

Body Modification: A Case of Modern Maiming?

R v BM [2018] EWCA Crim 560;
[2018] WLR (D) 187

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body modification, grievous bodily harm, defence of consent, personal autonomy

The Appellant, a tattooist and body piercer, also offered body modification services to customers. Although the Appellant was registered with the local authority to perform tattooing and body piercing (under Local Government (Miscellaneous Provisions) Act 1982, Part VIII), they were not registered to perform body modifications (at [7–8]). In their capacity as a body modifier, the Appellant performed the following modifications: (i) on 23 July 2015, the Appellant removed a customer's left ear (at [9]); (ii) on 16 August 2012, the Appellant removed a customer's nipple (at [11]); and (iii) on 23 July 2012, the Appellant split a customer's tongue, so that it resembled that of a reptile (at [11]). All such modifications were performed by and with the customers' consent (some with a signed consent form) and this was accepted by the Crown (at [1]).

The Appellant was charged with three counts of wounding with intent to cause grievous bodily harm (contrary to s. 18, Offences Against the Person Act 1861) along with three alternative counts of inflicting grievous bodily harm (contrary to s. 20) as a result of these three body modifications. On 29 September 2017, at a preparatory hearing, the question of whether the customers' consent to the body modifications was a defence (at [1]). On 6 October 2017, His Honour Judge Nawaz ruled that consent could not provide any defence to the charges on the basis of the decision of the House of Lords in *R v Brown* [1994] 1 AC 212 (at [2]). The judge's ruling was made under the Criminal Procedure and Investigations Act 1996, s. 31(3)(b), and he gave the Appellant permission to appeal to the Court of Appeal under s. 35(1) (at [2]).

In the Court of Appeal, the Appellant submitted that (i) while he accepted that *Brown* was not wrongly decided, public policy considerations should not invalidate the consents given by the customers (at [34]); (ii) *Brown* could be distinguished as that case involved sado-masochistic activity and there was good reason why the Appellant's conduct should be permitted in that it protected the customers' personal autonomy (at [34]); (iii) the procedures carried out were not medical or surgical but more akin to body adornment and therefore were natural extensions to tattooing and body piercing (for which consent has long been accepted to negative criminal activity) (at [34]); and (iv) as a combination of all submissions, the procedures carried out should be immunised from the criminal law of assault (at [35]).

Held, dismissing the appeal, that the Court of Appeal could see no good reason why body modification should be placed in a special category of exemption from the general rule that the consent of an individual to injury provides no defence to the person who inflicts that injury if the violence causes actual bodily harm or more serious injury (at [45]).

Commentary

When reading the judgment of the Lord Chief Justice, it seems that he was surprised that a case such as this had reached the Court of Appeal. Firstly, he found it 'striking' that the judge's ruling did not provoke guilty pleas to the charges on the indictment (at [3]) and, secondly, he appears to be critical of the 'clearly

untidy' (at [5]) procedural way the judge had in fact dealt with the case, that is, that it had been done in such a way as to produce an interlocutory appeal rather than a conviction followed by an appeal in the 'ordinary way' (at [5]). As to the first point, this is clearly a matter for the Appellant only and it should be left at that. As to the second, although the benefits of the 'ordinary way' are obvious, in that it provides a clear and full picture of the proceedings as a whole for the Court of Appeal to look back upon, it is debateable whether, if the 'ordinary way' had been pursued, that is, conviction and then appeal against conviction, the application to appeal against conviction would have got passed the single judge. From a single judge's point of view (following either a plea of guilty or conviction following trial), would it have been arguable that consent was a defence to a s. 18 offence in the light of *Brown*? It is likely that the single judge would consider such a point well settled and would have refused permission to appeal.

This case highlights a gap in the law, which has arisen as a result of the increasing significance of personal autonomy in contemporary society. The Appellant was a registered tattooist and body piercer who under the 1982 Act was *required* to be registered with the local authority for that purpose. This registration, according to the Lord Chief Justice, provided lawful authority to undertake those specific tasks as to do them without registration was an offence under the 1982 Act (at [7]). The 1982 Act, however, makes no mention of body modification, therefore it is unregulated and it requires no specific training or qualification (at [8]). The Appellant could not therefore be a registered body modifier as no registration scheme is in place. At face value, one may therefore say that the law *allowed* unregistered body modifiers as no scheme was put in place to register them. However, it could also, equally, be said that the law did not allow body modification and would have always treat such as an assault (either view is possible due to the lack of a legal landscape on body modification). The Crown emphasised the significance of the harm actually caused by the Appellant to the customers rather than considering the harm which the customers considered that they suffered at the time they underwent the body modifications, that is, the customers did not consider themselves to have been assaulted and signed declarations to that effect. The Crown's position therefore, to some extent, overrode the autonomy of the customers to make a decision for themselves as to what they could or could not do with their bodies. Historically, such actions were considered to have been criminal as they robbed the Crown of an able bodied man who could be called upon to fight; however, such arguments grow weaker with the advancement of modern technical weaponry. This case therefore highlights that our body is not really *our* body.

As part of the Crown's case against the Appellant, it filed evidence from an ear, nose and throat consultant and a consultant plastic surgeon. The evidence was summarised by the Lord Chief Justice (at [12–20]), but it can be further summarised as follows: (i) the modifications performed by the Appellant were not medically necessary and carried serious risks of hearing loss, speech, feeding and infection; (ii) proper standards of technique and cleanliness were not followed (i.e. clean to an operating theatre standard); (iii) no such operations would be carried out for aesthetic reasons by a qualified surgeon; and (iv) the Appellant had no way to assess whether the customers were suffering from body dysmorphic disorder. The Appellant was not a surgeon or medically trained, and it was argued that to place the same standards upon the Appellant as they would on qualified surgeons was unfair to the Appellant. Indeed the issue, which was *not* addressed, stemmed from the fact that no such aesthetic operations would be carried out by a qualified surgeon: Why then did the Appellant perform such modifications? The Appellant did offer such services and the customers did walk through the door, was it because they could not receive such services from a qualified surgeon (and therefore opted for second best), or was it because of the cost? It must be remembered that the Appellant was not a backstreet body modifier offering such procedures behind closed doors as he was registered with the local authority for other matters and must have advertised and made public his willingness to perform such procedures. The point was made by the Lord Chief Justice that no 'reputable surgeon' (at [19]) would have performed the modifications (although this is by no means clear). If such a 'reputable surgeon' (or indeed any surgeon) had performed such an operation, they too would in all likelihood be committing an assault; therefore, the evidence of the experts on the risks involved in performing the modifications is of no real value to convict the Appellant as they apply equally to the Appellant and a qualified surgeon. The focus of the Crown's case therefore seems to have been that these were unnecessary medical operations performed by a person with

no medical training whatsoever. This lack of training is, however, of no relevance: In *R v Wilson (Alan)* [1997] QB 47, the Court of Appeal equated the actions of the Defendant upon his wife as tattooing despite the fact that he was not a tattooist. The focus was on the act rather than the one that performed it. The Appellant performed the modifications as an extension of the services that they already offered, therefore the customers considered such an extension to be a legitimate extension to their work. Why then could the Crown not also consider body modification a legitimate extension of the Appellant's work? Tattooing and piercing are modifications of the body rather than medical operations and are considered '*personal piece[s] of personal adornment*' (*Wilson*, 50 (Russell LJ)) which, no doubt, the customer who had their tongue forked would have equally considered a personal adornment.

The question should be asked why these prosecutions were launched, given that the offences were allegedly committed in 2012 and 2015. As the case for the Crown turned on the fact that it was not in the public interest to decriminalise such activities when performed with the consent of customers (at [37]), one may wonder whether this is because of a change in policy (which has yet to be translated into a change in the law) as to the desirability of such procedures. The Crown also emphasised that the procedures were not warranted medically. Arguably, neither are such procedures as tattooing, piercing and, to some extent, circumcision when carried out for religious purposes, yet such procedures are exempt from criminal liability. The Lord Chief Justice in his judgment emphasised the references to surgical operations as being within the special categories of exemption contained with *Brown* (at [25–30]) but stated that such categories were not part of a coherent statement of underlying principle and that they were at best ad hoc (at [24] and [38]). It may therefore be time to reconsider these ad hoc items. This case therefore highlights that the line drawn in *Brown* between autonomy and public protection is no longer as certain as it was when *Brown* was decided and that such a line is incapable of adapting to new trends. It also highlights that the courts are unwilling to extend to any exceptions not specifically referred to in *Brown*. For the Lord Chief Justice, these must ultimately be done by Parliament (at [39] and [45]). Body modification as a practice is ancient and well known to anthropologists; however, Parliament has not seen fit (as yet) to regulate it nor to indicate how the courts are to react to it. Should it be regulated and licenced (and therefore exempted like piercing etc.) or should it be a criminal offence?

It is interesting to note that the customers' autonomy to consent or agree to the modifications was very much played down in the judgment. References to this were overshadowed by issues such as potentially vulnerable customers or those being mentally unwell undergoing procedures without really thinking the process through (at [39] and [43]). This must be a concern, but removal of an ear or a nipple is not something someone would do on a whim having just walked past the Appellant's shop. Indeed, the Lord Chief Justice is to some extent reaching when he considered that those who seek body modification—'that is not to say all' (at [43])—are suffering from some form of 'identifiable mental illness' (at [43]) or are otherwise 'vulnerable' (at [43]). Such comments seriously downplay the customer's personal autonomy in favour of a more paternalistic approach by suggesting that anyone who wishes to undergo such a treatment *must* by definition be mentally unwell and they *must* be protected at all costs from undergoing such procedures.

The lack of a defence of consent has effectively crippled the Appellant's defence to the charges. If the Appellant pleads not guilty, the judge will direct the jury that no matter how much they might sympathise or agree with the Appellant or no matter how much they think that what the Appellant did was not an assault they *must* as a matter of law convict the Appellant. On each count, the Appellant did not deny making the body modification with the requisite intention to make the modification (at [3]), as such the judge must direct any jury that grievous bodily harm has been committed by the Appellant with the intention to cause grievous bodily harm and that no defence to the charge can be offered (something which counsel for the Appellant accepted (at [3])), as a result they would be guilty.