

## Answers to problem solving questions

### Outline Answer

#### **Breast fondling:** S3 SOA 2003 - Sexual Assault. Definition. (See 11.4)

AR: sexual touching without consent;

MR: the touching must be intentional and there must be a lack of reasonable belief in consent having regard to all the circumstances and steps taken by D to ascertain consent which must also be reasonable.

AR: There is touching under s78 which is obviously sexual under s79(a).

Without consent: D's threat to inform the Law Society of her past might constitute pressure and a denial of agreement by choice, freedom or capacity to make a choice under s74. (See 11.2.2). It is not, at that stage, a threat of violence under the *Olugboja* distinction between submission and consent but discuss whether the new s74 definition would admit a wider interpretation of lack of consent. This issue will also be relevant to the rape that subsequently occurs. Since V has already refused D's request and pushes him off there is clear evidence of lack of consent in any case.

MR: The defence of mistaken belief in consent will not succeed unless D raises evidence that he had reasonable grounds for his belief in consent which will be determined according to the circumstances and steps D took to ascertain consent. Reasonable belief is unlikely but any sensible discussion will be credited. (See 11.2.3).

#### **Rape:** S1 SOA 2003- Definition. (See 11.2.1)

AR: Intentional penile penetration of the vagina, anus or mouth without consent.

MR: lack of reasonable belief in consent having regard to all the circumstances and steps taken by D to ascertain consent which must also be reasonable.

AR: There has been intentional penile penetration. Was it consensual? Here we can see that this rape which is clearly non-consensual gives rise to, at most, presumptions regarding lack of consent under s75 and not to conclusive presumptions as would be the case with s76 fraudulently induced consent.

Prosecution arguments to prove lack of consent: (See 11.2.2)

- S74 agreement by choice has been negated by V's fear of D's violent reputation.
- The threat to reveal V's past by D is also a denial of s74 on the grounds of mere submission to sexual intercourse through pressure. Threats of detriment were not included in s75.
- S75(2)(b): the threat of violence by A against V's children gives rise to a potential presumption against consent under s75(2)(b) but this requires the complainant to fear immediate violence against another person not future violence. If s75 does not apply, then s74 is an alternative route to proving lack of consent. Did she agree by choice with freedom and capacity to make that choice?
- V was locked in the bedroom: the presumption under s75(2)(c) applies: unlawful detention;

- The knife: the presumption under s75(2)(a) applies – threat causing fear of immediate violence against the complainant;

An explanation of how s75 operates regarding the burden of proof is required. S74 would be an alternative route to proving lack of consent.

MR: The defendants might argue that they reasonably believed in consent under S1-4 for the following reasons: **(See 11.2.3)**

- The circumstances and steps taken to ascertain consent are relevant; V was a prostitute and she freely agreed to render services in return for payment; Therefore their belief in her consent was reasonable (*Morgan* having been ousted by the new requirement of reasonable belief and not merely honest belief).
- Consent was given in accordance with s74 and none of the s75 provisions apply.
- Even under s76, although payment was not made, her consent was not negated. The common law authorities of *Linekar* and *Clarence* state that consent will not be negated unless there is fraud as to nature/identity and s76(2)(a) provides for fraud as to nature or purpose. S76 (the conclusive presumptions of lack of consent) do not apply for although they did not pay V, they had deceived her as to neither nature, identity or purpose (*Jeeta*).

In view of the violent nature of the attack, however, it is unlikely they will be believed.

**Assault by penetration:** s3 SOA 2003 - Definition. **(See 11.3)**

AR: Sexual penetration of the vagina or anus,

With a part of the defendant's body other than his penis or any other object,  
Without consent.

There has clearly been penetration of V by D with his fist.

The violent nature of the attack as set out above under rape provides the evidence of lack of consent.

MR: Intentional penetration,

Lack of reasonable belief in consent.

Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps taken to ascertain consent.

The only possible arguments that D and A can put forward have been covered under Rape above. They are no more likely to be believed here than there.