

Think box 11.1

If sexual intercourse takes place after the following words are spoken to a reluctant 'victim', would it be merely submissive or consensual?

1. A police officer says to a young woman: 'If you do not have sex with me, I will arrest you.'
2. A boss says to a secretary, 'If you sleep with me, I will not make you redundant.'
3. A journalist says to a person, 'Sleep with me or I will publicize some embarrassing fact about your past.'
4. A husband says to his wife, 'Sleep with me or I will give you no housekeeping money for the family this week.'
5. A cab driver says to a passenger with low IQ, 'Have sex with me or I will drive you miles from where you want to go.'

Answer guidance

There is not necessarily a right answer and clearly much will depend on the evidence of the 'victim' but each example illustrates how an unpleasant or even an unlawful threat short of violence might still result in submissive sex.

Think box 11.2

Do you think s74 helps you to distinguish consent from submission in relation to the illustrations in Thinking point 11.1? Remember that consent under s74 is defined as agreement by choice, with freedom and capacity to make that choice. If you are unsure, you are not necessarily wrong.

Answer guidance

There is no single definition of choice and freedom. What might seem 'unfree' to one, could be the opposite to another. Whether s74 will make any real difference is questionable. The last example should be a clearer case of lack of capacity to consent however.

Think box 11.3

D and V were former partners. V was a transsexual woman who had wanted a loving relationship with D but he was only ever interested in sex. In a chance encounter in a bar, V suggested to D that they get back together. D said that he would think about it. D went to buy some drinks and slipped a drug into V's sherry to make sure V would not resist his advances. Later in V's flat, V allowed D to have sexual intercourse but she fell asleep halfway through. The next morning she could not remember what had happened but realized that D must have had sex with her. Does s75 apply?

Answer guidance

Remember that there are three routes to proving lack of consent under the Act:

- s74: lack of agreement by choice;
- s75: the evidential rebuttable presumptions;
- s76: the conclusive presumptions (below).

Answer points: This answer deals with AR only. MR is yet to be covered.

Rape: Definition in s1 SOA 2003.

Actus Reus:

Penile penetration – yes;

Of the vagina, anus or mouth – yes. Transsexuals are protected by s79(3);

Without consent:

The issue in this question is whether V had the capacity to consent given her intoxicated condition which was the result of D secretly administering a drug in her sherry.

There are three routes to proving lack of consent - s74, s75 and s76 below.

We can concentrate on the first two. The facts give rise to a presumption of lack of consent under s75(2)(d) and (f). The prosecution must prove:-

- Penile penetration
- The s75 circumstance/s
- That D was aware of the circumstances.

Section 75

1.S75(2)(f): Administration or causing to be taken a substance capable of causing stupefaction or overpowerment

It would appear that she was both stupefied and that her will was eventually overpowered because she fell asleep. It is thought that causing a victim to drink more heavily will not fall within the provision. But where stronger alcohol or drugs (a substance) have been administered the provision should apply. The drug clearly had the effect of overpowering V, as it was intended to do. Whether total unconsciousness is required throughout the whole of the act is unclear. Both s75(2)(f) and (d) below raise the issue of capacity.

Reference should be made to the Government's proposals regarding capacity and the cases of Malone, Dougal and Bree [2007].

2. S75(2)(d): V was asleep or otherwise unconscious

This provision re-states the common law cases of Turner and Larter & Castleton except that there is now a rebuttable presumption of lack of consent and not a conclusive one. V was only asleep for half of the act according to the facts. D might now rebut the presumption of lack of consent by offering evidence that she did consent or had given prior consent.

Section 74

The general consent provisions will apply where D is able to rebut the evidential presumption under s75.

Think box 11.4

Do you think there should be a conclusive presumption against consent under s76(2)(a) if the following fraudulent statements are made?

1. These words, spoken by a man to his partner:

- 'I love you.'
- 'I am not married.'
- 'If you have sex with me I promise to buy you a fur coat.'
- 'I am a famous TV producer and can get you a role in my next programme.'

2. These words, spoken by a man to a prostitute: 'I will pay you £100 for sex.'

3. To a woman with low IQ who allows full sexual intercourse after being told: 'This is the medical treatment for your problem.'

4. A man arranges for a friend to secretly watch him having sex with a woman from whom the arrangement has been concealed.

5. A victim has sexual intercourse with a man under the mistaken impression that he is wealthy when he is not and he, knowing of the mistake, does not correct it.

6. A man has sexual intercourse with a woman, concealing from her the fact that he is infected with HIV, Chlamydia or genital herpes (sexual diseases).

Answer guidance

1. These deceptions might induce consent but rape is a serious offence and consent ought only to be negated by serious deceptions. Neither nature or purpose are in question here.
2. There is no deception as to the sexual nature of the act as it has been interpreted in the traditional narrow way. The jury originally convicted Linekar on similar facts of rape but this was overturned on appeal. The Act was not intended to change the Linekar position. However, opinions might vary on whether the nature or purpose of the act was different if V's agreement was conditional on being paid.
3. A deception as to nature under s76(2)(a).
4. There is no fraud as to nature but following Tabassum and s76(2)(a) there is now a deception as to purpose.
5. This mistake by the victim, as opposed to a deception by the defendant, would not be covered by s76. There is no duty to correct mistakes under either criminal or civil law.
6. This is not rape for there is no deception as to either the nature of what was done (as currently understood) or purpose. Following Dica [2004], this would be an offence under s20 OAPA 1861 for the reckless infliction of GBH- see Chapter 10.

Think box 11.5

D introduces himself to V as HRH Prince Ralph, a distant cousin to the monarch. V agrees to have sex with him. He later pretends to be the brother of a famous footballer who plays for an English Premiership team. V2 agrees to have sex with him. Has D committed rape?

Answer guidance

Neither impersonation will fall within s76(2)(a) unless the victim actually knows either of these personalities.

Think box 11.6

D is charged with rape in each of the scenarios below. At each trial D asserts that he reasonably believed V had consented to sexual intercourse. Will the defence succeed?

[In each case, the test is whether a reasonable person would believe that V is consenting. The jury's decision as to whether D's belief was reasonable must be based on the circumstances and any steps taken by D to ascertain consent.]

1. D, a stranger, follows V after she gets off a bus late one night. She turns into an unlit alleyway where D pulls her into the bushes after putting his hand over her mouth. He then has sexual intercourse with her.

2. D is a former boyfriend of V. He has a very low IQ. She invites him to her flat one day to discuss their relationship. She makes him a meal and becomes flirtatious. When they later sit on the settee together D climbs on top of V. She protests but D still manages to have sexual intercourse with her.

3. D and V go out on a date. V wears revealing clothes. D knows that V has had several sexual partners. V invites D back to her flat for coffee where he forces her into the bedroom. Ignoring her protests and overcoming her physical resistance, he has sexual intercourse with her.

Would it make any difference if, in each case, V had signs of physical injury, such as bruising, as a result of her resistance?

Answer guidance

1. In the first example it is clear that D could not possibly have a reasonable belief in consent. But in the others, you may think at first glance that the issue is less clear.
2. Here we can see how this might cloud the real issues of consent (AR) and D's reasonable belief in consent (MR). Therefore, her dress, conduct and background may well be allowed to obscure these matters. Any attributes of D such as mental capacity will be relevant.
3. Absolutely not! Rape is non-consensual sexual intercourse. Evidence of force or resistance is definitely not required.

Think box 11.7

Decide whether the following fall within the definition of 'sexual' under s78 or 'touching' under s 79:

1. A man strips another man against his will in public.
2. A man touches the bottom of V's skirt. His motive is sexual.
3. A hospital radiographer carries out an unnecessary gynaecological scan upon a woman by inserting a probe into her vagina.

Answer guidance

1. This would be sexual assault under both s78(a) and s79 where it involved touching. The conduct is of an obviously sexual nature.
2. Touching of the fabric occurs but s3(1)(a) sexual assault and s79(8)(c) require touching of another person through anything. Query whether the victim has herself been touched. This did not present a problem in R v H. Is the touching sexual? It is not obviously so and therefore S78(b) would need to be referred to: would a reasonable person conclude that it was sexual by reference to the circumstances or purpose of the defendant?
3. Assault by penetration or sexual assault. The act is not obviously sexual under s78(a) and so the circumstances and purpose would need to be considered under s78(b). This is unlikely to be an offence unless there was a sexual purpose.