt at all that there is prima facie evidence of that necessary ingredient. She denied doing anything to encourage him. Indeed she said that she was really quite unable to move and speak although she has conceded that she was calling the name of her then boyfriend."

The judge's direction to the jury in the summing-up began with a setting out of the statutory direction of rape with the words of the statute modified appropriately for the circumstances of the case:

> "Rape is committed when, without the woman's consent, a man has unlawfully sexual intercourse with her, knowing she was not consenting or being reckless as to whether she was consenting."

The judge went on to direct the jury that before they could convict the appellant of rape they must first be sure that his penis penetrated the complainant's vagina. If they were not sure of that he was to be acquitted. If they were sure then they had to consider the second ingredient which was her

state of mind at the moment of the act of sexual intercourse. They had to be sure that the act of sexual intercourse occurred without her consent. The judge then went on to say:

> "She says she did not consent.
>
> She does not claim to have physically resisted nor to have verbally protested. She says the drink had disabled her from doing either. The kick she gave, and on each version of these events, his and hers, she did kick him, but she says the kick was a reflex action to the pain caused by the penetration of his penis and you may wish to consider, having regard to your assessment of her condition, whether consenting to an act of sexual intercourse was consistent with it. She has told you she did not consent.
>
> For the prosecution to have proved this second ingredient you must be sure that the act of sexual intercourse occurred without Catherine's consent. Submitting to an act of sexual intercourse, because through drink she was unable physically to resist though she wished to, is not consent. If she submits to intercourse because of the drink she cannot physically resist that, of course, is not consent. No right thinking person would say that in those circumstances she was genuinely consenting to what occurred. What occurred in those circumstances, not wishing to have intercourse but being physically unable to do anything about it, if intercourse occurred in those circumstances it would plainly, as a matter of common sense, be against her will. It would be without her consent.
>
> Drink, of course, has different effects upon different people. It makes people do things they otherwise would not do. If you come to the conclusion that in drink she did consent to sexual intercourse then, of course, the prosecution would fail to clear this hurdle. Do not be confused about state of mind and being physically unable to do anything about it. Consent is essentially a state of mind. She tells you she did not wish to have sexual intercourse, that she did not consent to it, and she was unable to do anything about it because of the drink. She was unable to physically resist him.
>
> If you come to the conclusion that the drink resulted in her doing something she otherwise would not have done and that is give her consent, then, of course, that is a sufficient consent. The prosecution would fail on this second ingredient. Equally, if you come to the conclusion that in drink she may have given her consent to having intercourse with him then again the prosecution would fail. You have to be sure of what occurred when his penis penetrated her vagina occurred without her consent. If you are sure that there was an act of sexual intercourse but that you decide she consented to it or that she may have consented to it -- not guilty."

We turn to a consideration of the authorities to which we were referred by counsel. In the case of *Howard* the appellant was convicted of attempted rape on a girl under the age of 16. The conviction was referred to the Court of Criminal Appeal by the Registrar under s. 15 of the Criminal Appeal Act 1907. No counsel appeared on the appeal. The point the court was considering was the trial judge's direction to the jury that:

> "The question of consent does not come into it with a child of six, because, as a matter of law, a child of that age cannot give consent to such a thing."

This court consisting of Lord Parker Chief Justice, Ashworth and Widgery JJ pointed out that that was a misdirection but nevertheless dismissed the appeal, saying:

> "The court thinks it as well to repeat that it seems to this court that in the case of a girl under 16, the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. As Humphreys J pointed out in the passage to which I have referred, there are many girls under 16 who know full well what is happening and can properly consent. However, so far as the present case is concerned, this little girl Lucinda was only six, and it would be idle for anyone to suggest that a girl of that age had sufficient understanding and knowledge to decide whether to consent or resist. Accordingly, this application is refused."

In the second case to which reference was made, the appellant Lang was charged with rape, the only effective issue at the trial being whether the girl had consented. The prosecution's case was that the girl had submitted only after a struggle and in the belief that further resistance was useless. The defence introduced the question of her drinking in an attempt to show that she might well have consented, being in a less inhibited state of mind than she would have been had she taken no drink. The case was heard by a jury at the Central Criminal Court in a trial presided over by the Common Serjeant. After a retirement of 2½ hours the jury sought further guidance on the question of drink vitiating consent. The Common Serjeant encouraged the jury to think that it was necessary for them to determine how the complainant had come to take drink. He indicated that guilt might depend on the answers to such questions as these:

Did she take alcohol willingly knowing what she was doing?

Was she deceived by her seducer, not appreciating that she was being given alcohol to drink?

Did she take it knowingly but actively encouraged by him in the hope that her resistance might collapse?

This court consisting of Scarman, Ormrod LJJ and Swannick J said:

"We have no doubt that there is no special rule applicable to drink and rape. If the issue

> be, as here, did the woman consent? The critical question is not how she came to take the drink, but whether she understood her situation and was capable of making up her mind. In *Howard* .... the Court of Criminal Appeal had to consider the case of a girl under 16. Lord Parker, CJ .... said: ..... "In the case of a girl under 16 the prosecution .... must prove either that she physically resisted or if she did not, that her understanding and knowledge was such that she was not in a position to decide whether to consent or resist."
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> In our view these words are of general application whenever there is present some factor, be it permanent or transient, suggesting the absence of such understanding or knowledge. The cases support this view of the law. In *Camplin* [1845] 1Den 45, the judges by a substantial majority, rejected the submission (and I quote the words of Serjeant Ballantine: "There must be an opposing will on the part of the person ravished" (page 90) and upheld the conviction in a case in which the man had made the girl of 13 "quite drunk and, when she was in a state of insensibility, took advantage of it and violated her." It has been held that intercourse with a sleeping woman is rape: also intercourse with a girl of weak intellect who is incapable of exercising any judgment in the situation in which she found herself. ..... none of this was explained to the jury. Their intention was focused by the judge upon how she came to take the drink, not upon the state of her understanding and her capacity to exercise judgment in the circumstances. Moreover, had the jury been directed to consider this issue, the lack of evidence upon it would have been plain to them."

That judgment was given on the 16th October 1975 prior to the passing of the Sexual Offences (Amendment) Act 1976.

This issue came before this court again in the appeal of *Olugboja*. In the reserved judgment of the court consisting of Dunne LJ, Milmo and May JJ this court dealt with the submission made by the appellant's counsel that the 1976 amendment to s. 1 of the Sexual Offences Act 1956 was declaratory only and had not changed the common law whereby the type of threat which vitiates consent is limited to threats of violence either to the victim or as in duress to some close or near relative. This court referred to the decision in the House of Lords in *DPP -v- Morgan* [1976] AC 182 and said:

> "Their Lordships were primarily concerned with the necessary mens rea of the offence. They were not concerned with, nor did they consider, the actus reus. But there is a passage in the speech of Lord Hailsham .... at page 210 .... which appears to indicate that the Lord Chancellor was accepting the common law definition of rape, that is to say sexual intercourse by force, fear or fraud". (See pages 348-9 of the report).

This court went on to refer to the report to the Home Secretary by an advisory group under the chairmanship of Heilbron J made on the 14th November 1975. In particular this court referred to

paragraph 84 of that report which was in these terms:

> "Finally, as rape is a crime which is still without statutory definition, the lack of which has caused certain difficulties, we think that this legislation should contain a comprehensive definition of the offence which would emphasise that lack of consent (and not violence) is the crux of the matter."

The crucial part of this court's judgment in *Olugboja* comes at page 350 in the final paragraph on that page:

> "Nor, on the other hand, do we agree with Mr Brent's submission, on behalf of the Crown, that it is sufficient for a trial judge merely to leave the issue of consent to a jury in a similar way to that in which the issue of dishonesty is left in trials for offences under the Theft Act 1968. In such cases it is sufficient to direct the jury that "dishonest" is an easily understood English word and it is for them to say whether a particular transaction is properly so described or not. Although "consent" is an equally common word it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent (per Coleridge J in *Day* [1841] 9 C & P 722, 724). In the majority of cases, where the allegation is that intercourse was had by force or the fear of force, such a direction coupled with specific references to and comment on the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or the fear of it, as in the examples given by Mrs Trewella, to which we have referred earlier in this judgment, we think that an appropriate direction to a jury will have to be fuller. They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of the states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case."

Mr Germain referred us to paragraph 20-26 at page 1564 of the current edition of Archbold and to the passage which reads:

> "The prosecution must prove either that the victim physically resisted, or otherwise, that her or his understanding and knowledge was such that she or he was not in a position to decide whether to consent or resist."

citing the case of *Howard.* Mr Germain pointed out that in the following paragraph the editors of Archbold set out that part of the judgment of this court in *Lang* at page 52, which we have already quoted. Here, argues Mr Germain, the prosecution could not on the complainant's evidence prove either that she had physically resisted or that her understanding and knowledge were such that she had not been in a position to decide whether to consent or resist. Consequently the case should have been stopped at the end of the prosecution's evidence. Alternatively the direction to the jury that the complainant had said that the drink had disabled her from doing either (physical resistance or verbal protest) was a misdirection concerning the evidence the complainant had given; her evidence being that she could speak and that she was capable of physical movement.

Mr Germain makes a further complaint concerning the directions given to the jury. He maintains that the judge did not give the further direction on the issue of consent referred to by this court in the passage from *Olugboja*.

We reject these criticisms of the judge's ruling and of the judge's summing up. The actus reus of rape is an act of sexual intercourse with a woman who at the time of the act of sexual intercourse does not consent to that act of sexual intercourse. There is no requirement that the absence of consent has to be demonstrated or that it has to be communicated to the defendant for the actus reus of rape to exist. We accept the submissions of Mr Williams for the respondent that Parliament in defining rape deliberately made no mention of a complainant having to resist unwanted sexual intercourse, thus following the recommendation in paragraph 84 of the Heilbron Report. The authorities of *Howard* and *Lang* have to be read with caution. Howard was a decision on the particular facts of that case. The matter was not argued before this court. It was decided prior to the passing of the 1976 Act and cannot, with respect, be treated as a statement of general principle. In *Lang*, this court was concerned

that the jury may have convicted, although not satisfied that the complainant had physically resisted (the prosecution's case) but on the basis that her resistance had been overcome by drink administered to her by the appellant. This court in *Lang* approved the earlier rejection of the submission "that there must be an opposing will on the part of the person ravished". Both the cases of *Howard* and *Lang* were very different from this case and in our judgment neither assist the appellant in this appeal. We accept Mr Williams' submission that the law, in so far as it is necessary to have a gloss on the words of the statute, is that set out in the judgment of this court in *Olugboja*.

Mr Germain referred us to the case of *Linekar* [1995] 2 Cr App R 49 as a judgment of this court indicating that this court on the issue of consent in cases of rape will take account of decisions made prior to the passing of the 1976 Act. That case was concerned with the question whether consent was vitiated by fraud in a case where the appellant had offered to pay a prostitute for sexual intercourse and there was evidence which indicated that he never intended to pay. No doubt in appropriate cases this court will take account of decisions which pre-date the 1976 Act as it will take account of decisions of courts in other jurisdictions. But in our judgment pre-1976 decisions cannot be binding but may be of assistance in an appropriate case. What the case of *Linekar* does do in our opinion is underline that the actus reus is complete if there is sexual intercourse without consent and that demonstration or communication of the lack of consent is not part of the actus reus.

No doubt in order to obtain a conviction there will have to be some evidence of lack of consent to go before the jury. But what that evidence will be will depend on the particular circumstances of the case that the jury is trying. The evidence may be of widely differing kinds as a few illustrations will show. It may be the complainant's simple assertion "I did not consent to sexual intercourse with the defendant". It may be evidence of threats uttered by the defendant. It may be evidence of the use of physical force by the defendant. It may be evidence that the complainant was by reason of drink or drugs incapable of giving consent or incapable of being aware of what was occurring. It may be

evidence that by reason of age or lack of understanding due to mental handicap the complainant did not give consent. The jury may accept that the complainant was asleep when sexual intercourse occurred or that she was tricked into giving her consent in the belief that the defendant was her husband or partner. We do not for a moment suggest that these examples exhaust the possible factual situations which may arise. They suffice to demonstrate that it is not the law that the prosecution in order to obtain a conviction for rape have to show that the complainant was either incapable of saying no or putting up some physical resistance or did say no or put up some physical resistance.

Mr Williams for the respondents was quite correct to underline the importance of distinguishing between the correct definition of the actus reus of rape and the evidence on which the prosecution relies to establish the existence of that actus reus.

Mr Germain's second criticism of the summing-up that it did not provide the further direction suggested by this court in *Olugboja* can be dealt with quite shortly. That further direction was given in the passages from the summing-up which we have cited in terms appropriate to the facts and issues of this case, We can see no substance in this point at all.

Mr Germain's next ground is that there was no evidence or alternatively no reliable evidence that the appellant knew of the complainant's lack of consent or was reckless as to whether she was consenting or not. That lack of evidence should have lead to the case being stopped at the end of the prosecution's evidence. The judge dealt with that submission in his ruling that there was a case to answer in this way:

> "The jury may want to reflect upon the significance of that, but I equally have no doubt that there is prima facie evidence that the defendant knew or at any rate was reckless that she was not consenting to what he was doing. He knew first of all that she was in a very drunken state.
>
> On the account he gave he reported that she was feeling sick and, as I say, if you add that with her evidence then at this stage there must inevitably and in my judgment I find that there is evidence that he knew or was reckless as to whether she

> was consenting to what he did. Accordingly, in my view, this case can properly be left to the jury, although as everybody has acknowledged it is unusual and clearly beyond doubt that there are a number of telling points which a jury would have to consider very carefully before they could be sure that guilt had been proved, but those are all matters for the jury and, in my judgment, the case should be and can be safely left to them. The necessary criteria which permits that happening having been satisfied."

In this case the contrast between the accounts given by the appellant and by the complainant of what occurred in the complainant's bedroom was very marked. If he was right the complainant was leading him on to have some sexual activity with her. If her evidence was the truth, then she was in a near helpless state in which by pulling the quilt back over herself and turning away from the appellant as he began his sexual advances to her she did the little her condition permitted her to do to resist him. There was much in his evidence and in his answers in interview which supported her account. For example his description of her condition. His admission that he thought of having sexual intercourse with her and he undid the belt of his trousers and the top two buttons of his trousers. His evidence that she suddenly kicked him.

The two conflicting accounts were very fully and carefully set out by the judge in a summing-up which the appellant's counsel accepted on more than one occasion during his argument was fair and at times very favourable to the appellant.

The evidence, in our judgment fully justified the judge's ruling that there was a case for the appellant to answer on the issue of whether he knew that the complainant was not consenting to what he was doing or was reckless as to whether she was consenting or not.

These matters are also relevant to the final point taken by Mr Germain in this appeal namely that this is a case where the court should form the view that the conviction is unsafe because of the unsatisfactory nature of the complainant's evidence. Mr Germain relies upon the internal conflicts within the complainant's evidence and to the conflicts between the complainant's evidence and those

of other witnesses. Here he advanced three significant differences set out in the third paragraph of his advice on appeal namely the complainant's denial that she had told her friends on the night of the 11th that she was going to have a baby. Second that the complainant maintained she had told her mother that she had been raped, whereas her mother's evidence was that her daughter would only say "You don't understand - you weren't there". Thirdly that Sarah Jewell gave evidence that the complainant in the car had asked for "Tom" whereas the complainant said she had no recollection of this. Mr Germain accepted that this last point did not represent a conflict of evidence. In addition Mr Germain relied on the complainant's failure to give any explanation for failing to say "No" other than to dissolve into tears.

Mr Germain also drew our attention to the judge's observation during his ruling on the defence submission that there was no case to answer prompted by his assertion that the complainant's evidence had been seriously undermined: "There can be no doubt that her credibility has to an extent been undermined." It seems to us that the judge there was choosing his words carefully and that the judge considered that the complainant's evidence was still fit to go to the jury and for the jury to act on if they accepted it. It is clear from the jury's verdict that the jury did accept the complainant's evidence as to what had occurred in her bedroom. They did that unanimously after a relatively short period of retirement following a very careful and helpful summing-up which put all the points that could properly be made on behalf of this appellant before them fully. As we have already observed the complainant's account was confirmed on a number of important details by the evidence of the appellant himself. In the circumstances of this case, we consider that we would be usurping the function of the jury to say that this conviction is unsafe. If the jury accepted the complainant's evidence as they clearly did, then there was ample evidence on which this appellant could be convicted. There being in our judgment no valid criticism of the summing-up there is no ground for our concluding that this conviction is unsafe. In those circumstances this appeal has to be dismissed.

LORD JUSTICE ROCH: Since hearing that appeal we have this morning received a long letter from Mr Malone, which we have read. We say that that letter makes no difference to the conclusions that we have reached.

MR GERMAIN: My Lords, my learned friend Mr Ageros appears on behalf of the respondent today.

Your Lordships may know that Mr Malone suffered from colitis and is too ill to travel, and that is why he is not here.

My Lord, there remains an appeal against sentence.

Sentence appeal heard

LORD JUSTICE ROCH: As is indicated in the handed down judgment, the sentence passed in this case was one of six years' imprisonment. The sentencing remarks of Mitchell J make it clear that the previous conviction of the appellant in 1994 for unlawful sexual intercourse with a 15 year old girl was a factor which caused the judge concern and led him to form the view that the appellant appeared to be a menace to teenage girls. No doubt it followed from that that the judge considered the risk of further offences to be significant.

Mr Germain advances the appeal against sentence on the basis that the starting point of five years in Billam should now be discounted to some extent because of the new rules which affect the dates of release for persons sentenced to more than four years' imprisonment. He submits that there is not present any of the aggravating features set out in the case of Billam, and the circumstances of this appellant and his wife and family are such that they call for a reduction in this sentence.

We have given consideration to those submissions and to the compassionate factors set out in the letter we have received this morning from Mr Malone. However, an appeal against sentence is only to be allowed if the sentence is wrong in principle - clearly this sentence was not - or if it was manifestly excessive. Again that is a submission which cannot be sustained in this case, and consequently the appeal against sentence will also be dismissed.