

### [Can a lie about fertility negate ostensible consent?](#)

*Letitia Eagan reviews the recent judgement of R v Jason Lawrance [2020] EWCA Crim 971.*

In the appeal of *R v Jason Lawrance* [2020] EWCA Crim 971, the Court of Appeal decided the question ‘can a lie about fertility negate ostensible consent?’. In the judgment of the court, handed down by the Lord Chief Justice, deceit concerning fertility is not sufficiently connected to the ‘nature and purpose’ of the sexual act and so the convictions were quashed.

#### **Facts**

The appellant was convicted of a number of sexual offences against more than one complainant after trial at Nottingham Crown Court in July 2019. This appeal related to two counts of rape alleged by the same complainant.

The appellant had met the complainant on a dating app in 2014 and sexually explicit text messages and phone calls were exchanged between them. In one conversation, via text message, the complainant was discussing a sexual encounter with another man. The appellant asked if they had used a condom to which the complainant replied they had not as “he had the snip years ago”. The appellant responds “so have I”. No further messages on the subject of contraception are exchanged between them.

On 21<sup>st</sup> July 2014 the pair met and after an evening together returned to the complainant’s home. In evidence at trial, the complainant stated that she sought additional reassurance from the appellant that he had had a vasectomy and made it clear she did not want to risk becoming pregnant. She further alleged that he had assured her he had undergone a

vasectomy and they then had sexual intercourse twice. The appellant did not give evidence at trial but in cross-examination it was put to the complainant that this conversation in her flat had not happened.

The next day, via text message, the appellant messaged the complainant “I have a confession, I’m still fertile, sorry”. The complainant later discovered she is pregnant and had a termination.

### The Relevant Law

The circumstances in which consent can be vitiated are set out in s76 Sexual Offences Act 2003:

*(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—*

*(a) that the complainant did not consent to the relevant act, and*

*(b) that the defendant did not believe that the complainant consented to the relevant act.*

*(2) The circumstances are that—*

*(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;*

*(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.*

The question concerning the Court of Appeal was therefore whether the appellant’s lie about having had a vasectomy amounted to deceit as to the “nature or purpose of the relevant act”.

### The Appeal

On behalf of the appellant it was submitted, following the test in *in R (Monica) v. Director of Public Prosecutions* [2019] QB 1019 [2018] EWHC 3508 (Admin), that the deception in the present case was not so closely connected to the nature and purpose of the sexual act to vitiate consent.

The act of sexual intercourse, it was argued, is a physical one involving penetration and sometimes ejaculation and that the complainant had freely consented to both of these elements. The deception did not go to the act itself but to the risks more broadly associated with it i.e. the potential for pregnancy. The case was compared with that of *R v B* [2007] 1 WLR 1567, in which the court found that failing to disclose a diagnosis of HIV did not vitiate consent as the deceit went to the consequences of the sexual act, rather than to the nature of the act itself.

The Crown asserted that the directions given by the learned judge at first instance were correct. Namely, that a lie about a vasectomy is equivalent to pretending to wear a condom which was either never worn or removed without the complainant's knowledge, as was the case in *Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

Ultimately, the Court of Appeal was persuaded by the arguments put forward by the appellant. They found that, unlike the *Assange* case, the complainant in this appeal was not deceived about the physical performance of the act and so had not been deprived of her ability to consent freely to it.

## Conclusion

The court's scope to widen the circumstances in which a lie can vitiate consent is limited both by public policy reasons and the legislation, but for some the distinction between the deception in the *Assange* case and this one will seem disappointingly artificial. However, as is noted in the judgment, these cases perhaps require a wider debate as a matter of social and public policy.