## Thinking point 9.1

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 junior employee, ‘If you sleep with me, I will not make you redundant.’

3. A journalist says to a person, ‘Sleep with me or I will publicise 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 an intellectual disability, ‘Have sex with me or I will drive you miles from where you want to go.’

* In some of these situations, you might think that consent is clearly absent.
* In others, there is not necessarily a clear right answer.
* However, these situations illustrate how consent might be absent even where there is no threat of violence.

## Thinking point 9.2

Do you think s74 helps you to distinguish consent from submission in relation to the illustrations in Thinking Point 9.1? 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.

* Key terms in s74, such as ‘choice’ and ‘freedom’, do not have a single definition.
* Scenario (5) suggests a lack of capacity to make the choice.

## Thinking point 9.3

D and V were former partners. 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 realised that D must have had sex with her. Does s75 apply?

* Issue:
  + whether s75 applies: were any of the circumstances in s75 present?
* Rule:
  + if one of the circumstances in s75 applies, it will be presumed that V did not consent and D did not have a reasonable belief in consent. (D may call further evidence to rebut the presumption.)
  + Circumstance (f): administration of a substance causing stupefaction or overpowerment;
  + Circumstance (d): V was asleep or otherwise unconscious.
* Application:
  + It appears V was stupefied and then overpowered by the substance
  + V was only asleep for half of the actus reus. D might put forward her prior consent to rebut the presumption of lack of consent.
* Conclusion:
* Your conclusion should summarise which of the presumptions might apply and whether D might rebut them.

## Thinking point 9.4

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 expensive jewellery.’

■ ‘I am a famous TV producer and can get you a role in my next programme.’

* Under the current law, none of these deceptions would negate consent since they do not apply to the nature or purpose of the act or involve D impersonating someone known personally to V.
* Do you agree that these fraudulent statements should be irrelevant to consent in law?
* Even if you disagree, you might think that they should not be the subject of conclusive presumptions.

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

* Before the SOA 2003, *Linekar* established that there was no deception as to the nature and purpose of the act.
* The SOA 2003 does not change this position.
* Do you agree that the deception as to payment should be irrelevant to consent?
* Even if you disagree, you might think that the presumption should not be conclusive.

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

* Here, there is deception as to the nature and purpose of the act so the conclusive presumption under s76(2)(a) will apply.

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

* There is no fraud as to the nature of the act but following *Tabassum* and s76(2)(a) there may be deception as to its purpose.

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.

* There is no obligation on D to correct V’s mistake.
* In any event, the court in *McNally* confirmed that a deception as to wealth would not affect consent.

6. A man has sexual intercourse with a woman, concealing from her the fact that he is infected with a sexually transmitted infection.

* There is no deception as to the nature or purpose of the act, so the conclusive presumption would not apply.
* However, there might be a non-sexual offence against the person (see Chapter 8).

## Thinking point 9.5

D introduces himself to V as HRH Prince Ralph, a distant cousin to the monarch. V1 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?

* Issue: has D committed rape?
* Rule:
  + AR of rape – penetration without consent. Both Vs agreed, so D will only have the AR if his deceptions vitiated V’s consent.
  + S74: consent = agreement by choice where V had freedom and capacity to make that choice
  + S75: rebuttable presumptions (none apply here)
  + S76: conclusive presumption that there was no consent if D deceived V as to nature & quality of act/impersonated someone known personally to V.
  + MR: intention to penetrate + lack of reasonable belief in consent. D will be presumed to lack reasonable belief if s76 applies.
* Application:
  + D’s impersonations of ‘HRH Prince Ralph’ and a footballer’s brother will not engage s76 as they were not personally known to Vs.
  + Is there consent under s74? Court is unlikely to find that D’s deception removed V’s freedom to agree by choice (*McNally*).
* Conclusion:
  + Unlikely that D is guilty of rape of either V as he lacked AR if Vs’ consent was legally valid.

## Thinking point 9.6

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 an intellectual disability. 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?

* Issue: did D have a reasonable belief in consent?
* Rule:
  + S1(1)(c): D commits an offence if did not reasonably believe V consented
  + S1(2): to be determined in all the circumstances including any steps D took to determine whether V consented.
* Application:
  + (1) Clear D could not have reasonable belief in consent.
  + (2) D’s disability will not be relevant: reasonable belief is an objective test. V’s dress, conduct and background may cloud the issue.
  + (3) Again, V’s dress, conduct and background may be used to cloud the issue. However, given her protests and resistance, it is hard to argue that D’s belief could be reasonable.
* Evidence of use of force or resistance is not required.

## Thinking point 9.7

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.

* Issue: was there ‘sexual’ ‘touching’ in each case?
* Rule:
  + S78: ‘sexual’ means either (a) obviously sexual or (b) sexual by virtue of circumstances or purpose
  + S79: ‘touching’ includes touching with any part of the body or anything else, through anything, and touching amounting to penetration.
* Application and conclusion:
  + For each case, was there touching of V under s79, which was either obviously sexual (s78(a)) or sexual by virtue of the circumstances or D’s purpose (s78(b))?
  + You may think that both elements were clearly present in (1) but that the answer is less obvious in (2) and (3).