England and Wales Court of Appeal (Criminal Division) Decisions

Neutral Citation Number: [2013] EWCA Crim 1051

Case No: 201302101C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOOD GREEN
His Honour Judge Patrick
T20127553

Royal Courts of Justice
Strand, London, WC2A 2LL

27/06/2013

B e f o r e :

LORD JUSTICE LEVESON
MR JUSTICE KENNETH PARKER
and
MR JUSTICE STEWART

Between:

JUSTINE McNALLY	**Appellant**
- and -	
THE QUEEN	**Respondent**

Tom Wainwright and Shahida Begum (instructed by Levenes, London) for the Appellant
John McGuinness Q.C. (instructed by CPS) for the Respondent

Hearing date : 11 June 2013

HTML VERSION OF JUDGMENT

Lord Justice Leveson :

1. On 4 December 2012, in the Crown Court at Wood Green before His Honour Judge Patrick, this appellant (then 19 years of age) pleaded guilty to six counts of assault by penetration contrary to s. 2 of the Sexual Offences Act 2003; a further allegation was ordered to remain on the file. On 21 March, with the benefit of detailed reports, she was sentenced on each count to 3 years detention in a young offender institution; a restraining order was made for three years which operated for the benefit of the complainant and her mother.

2. With the leave of the single judge, the appellant appeals against both conviction and sentence. On 11 June 2013, at the conclusion of the hearing, we dismissed the appeal against conviction and allowed the appeal against sentence, substituting for the term of 3 years detention, a term of 9 months detention in a young offender institution suspended for two years, together with a suspended sentence supervision order. In the light of the issues raised in the case, we decided to put our reasons into writing: these we now provide.

3. The facts are undeniably unusual. The appellant (who was born on 19 April 2004) lives in Scotland. She met M on the internet through the social networking game "Habbo"; she used a male avatar "Scott". At the time they first made contact, she was aged 13 years. M (who lives in London) was a year younger (aged 12-13); she believed that she was communicating with a boy called "Scott Hill" from Glasgow.

4. Over the following 3½ years, the internet relationship developed and M began to refer to the appellant as her boyfriend. They talked (mainly by the online messenger service, MSN) about getting married and having children. The relationship extended into mobile phone conversations and M also saw "Scott" on a web cam.

5. As the couple began to get older they became interested in each other sexually and were very interested, to the point of exhibiting jealousy, in the other's relationships with other people. This culminated in each ending their relationships with others and agreeing to have an exclusive romantic relationship. The couple would have phone sex and speak about what they wanted to do to each other sexually. "Scott" would talk about what he wanted to do to her with "it" and "putting it in" which the complainant took to mean "his" penis.

6. Arrangements were made for "Scott" to come down to London to see M just after her 16th birthday in March 2011: it is unlikely that the passage of this birthday was a coincidence.

M's mother did not want 'him' to stay at their house and so they arranged for the appellant to stay at the home of a family friend.

7. "Scott" was collected from Euston Station by M and her mother. At the time the appellant was aged 17 years and she presented as a boy wearing what the complainant thought was gothic clothing (although the appellant denies wearing such clothing). Under her trousers, she was also wearing a strap-on dildo which resembled a penis.

8. Over the following months, the appellant visited the complainant on four occasions in total. On the first occasion, they watched a film together and kissed. They went to a bedroom where it was dark and the appellant began to rub M's vagina with her fingers and gave her oral sex. The complainant then went to get condoms which she had purchased intending that they have intercourse. She was nearly naked but the appellant kept clothing on: it was difficult to see because it was so dark. M offered to give the appellant oral sex but the appellant declined. It was alleged (this being the count that was denied and not pursued) that M was penetrated with the dildo.

9. On the second visit, there were lots of occasions of oral penetration and occasions of digital penetration, always of M. They were apart so much that when they were together they wanted to engage in sexual activity all the time. On the third visit, although there were difficulties in the relationship, they had a party. They still talked about having sex but the appellant was not interested in trying again.

10. However on the fourth and final visit in November 2011, the appellant was confronted by M's mother about really being a girl. When M was told by her mother, she was devastated. The appellant then came clean and also showed her a Facebook profile in her true name. M felt physically sick. She told the appellant if she had told her from the start she wouldn't have judged her and things might have been different, but she was mainly in shock and asked lots of questions. The appellant kept talking about wanting a sex change and M said the appellant had lied to her for four years and all that time she had been calling her Scott.

11. The relationship ended but there was still some limited communication between the appellant and M. On 7 November 2011, the complainant's mother made a complaint to the appellant's school (which was also attended by a real boy called Scott Hill) and the police became involved when the appellant admitted to her head teacher that sexual acts had taken place. On 30 November 2011, M gave a full account to police of these offences. Although one or two answers might be said to be equivocal, she said that she did not know that "Scott" was a girl. She considered herself heterosexual and had consented to the sexual acts because she believed she was engaging in them with a boy called Scott.

12. The account which the appellant provided to the police in a prepared statement was to the effect that she met M through the internet, pretending to be "Scott" because it made her more comfortable. She suggested that M found out about her real identity as early as December 2009 and they had a big argument. They eventually started speaking again and then met up. She expressed the view that she thought that the complainant knew or suspected that the appellant was a girl. That suspicion would be inconsistent with the suggestion of an

argument when M found out; neither would it be consistent with M's purchase of condoms before the first visit and preparation for it in 2011.

13. In this court, Mr Tom Wainwright and Ms Shahida Begum, for the appellant, advance three grounds of appeal against conviction that flow into each other. They are (1) that the appellant's legal advisors failed to advise her correctly on matters that went to the heart of her plea because (2) the elements of the offence were not made out and the appellant could not have been convicted with the result that (3) the appellant's plea was equivocal.

14. It is appropriate to deal with these grounds in a slightly different order. If, on any version of the facts, the elements of the offence were not made out, this conviction would undeniably be unsafe and would fall to be quashed even though the appellant had pleaded guilty: see *R v McReady and Hurd* [1978] 1 WLR 1376. In those circumstances, the legal advice would also be undermined. An answer adverse to the appellant is not conclusive in relation to the remaining grounds because even if the offence can be made out, that does not necessarily mean that the appellant was correctly advised. The first and third issues, however, do go together. It is not suggested that the plea entered in court was equivocal and if the appellant was correctly advised and had determined to plead guilty, the basis for setting it aside would not be made out.

15. Against that background we first consider the offence. Section 2 of the Sexual Offences Act 2003 ("the Act") provides:

> "(1) A person (A) commits an offence if –
>
> (a) he intentionally penetrates the vagina … of another person (B) with a part of his body or anything else,
>
> (b) the penetration is sexual,
>
> (c) (B) does not consent to the penetration, and
>
> (d) (A) does not reasonably believe that (B) consents.
>
> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."

16. Of particular significance in this appeal, s. 74 of the Act provides that:

> "For the purposes of this Part, a person consents if he agrees by choice and has the freedom and capacity to make that choice."

17. A number of evidential presumptions are contained in s. 75 of the Act: none are relevant to the circumstances that here arise. Conclusive presumptions rebutting consent and belief in consent, however, are contained in s. 76 of the Act. The circumstances in which these presumptions operate are (a) intentional deceit of the complainant as to the nature or purpose

of the relevant act; and (b) intentionally inducing the complainant to consent by impersonating a person known personally to the complainant.

18. This last provision has been considered in a number of decisions (in particular, *R v Jheeta* [2007] 2 Cr App R 34, *R v Devonald* [2008] EWCA Crim 527 and *R v B* [2013] EWCA Crim 823). Whether and if so how these cases fit together is irrelevant for the purposes of this appeal: it was never suggested that the conclusive presumptions applied and the relevance of the provision is restricted to the impact on the construction of s. 74. As Hallett LJ said in respect of the facts in *B* (at para. 24) the court "need look no further than the provisions of s. 74".

19. The interpretation of s. 74 has been considered in a number of cases. In *R v EB* [2006] EWCA Crim 2945, [2007] 1 WLR 1567, this court had to consider whether failure to disclose HIV status could vitiate consent (and, equally, belief in consent) to sexual intercourse. The proposition was rejected, Latham LJ observing (at para. 17):

> "Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexual transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease."

20. In that case, there was no question of any deception. The appellant had not misled the complainant (whose complaint of rape did not, in any event, turn on the appellant's HIV status although the judge had ruled that fact admissible). He went on, however, to deal with express deception:

> "As has been indicated in an article by Professor Tempkin and Professor Ashworth, in the 2004 Criminal Law Review, page 328, 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, let alone implied deceptions. It notes that 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?" There is no suggestion in that article that whatever may be the answer to that question, an implied deception can be spelt out of the mere fact that a person does not disclose his HIV status, or his or her infection by some other sexually transmissible disease, that such a deception should vitiate consent.

21. Active deception has been considered in connection with the issue of extradition in the specific context of dual criminality. In *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), the Divisional Court was concerned with the potential criminality in

this country of having sexual intercourse without a condom when it had been made clear that consent was only forthcoming if a condom was used. Having rejected reliance on s. 76 of the Act, the court observed (at para. 87) that the materiality of the use of a condom could be determined under s. 74. Sir John Thomas PQBD went on:

> "88. It appears to have been contended by Mr Assange, that if, in accordance with the conclusion we have reached, the deception was not a deception within s.76 (a deception as to the nature or quality of the act or a case of impersonation), then the deception could not be taken into account for the purposes of s.74. It would, in our view, have been extraordinary if Parliament had legislated in terms that, if conduct that was not deceptive could be taken into account for the purposes of s.74, conduct that was deceptive could not be. There is nothing in *R* v *B* that suggests that. ...
>
> 89. The editors of *Smith & Hogan* ... regard it as self evident that deception in relation to the use of a condom would "be likely to be held to remove any purported free agreement by the complainant under s.74". A very similar view is expressed in *Rook and Ward on Sexual Offences;* (4th edition) at paragraph 1.216. ...
>
> 90. In our view s.76 deals simply with a conclusive presumption in the very limited circumstances to which it applies. If the conduct of the defendant is not within s.76, that does not preclude reliance on s.74. *R v B* goes no further than deciding that failure to disclose HIV infection is not of itself relevant to consent under s.74. *R v B* does not permit Mr Assange to contend that, if he deceived AA as to whether he was using a condom or one that he had not damaged, that was irrelevant to the issue of AA's consent to sexual intercourse as a matter of the law of England and Wales or his belief in her consent. On each of those issues, it is clear that it is the prosecution case she did not consent and he had no or no reasonable belief in that consent. Those are issues to which s.74 and not s.76 is relevant; there is nothing in *R* v *B* which compels any other conclusion. Furthermore it does not matter whether the sexual contact is described as molestation, assault or, since it involved penile penetration, rape. The dual criminality issue is the absence of consent and the absence of a reasonable belief in consent. Those issues are the same regardless of the description of the conduct."

22. More recently, *R(F) v DPP* [2013] EWHC 945 (Admin) was concerned with a decision not to prosecute where the allegation was that consent was forthcoming on the basis that ejaculation would only take place outside the body. Lord Judge CJ, in a court also comprising of Fulford and Sweeney JJ observed (at para 25):

> " ... Given that essential background, the evidence about the

incident in February 2010 is reasonably open to this analysis. Consensual penetration occurred. The claimant consented on the clear understanding that the intervener would not ejaculate within her vagina. She believed that he intended and agreed to withdraw before ejaculation. The intervener knew and understood that this was the only basis on which she was prepared to have sexual intercourse with him. There is evidence from the history of the relationship, as well as what he said when sexual intercourse was taking place, and his observations to the claimant afterwards, that although he never disclosed his intention to her (because if she had known he knew that she would have never have consented), either from the outset of penetration, or after penetration had begun, he intended that this occasion of sexual intercourse would culminate in ejaculation within her vagina, whatever her wishes and their understanding. In short, there is evidence that he deliberately ignored the basis of her consent to penetration as a manifestation of his control over her.

26. In law, the question which arises is whether this factual structure can give rise to a conviction for rape. Did the claimant consent to this penetration? She did so, provided, in the language of s.74 of the 2003 Act, she agreed by choice, when she had the freedom and capacity to make the choice. What *Assange* underlines is that "choice" is crucial to the issue of "consent", and indeed we underline that the statutory definition of consent provided in s.74 applies equally to s.1(1)(c) as it does to s.1(1)(b). The evidence relating to "choice" and the "freedom" to make any particular choice must be approached in a broad commonsense way. If before penetration began the intervener had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because "penetration is a continuing act from entry to withdrawal" (see s.79(2) of the 2003 Act) he decided that he would not withdraw at all, just because he deemed the claimant subservient to his control, she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape."

23. The case for the Crown was that M's consent was obtained by fraudulent deception that the appellant was a male and that had she known the truth, she would not have consented to acts of vaginal penetration. Mr Wainwright argues that deception as to gender cannot vitiate

consent; in the same way deception as to age, marital status, wealth or, following *EB*, HIV status being deceptions as to qualities or attributes cannot vitiate consent. Thus, he submits that *Assange* and *R(F)* can be distinguished as the deceptions in those cases were not deceptions as to qualities or attributes but as to the features of the act itself.

24. We reject this analysis. First and foremost, *EB* was not saying that HIV status could not vitiate consent if, for example, the complainant had been positively assured that the defendant was not HIV positive: it left the issue open. As Mr McGuinness for the Crown contends, the argument that in *Assange* and *R(F)* the deceptions were as to the features of the act is not sustainable: the wearing of a condom and ejaculation are irrelevant to the definition of rape and are not 'features' of the offence and no such rationale is suggested. In the last two cases, it was alleged that the victim had consented on the basis of a premise that, at the time of the consent, was false (namely, in one case, that her partner would wear a condom and, in the second, that he would ejaculate outside her body).

25. In reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent. In our judgment, Lord Judge's observation that "the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way" identifies the route through the dilemma.

26. Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male. Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception.

27. It follows from the foregoing analysis that we conclude that, depending on the circumstances, deception as to gender can vitiate consent and we reject the proposition that these pleas of guilty come within the principle set out in *R. v Emmett* [1988] AC 773 at 782 or that they were vitiated having been induced by a fundamental mistake as to law or fact. There is no suggestion that the pleas were equivocal in the face of the court. The only basis on which Mr Wainwright can argue that this court should now intervene is that the appellant was wrongly advised and did not appreciate the elements of the offence to which she was pleading guilty (see *Revitt, Borg and Barnes v DPP* [2006] EWHC 2266 Admin). Privilege having been waived, this is a combination of the remaining arguments to which we now turn.

28. We start with the nature and extent of the advice that the appellant was offered, noting that on each occasion that she was seen by her lawyers, she was accompanied by her parents. At the preliminary hearing, on 14 March 2012, there was a substantial delay before the case could be heard and counsel, Mr Keith Thomas, along with her solicitor, took preliminary instructions (prior to service of the papers) in order to start drafting a witness statement and a defence statement. At that stage (reflected in the defence statement), the appellant was saying, in terms, that M and two of her friends had challenged her about her gender and that she had admitted that she was female.

29. This statement is consistent with the written statement she provided to the police to the effect that M had found a Facebook page with the appellant's real name and photograph which, at Christmas 2009, had caused them to fall out. The draft defence statement goes on:

> "7. If, which is denied, [M] did not consent to the acts complained of, the [appellant] will contend that she reasonably believed [M] consented to all such acts as took place and in the knowledge that the [appellant] was a female. "

30. The draft witness statement re-iterated that the appellant had lost contact with M around Christmas 2009, noting that it was resumed when M requested pictures via a webcam for which purpose the appellant made herself look like a boy. The statement goes on to say that when the appellant travelled to London, she did not try to disguise herself as a boy and continued with these words:

> "12. I presumed M knew that I was a girl and consented to sexual activity which took place although I specifically deny I ever used a dildo on her. I admit I had a dildo which she saw but I did not use it on her."

31. After the preliminary hearing, there was discussion on 2 October 2012 and a further lengthy conference in London on 21 October 2012. In the car, on the way down from Scotland, the appellant and her parents talked about the case. In her evidence to this court, the appellant said that she told them that she wanted to plead guilty or was thinking about pleading guilty; her father recalled that she said she may as well plead guilty. Both her parents spoke of telling her that if she had grounds for believing that M knew she was a girl, she should fight the case. As a statement of the law, that proposition was entirely accurate although Mr McNally was emphatic that he did not derive this knowledge from anything that his daughter's lawyers had ever said about the ingredients of the offence.

32. At the conference (which took place over 1½ hours), Mr Thomas went through the proposed defence statement whereupon the appellant said that it was not right to say that she had told M she was a girl: the sentence was crossed out of the draft. According to the appellant, Mr Thomas said that this retraction "changes everything" and that he then said she should plead guilty because she didn't have any proof or evidence that M knew she was a girl; she therefore had no defence. She said that she did not know that a belief that M knew that she was a girl constituted a defence, let alone that the burden of disproving that allegation fell on the Crown. When cross examined before us, she agreed that she did not want to tell M the truth. She said that in a way, if she told M the truth, she might have ended the relationship and the appellant did not want it to end; therefore she did not tell her.

33. In his evidence, Mr McNally recollected that his daughter said that she might as well plead guilty and that this surprised him. He said that he could not remember if his daughter was asked that she had told M she was a girl; the appellant had said that she presumed M knew and she was not asked why she made that assumption. Mrs McNally could not remember the words used but did recollect that it was a case of the appellant having to prove her defence.

34. We also heard from Mr Thomas, a barrister who had practised criminal law for in excess of

40 years. He was clear that he had explained the burden and standard of proof and had gone through each of the elements of the offence not only prior to the preliminary hearing but also in the later conference. He denied that he ever told the appellant that she had no proof that M did not know she was a girl; on the contrary, he said that just because she had not told M she was a girl did not deprive her of a defence. The way in which he put it in his statement was:

> "In view of her replies I was satisfied in my own mind she (and her parents) knew what all the constituent elements of the offence were and that these were made out. I did not say what is set out in para. 14 of the recent advice ['because she did not tell the complainant she was a girl ... she had no defence and should plead guilty'] – that is not my understanding of the law. Indeed, I had specifically referred to the issue of Miss McNally's 'reasonable belief' in paragraph 7 of the draft defence statement."

35. Mr Thomas accepted that he pointed out the difficulties that the appellant faced (not least concerning the evidence that M had bought condoms prior to her arrival and the nature of her admissions to her headmaster in relation to the dildo). He also observed that the versions of events provided by M and by her could not live in the same world but that it would be clear to the jury who was telling the truth.

36. Mr Thomas said that until the end of the conference on 21 October, he believed that the appellant intended to plead not guilty. It was only then that her father said that Justine wanted to tell him something whereupon the appellant indicated that she wished to plead guilty to all but the allegation concerning the dildo. He said that he was taken aback given her previous instructions and the discussion that afternoon: the result was that he went through the elements of the offence again.

37. The upshot was that five paragraphs were added to the witness statement (without any other amendment being made to the earlier parts so that, on the face of it, the document appears inconsistent). These additional paragraphs were as follows:

> "17. At that conference, attended also by both my parents, I stated that I wished to plead guilty to all matters save and except the offence involving the use of the dildo (count 1).
>
> 18. I accept that [M] did not consent to the sexual activity between us because she did not realise I was a girl and not a boy. I accept that she only consented because she thought she was having a relationship with Scott Hill, a boy. She would only agree to sexual activities with a boy.
>
> 19. I admit I went to London on 4 occasions as a boy as I told the headmaster... . I stayed with [M] or her family and admit the sexual activities complained of took place with the specific exception of the use of the dildo.
>
> 20. I intend to plead guilty to counts 2, 3, 4, 5, 6 and 7 but not guilty

to count 1.

21. If the CPS will not accept my not guilty plea on count 1, I will discuss the overall position with [Mr Thomas]."

38. Given the expressed view of her parents during the trip down to London, it is perhaps surprising that neither sought to intervene in the conference but, in any event, this was not the last opportunity for the appellant to consider the matter. The case was listed some six weeks later, on 4 December, and it was only on that occasion that the appellant both signed the witness statement which contained the five paragraphs which we have just set out and tendered the pleas in court (which the Crown accepted).

39. Mr Wainwright cross examined Mr Thomas about a note that was prepared in which it was recorded that counsel had "reiterated that no offence was committed IF consensual and with the complainant's full knowledge client was female" and that client "confirmed she had done/said nothing to inform the complainant she was actually female. She relied on presumption." It is said that this note contains no reference to the requirement that she had no reasonable belief in consent although that was the point on which her parents had dwelt. Mr Thomas repeated the advice that he had given; he had not been responsible for the preparation of the note.

40. As to Mr Thomas' account, the appellant accepts that she signed the statement and thereby accepted the contents as true but says that, by that time, she "just wanted it to be over". Otherwise, she denies understanding the ingredients of the offence as Mr Thomas explained them: essentially, her account and that of her parents is inconsistent not only with the witness statement that she signed and the draft defence statement but also Mr Thomas' account.

41. When seeking to resolve this conflict, it is important further to consider the chronology of events. Not only did Mr and Mrs McNally have the period between the conference and the further appearance in court (not least to discuss the view expressed by Mr McNally that she should not admit any offence if she believed that M knew she was a girl) but, after the plea was entered, a further 3½ months elapsed before the case returned for sentence. There is no suggestion that the appellant or her parents challenged Mr Thomas or the solicitors either then or subsequently.

42. What did happen in the period between the plea and the sentence was that the appellant saw a number of professionals in order to provide information to the court. In that regard, Mr Wainwright relies on a number of the observations included in the report of the psychologist (prepared for the purposes of sentence) to the effect that the appellant "assumed that [M] actually knew her gender but chose not to mention it" and "said that she believed that [M] knew her true gender and claimed that she commented on her breasts and her high pitched voice". He claims that these statements demonstrate that there truly was an issue that should have been ventilated and demonstrates the accuracy of the appellant's account of her conference with counsel.

43. On the other hand, Mr McGuinness for the Crown points to other parts of the report where

the author notes inconsistencies in the appellant's account and her failure to disclose relevant information; the psychologist said that there was evidence of rationalisation, distorted thinking processes and victim-blaming. She also notes that when planning the visit to M, the appellant was "worried and scared her gender would be apparent to [M]". The psychologist also observed that the appellant had insisted that only M take off her clothes while she changed into jogging bottoms and "hid herself by sitting on the edge of the bed"; there was similar behaviour on each occasion.

44. Mr McGuinness also points to the Criminal Justice Social Work Report (being the equivalent of the Pre-Sentence Report in Scotland) which, on the issue of seriousness, records that the appellant was aware that the contact with the victim was based on deceit and secrecy and breach of trust while emphasising that she did not intend to cause her harm. Earlier parts of the report not only provide the context of the offence that the victim remained unaware of the appellant's gender but go on to observe in relation to the level of responsibility for the offence:

> "Miss McNally accepts that she has committed an offence and in order to do so maintained a cycle of deception, secrecy and breach of trust."

45. It is clear that, for whatever reason, the appellant has said different things at different times: Mr Thomas said that he often found that defendants did not tell experts what they had told their lawyers. On any showing, we recognise that the conferences with counsel would have been a fraught and anxious occasion both for the appellant and her parents. It would not, however, have been an emotional occasion for Mr Thomas and we accept his account that he properly advised the appellant and her parents as to the law: it was clear from the defence statement that he had understood all the ingredients of the offence and there is no reason for him not to have made them clear. Further, given the formality of the preparation of the defence statement which was then signed by the appellant, doubtless in the presence of her parents, it is difficult to see how they would have allowed the issue of knowledge to pass without comment, not only because of the conversation in the car but also because of their wish to protect their daughter.

46. In his written submission, Mr Wainwright also argues that the equivocations in M's ABE statement, with two passages from which knowledge might have been inferred, were such that it would not have been open to the jury to convict. Mr McGuinness rightly accepts that this material would have been available for cross examination but submits that, read as a whole, M believed the appellant to be a boy called Scott with references to "he" and "him" throughout; to that must be added her reaction when being informed by her mother. None of this demonstrates that the case would have failed on evidential grounds and neither it, nor the dispute between the appellant, her parents and Mr Thomas start to justify the conclusion that "the defence would quite probably have succeeded" so that "a clear injustice has been done": see *R v Boal* [1992] QB 591 at 599H-600A. The criticism of the appellant's legal advisors is not made out: these grounds of appeal also fail. In these circumstances, the appeal against conviction was dismissed.

47. Turning to sentence, the appellant was aged 18 when sentenced and was of previous good character. The pre-sentence report spoke of a history of self harm and confusion surrounding her gender identity and sexuality, which were resolving. The author believed that she was suitable for a community sentence and that custody would not be suitable or address the appellant's needs and risks which could be addressed properly by the probation service. We repeat that the appellant had accepted that she had deceived not only others but also herself in committing these offences. An exceptionally detailed report from a Consultant Clinical and Forensic Psychologist concluded that she required a "robust and intensive programme of risk management" which, if not available, could lead to repetition or what the psychologist called "a twist and escalation scenario".

48. When passing sentence, the Judge concluded that the appellant's deception represented an abuse of trust and referred to the impact on M as identified in her victim impact statement. He did not consider to be remarkable either her troubled history or her confusion with her own sexuality. He recognised that the appellant was 17 years old at the date of the offending, that she had pleaded guilty and that she did not appreciate the seriousness of what she was doing. In following the guidelines, the Judge took a starting point of 9 years and then reduced it by a third for the plea (to 6 years) and then by half to reach a custodial sentence of three years detention.

49. Mr Wainwright accepts that if the judge was correct to identify this offending as being in breach of trust, the guidelines issued by the Sentencing Guidelines Council identify a starting point in relation to a victim over the age of 16 years as 8 years imprisonment. He contends, however, that there was no breach of trust in this case not least because, although not directly applicable, s. 21 of the Sexual Offences Act 2003 defines 'positions of trust' for the purposes of ss. 16-19 of the Act as covering relationships such as teacher and pupil or doctor and patient.

50. In *R v ZBT* [2012] EWCA Crim 1727, this court rejected the proposition that step-siblings in a familial context were in a relationship which gave rise to trust and postulated, by way of example, that there was no duty of care owed by the appellant to his step sister. Mr McGuinness acknowledged that the circumstances of two teenagers of similar age did not fall within that definition: we agree.

51. In the absence of an abuse of trust, the starting point set out in the guideline for an offence involving penetration with a body part, committed when a victim is 16 years old or over is 2 years imprisonment with a range of 1-4 years. Furthermore, the context and the personal circumstances demonstrate features of mitigation to which the court is bound to have regard.

52. The appellant has now served just under 3 months of the custodial sentence imposed by the judge and although the length of the deception practiced upon M (relevant to culpability) and the degree of harm caused to M fully justifies the conclusion that the custody threshold has been exceeded, in the circumstances now obtaining, we concluded that justice could be served by imposing a sentence of 9 months in a young offender institution, suspended for a period of 2 years, together with a suspended sentence supervision order also extending for 2 years. In that way the appellant will receive the help that she so clearly needs. The

restraining order will remain in place and the notification requirements modified to reflect the reduced sentence. To that extent, the appeal against sentence was allowed.
