

Chapter 7

Tom and Patricia agree to have sexual intercourse, but Patricia makes it clear that she agrees only on condition that Tom wears a condom. Tom proceeds with sexual intercourse but, unknown to Patricia, he is not wearing a condom. Is this rape?

A key issue here will be whether Patricia has consented to the penetration. One set of arguments will surround section 76 and whether or not it can be argued that Tom has deceived Patricia as to the nature of the act. However, it may be questioned whether there is a deception here, unless it is argued that Tom's statement that he intends to wear a condom is deceptive. Even if it is there is still a dispute as to whether any such deception would relate to the 'nature or purpose of the act'. The defendant may argue that the act is still sexual intercourse, whether or not a condom is worn.

A more straight-forward argument would be to say that Patricia did not consent in the general meaning of the word. She had made it clear that would only consent to the act if the condom was worn. As it was not, there was no consent. That was the argument that succeeded in *R(F) v DPP* when a case with similar facts was heard before the Divisional Court.

Brian has a low IQ and is sexually inexperienced. He meets Dawn who appears to be very friendly and accepts an invitation for a cup of tea in his flat. He decides that she must be willing to have intercourse with him. Dawn resists his advances but Brian decides that she must be consenting. Has Brian committed rape?

There is little doubt in this scenario that the actus reus of rape is made out. The key issue surrounds the *mens rea*. One possibility is that the *mens rea* could be presumed if Brian had used violence immediately before or during the penetration. If so there could be an evidential presumption that the mens rea was present under section 75 of Sexual Offences Act 2003. Otherwise, there is the question of whether Brian reasonably believed that Dawn consented. The obvious answer is no, but it is necessary to consider whether the jury, in considering whether Brian's belief was reasonable, should take into account his low IQ and his sexual inexperience. The case of *B* indicates that the courts are likely to take a strictly objective approach to this question.

Some American colleges and universities, in an effort to encourage students better to communicate about sexual matters, have strict rules requiring explicit consent to be obtained to each stage of a sexual relationship. If such consent is not obtained the actions can be regarded as a sexual offence (see e.g. Harrison, Downes, and Williams (1991)). Would such a regime be a good idea as a national law? Some claim it would rob sexual activity of its spontaneity and passion. Would it? Even if it did, would it be worth it if it reduced the incidence of unwanted sex?

The law on sexual offences needs to strike a difficult balance. It can easily get things wrong. If too strict over what counts as consent then it is very difficult for two people wanting to have sex to be confident they are acting lawfully. On the other hand if it is too lax, people will be taken to consent to sex, when in truth they did not. Protecting people's sexual autonomy means ensuring they have the right to be able to have sex when they want, as well as the right not to have sex when they want.

Everyone agrees that people should have the right to say 'no' to sexual relations. We could take that right very seriously. We could demand that any two (or more) people who wish to have sex together should appear before a judge and persuade her or him that the sexual activity will be consensual and otherwise lawful. The judge could then grant a certificate permitting sexual activity. Without such a certificate the sex would be regarded as non-consensual. That would be a good protection of the right to say 'no', but it might be regarded as a showing insufficient protection of the right to say 'yes'! When the mood strikes, waking up the nearest judge may not be the best way to stoke the fires of passion.

On the other hand we could go to the other extreme and say that unless someone makes it absolutely clear that they do not want consent to sexual relations they should be taken to consent. This would be woefully inadequate to protect the right to say "no". Someone sleeping, terrified or utterly intoxicated would be taken to consent. Indeed you would be taken to consent to sexual relations at any time unless you made it clear otherwise.

Of course, few people would take either of these two extreme positions. The difficulty is in finding the correct place between them. The answer cannot be found in the dictionary meaning of consent. Nothing in a dictionary will tell us whether consent should be understood in a rich sense (consent where there are no pressures; there is full understanding of all relevant issues; and an ability to reach a rational decision) or in a weak sense (consent as long as there are no really serious pressure; it is at least understood that sexual relations are proposed; and the person has at least some awareness of what is going on).

So, where should the balance be struck? Should we require a rich meaning of consent or a weak meaning of consent? One key issue is the extent to which sexual penetration *per se* is a wrong. If a doctor was seeking the consent of a patient to perform major heart surgery, we would expect the doctor to ensure that the patient understood all the key issues; was aware of the risks of surgery; and that the patient had made an informed decision about whether to have the operation. A doctor who noticed a patient was drunk when making the decision would be severely censured if she relied on a drunken consent before operating. On the other hand if a doctor was going to wipe a bit of dirt from a patient's hand with a cloth, we would be happier with a weaker understanding of consent. No one would question the propriety of doctor relying on a drunken consent in such a case. So the degree of the wrong involved can affect how strict our requirements of consent will be.

The question of to what extent it is a wrong to someone to sexually penetrate them is a difficult one. There is a danger of a circular argument here. Whether we take a strong or weak understanding of consent in part depends on whether sexual penetration is seen as a serious wrong. But whether or not it is a serious wrong depends on whether or not there is consent. However, there are identifiable wrongs that can be found in the act of sexual penetration *per se*. The difficulty is that there is a diverse range of opinion about how serious those wrongs are.

A second issue is what can be expected of the parties. We can reasonably expect a doctor to give her patient all the relevant information before the patient consents to major surgery. Indeed we would want the doctor to ensure that the patient was able to reach a reasoned decision and was not, for example, intoxicated or so fearful as to be unable to make a reasoned decision.

We would not expect football players to discuss the risks involved in their sport with each other before playing. So social expectations and practical realities play a role in what is required of consent.

So, what is expected of sexual partners? One view is that in the throes of passion we cannot expect too much from sexual partners, apart from ensuring that there is some indication of consent. We might want our doctors to sit us down, calm us down and carefully explain all the risks and issues involved in a medical procedure, including their qualifications. We might not want the same from our sexual partners. On the other hand, surely we are entitled to some measure of respect and honesty from them.

Respect and honesty is what we expect from two people entering a contract. Try and use deceptions or threats to get someone to obtain property you will soon find the law coming down on you. Use deceptions and threats to obtain sex, and suddenly the issue is far from clear. True there is a balance between protecting the freedom to engage in sexual relations with someone and the right to be protected from unwanted sexual relations. But in striking that balance the right to say 'no' is far more important than the right to say 'yes';. Not being able to have sex when you want to may be frustrating. Having sex forced on you against your will is dehumanizing.