Asif Tufal

CASES ON CONSENT

CONSENT TO ACTUAL BODILY HARM

R v Brown and Others **[1993] 2 All ER 75.**

The accused belonged to a group of sado-masochistic homosexuals who willingly participated in acts of violence against each other, including genital torture, for the sexual pleasure engendered in the giving and receiving of pain. The passive partner in each case consented to what was done and the bodily harm suffered was not permanent. The activities took place in private. They were video recorded and the tapes distributed only among the group. The police discovered the activities by chance. The accused were convicted of assault occasioning actual bodily harm and unlawful wounding, contrary to ss47 and 20 of the Offences Against the Person Act 1861 respectively. Their convictions were upheld by the Court of Appeal. The accused appealed to the House of Lords, contending that a person could not be guilty of offences under ss47 and 20 of the 1861 Act in respect of acts carried out in private with the victim's consent.

By a majority (3-2), the House of Lords dismissed the appeals. It held that, since actual bodily harm was intended and caused, consent was irrelevant unless it could find that it was in the public interest to permit such activities by recognising as valid a consent to intentional causing of actual bodily harm in the course of sado-masochistic practices, and there were several good reasons why it should not do so. First, it was only luck that the participants had not suffered any serious harm or infections. Second, there was a risk of spreading diseases such as AIDS. Third, there was the danger that young people could be drawn into the unnatural practices.

This decision was upheld by the European Court of Human Rights in 1997.

R v Wilson **(1996) Times Law Report March 5 1996**

The defendant had been charged with assault occasioning a.b.h. contrary to s47 of the O.A.P.A. 1861. The activity involved the defendant burning his initials onto his wife's buttocks with a hot knife because she had wanted his name on her body. The Court of Appeal held that consensual activity between husband and wife in the privacy of the matrimonial home was not a proper matter for criminal investigation or criminal prosecution. The court believed that the defendant had been engaged in an activity which in principle was no more dangerous than professional tattooing. Thus, the court was of the opinion that it was not in the public interest that his activities should amount to criminal behaviour.

Attorney-General's Reference (No 6 of 1980) **[1981] 2 All ER 1057.**

The accused and a youth met in a public street and argued together. They decided to settle the argument there and then by a fight. They exchanged blows with their fists and the youth sustained a bleeding nose and bruises to his face caused by blows from the accused.

The trial judge directed the jury that the accused would, or might, not be guilty of assault if the victim agreed to fight, and the accused only used reasonable force. The respondent was acquitted. The Court of Appeal held that a fight between two persons would be unlawful, whether in public or private, if it involved the infliction of at least actual bodily harm, or if actual bodily harm or worse was intended. This would make most fights between people wishing to 'settle their differences' in this manner unlawful. Lord Lane CJ stated:

"The answer to this question, in our judgment, is that it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.

Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases."

CONSENT TO RISK OF UNINTENTIONAL A.B.H.

R v Billinghurst **[1978] Crim LR 553.**

During a rugby match and in an off-the-ball incident B punched an opposing player, in the face fracturing the jaw. B was charged with inflicting grievous bodily harm contrary to s20 of the Offences Against the Person Act 1861. The only issue in the case was consent. Evidence was given by the victim that on previous occasions he had been punched and had himself punched opponents on the rugby field, and by a defence witness, a former International rugby player, that in the modern game of rugby punching is the rule rather than the exception.

- It was argued by the defence that in the modern game of rugby players consented to the risk of some injury and that the prosecution would have to prove that the blow struck by B was one which was outside the normal expectation of a player so that he could not be said to have consented to it by participating in the game.
- The prosecution argued that public policy imposes limits on violence to which a rugby player can consent and that whereas he is deemed to consent to vigorous and even over-vigorous physical contact on the ball, he is not deemed to consent to any deliberate physical contact off the ball.

The judge directed the jury that rugby was a game of physical contact necessarily involving the use of force and that players are deemed to consent to force "of a kind which could reasonably be expected to happen during a game." He went on to direct them that a rugby player has no unlimited licence to use force and that "there must obviously be cases which cross the line of that to which a player is deemed to consent." A distinction which the jury might regard as decisive was that between force used in the course of play and force used outside

the course of play. The judge told the jury that by their verdict they could set a standard for the future. The jury, by a majority verdict of 11 to 1, convicted B.

R v Jones (Terence) **(1986) 83 Cr App R 375.**

The defendants were convicted of inflicting grievous bodily harm on two schoolboys, who had been tossed high in the air and then allowed to fall to the ground by the defendants. The defendants' evidence was that they regarded this activity as a joke. There was some evidence showing that the victims, likewise, so regarded this. The judge declined to direct the jury that if they thought that the defendants had only been indulging in rough and undisciplined play, not intending to cause harm, and genuinely believing that the victims consented, they should acquit. On appeal, their appeals were allowed on the basis that consent to rough and undisciplined horseplay is a defence; and, even if there is no consent, genuine belief, whether reasonably held or not, that it was present, would be a defence.

R v Aitken and Others **[1992] 1 WLR 1066.**

The three defendants and a man named Gibson were all RAF officers attending a party to celebrate the completion of their formal flying training. During the course of the evening the defendants had, in jest, tried to ignite the fire resistant suits of two fellow officers. When G indicated that he was leaving the party to go to bed, the defendants manhandled him and set fire to his fire resistant suit. Despite the rapid efforts of the defendants to douse the flames, G suffered serious burns. Although it was accepted that the defendants had not intended to cause injury to G, the defendants were court martialled, and convicted of inflicting GBH contrary to s20 of the Offences Against the Person Act 1861.

An appeal against conviction was allowed. The Courts-Martial Court of Appeal held that the judge advocate should have directed the court to consider whether G gave his consent as a willing participant to the activities in question, or whether the appellants may have believed this, whether reasonably or not.