

**Criminal Law Guidebook Second Edition – Chapter 6: Sexual Offences**

The following is a suggested solution to the problem on pages 148–149. It represents an answer of an above average standard. The ILAC approach to problem-solving as set out in the ‘How to Answer Questions’ section of the preliminary pages of the *Criminal Law Guidebook Second Edition* has been used in devising this solution. For this solution, the ‘grid answer format’ referred to on pp. xii–xiii has been utilised to demonstrate how it can assist in developing and refining problem-solving skills. This solution is restricted to an analysis of the sexual offences which could be charged.

**PRIMARY CHARGE:** [Sexual Assault \(NSW\)](#); [Rape \(Victoria and South Australia\)](#) [2 counts]

**Section 61I *Crimes Act 1900* (NSW) Section: 38 *Crimes Act 1958* (Vic) Section: 48 *Criminal Law Consolidation Act 1935* (SA)**

Elements of Offence	Material facts	Legal Issue	Relevant law – cases/judicial interpretation of statutory provision	Apply relevant law to material facts (analysis/reasoning)	Is element proved beyond reasonable doubt? (Y/N/unclear)
An act of sexual intercourse or sexual penetration	Kasey woke from her unconscious state naked from the waist down and felt pain in the area of her vagina. The semen on the swabs taken from Kasey’s vagina and anus was later matched to Rhett’s DNA profile.	Is there an act of sexual intercourse or sexual penetration?	<i>Crimes Act 1900</i> (NSW) s 61H; <i>Crimes Act 1958</i> (Vic) s 37D; <i>Criminal Law Consolidation Act 1935</i> (SA) s 5(1).	Although it is apparent that Kasey was not conscious at the time of the act, there is circumstantial and forensic evidence available to infer Rhett committed an act of sexual intercourse or sexual penetration upon Kasey by inserting his penis into her vagina and her anus. The circumstantial evidence is Kasey discovering that she was naked from the waist down and feeling pain in the area of her vagina when she woke from her unconscious state. Kasey’s last memory prior to waking was of the night before when Rhett was on the lounge with her at her townhouse and him moving his hand to touch her groin. The forensic evidence is the expert DNA profiling of the semen detected on the swabs taken from Kasey’s vagina and anus, which was found to match Rhett’s DNA from the buccal swab taken during his detention by investigating police. Together this evidence provides a strong inference of sexual intercourse or sexual penetration.	Yes

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Without the consent of the other person	When Rhett moved his hand to Kasey’s groin she yelled ‘Stop’ and jumped up, slipped on a floor mat and was knocked unconscious when she fell and struck her forehead on a wooden coffee table.	Did Kasey consent to the act of sexual intercourse or sexual penetration by Rhett?	<i>Crimes Act 1900</i> (NSW) s 61HA; <i>Crimes Act 1958</i> (Vic) s 34C; <i>Criminal Law Consolidation Act 1935</i> (SA) s 46.	It is apparent from Kasey saying ‘Stop’ and jumping up and away from Rhett when he moved his right hand to her groin together with her earlier statement that she wanted him to leave her townhouse that she did not consent to sexual intercourse with him. This is evidence of Kasey’s state of mind prior to the acts of intercourse. When Kasey slipped and hit her head on the solid wooden coffee table she became unconscious. Persons in a state of unconsciousness are not capable of giving consent in the form of free and voluntary agreement to acts of sexual intercourse. <sup>1</sup> It is clear from Kasey’s statement to the police that she did not consent to sexual intercourse with Rhett.	Yes
The accused knew the other person did not consent, or was reckless as to whether they consent-	When Rhett came to the door of Kasey’s townhouse she eventually relented, let go of the door and allowed him inside. While Kasey was seated and crying, Rhett put his arm	Did Rhett know that Kasey did not consent to sexual intercourse with him or was he reckless as to whether she consented or not? Did Rhett	<i>Crimes Act 1900</i> (NSW) s 61HA(3); <i>Crimes Act 1958</i> (Vic) ss 38(1)(c) and 37G; <i>Criminal Law Consolidation Act 1935</i> (SA) ss 47, 48(1); <i>R v Kitchener</i> (1993) 29 NSWLR 696;	Whether Rhett had knowledge of Kasey’s lack of consent involves a subjective test and it is sufficient in New South Wales and South Australia that Rhett was reckless as to whether Kasey consented or not. Recklessness can be established by the prosecution proving that Rhett was aware of the possibility Kasey did not consent but went ahead regardless, or Rhett not giving any thought at all to the question of whether she consented. <sup>3</sup> It is arguable that Rhett’s knowledge of non-consent can be inferred from the fact that Kasey yelled ‘Stop!’ and jumped up away from Rhett when his hand moved to her groin area. Kasey was unconscious shortly after that as a result of striking her forehead on the table when she fell, so it is a rational	Unclear as it would depend on the reliability of Kasey’s evidence. Arguably could be proved beyond reasonable doubt and there is a

<sup>1</sup> *Crimes Act 1900* (NSW) s 61HA(4)(b); *Crimes Act 1958* (Vic) s 34C(2)(d); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c).

<sup>3</sup> *R v Kitchener* (1993) 29 NSWLR 696; *Banditt v R* (2005) 223 ALR 633; *Criminal Law Consolidation Act 1935* (SA) ss 47(a) and c).

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<p>ed to sexual intercourse. The accused did not reasonably believe that the other person consented to the penetration (Victoria)</p>	<p>around her and began kissing and caressing her all over. Facts continue as above.<sup>2</sup></p>	<p>reasonably believe that Kasey consented to the sexual penetration? (Victoria)</p>	<p><i>Banditt v R</i> (2005) 223 ALR 633; <i>DPP v Morgan</i> [1976] AC 182; <i>R v Brown</i> (1975) 10 SASR 139; <i>R v Higgs</i> (2011) 111 SASR 42.</p>	<p>inference that Rhett decided he was going to have sexual intercourse with her knowing she didn't consent, or clearly being reckless in that he realised the possibility of her lack of consent but went ahead anyway, or simply did not turn his mind at all to whether Kasey consented in her unconscious state. Even though it appears Kasey had consented to the kissing and caressing all over by Rhett, she certainly had indicated the drawing of a line when Rhett's hand moved into her groin with a strong indication of lack of consent to sexual intercourse at that point in time.</p> <p>Rhett could possibly raise mistaken belief in consent. The mistake does not have to be reasonable as long as he honestly believed that Kasey consented to the sexual intercourse.<sup>4</sup> This common law position no longer applies in New South Wales where such a mistake now has to be based on reasonable grounds.<sup>5</sup> Also, in Victoria it is now a consideration of whether Rhett reasonably believes that Kasey is consenting to the act of sexual penetration and that depends on the particular circumstances, including any steps taken by Rhett to ascertain consent by Kasey.<sup>6</sup> There is a clear objective aspect in this question of a reasonable belief so that Rhett's belief will be judged from the standpoint of the reasonable person in his position. In South Australia, the principle from <i>DPP v Morgan</i> still applies, but is modified in that to be recklessly indifferent Rhett must realise the possibility that Kasey is not consenting</p>	<p>strong basis for charging Rhett with rape or sexual assault<sup>8</sup> (2 counts based on evidence of semen in both the vagina and anus of Kasey).</p>
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<sup>2</sup> See 'Material Facts' for the element 'Without the consent of the other person' above.

<sup>4</sup> *DPP v Morgan* [1976] AC 182; *R v Brown* (1975) 10 SASR 139.

<sup>5</sup> *Crimes Act 1900* (NSW) s 61HA(3)(c).

<sup>6</sup> *Crimes Act 1958* (Vic) s 37G(2); *Jury Directions Act 2015* (Vic) s 47.

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				<p>and then fail to take reasonable steps to ascertain whether she did in fact consent before proceeding with the act of sexual intercourse<sup>7</sup>.</p> <p>In the factual context, the question is - has Kasey's conduct from the initial comment that she wanted Rhett to leave, then allowing him to come inside, and letting him kiss and caress her, led Rhett to believe that Kasey consented to sexual intercourse? The major stumbling block for the defence from the common law perspective of an honest subjective belief and the statutory requirements of a reasonable belief in consent, reasonable grounds for the belief in consent, or to take reasonable steps to ascertain whether there is consent when aware of the possibility of a lack of consent, must be Kasey's yelling 'Stop!' when Rhett moved his hand to Kasey's groin. Rhett may have believed that Kasey would change her mind as she had moments before when she allowed him into the unit. The fact that Kasey then became unconscious and no longer had the capacity to consent when her last indication was a lack of consent would, however, provide the prosecution with strong evidence against a reasonable belief in consent, an honest belief in consent based on reasonable grounds, or Rhett having taken reasonable steps to ascertain whether Kasey did consent.</p>	
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<sup>8</sup> In South Australia an applicable aggravating factor is that Rhett committed the offence on Kasey knowing that she was his former domestic partner – *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g)(ii).

<sup>7</sup> *Criminal Law Consolidation Act 1935* (SA) s 47(b); *R v Higgs* (2011) 111 SASR 42.

Prepared by John Anderson to accompany the *Criminal Law Guidebook* Second Edition.

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**SECONDARY CHARGE:** [Indecent Assault \(New South Wales and South Australia\); Sexual Assault \(Victoria\)](#).

**Section:** 61L *Crimes Act 1900* (NSW) **Section:** 56 *Criminal Law Consolidation Act 1935* (SA) **Section:** 40 *Crimes Act 1958* (Vic).

Elements of Offence	Material facts	Legal Issue	Relevant law	Apply relevant law to material facts (analysis/reasoning)	Is element proved beyond reasonable doubt (Y/N/unclear)
Assault (NSW & SA); Touching (Vic).	Rhett was kissing and caressing Kasey all over and then moved his right hand to her groin.	Is it an assault? Is it a touching?	<i>Criminal Law Consolidation Act 1935</i> (SA) s 20(1)(b); <i>Crimes Act 1958</i> (Vic) s 37E; <i>R v Williams</i> (1990) 50 A Crim R 213. <sup>9</sup>	<p>The touching of Kasey by Rhett in her groin was without her consent, demonstrated by Kasey yelling ‘Stop!’ and jumping up from the lounge to get away from Rhett. This is an intentional unlawful physical contact by Rhett and would amount to an assault at common law.<sup>10</sup> It would also amount to an intentional touching by Rhett without the consent of Kasey in Victoria.<sup>11</sup></p> <p>If this incident occurred in South Australia an assault is committed through Rhett ‘intentionally making physical contact’ with Kasey without her consent, and knowing that she ‘might reasonably object’ in the circumstances<sup>12</sup>. Arguably this can be established on the known facts, as Rhett intentionally touched Kasey in the groin and she immediately expressed her lack of consent by yelling ‘Stop!’ and jumping up and away from Rhett. Rhett’s knowledge that Kasey might reasonably object may be established through the fact that they had recently separated following a two-year relationship and she had initially told Rhett that she wanted him to leave her townhouse. On the other hand, the defence could argue that Rhett did not have this knowledge as Kasey relented and</p>	Yes likely to be proved in NSW and Victoria. Unclear in South Australia – may not be sufficient evidence to amount to a statutory assault.

<sup>9</sup> See Chapter 5 for a detailed commentary on the common law of assault applicable in New South Wales.

<sup>10</sup> *R v Williams* (1990) 50 A Crim R 213.

<sup>11</sup> *Crimes Act 1958* (Vic) ss 37E(1), 40(1)(a) and (c).

<sup>12</sup> *Criminal Law Consolidation Act 1935* (SA) s 20(1)(b).

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				let him into the house and she seemed to allow the other kissing and caressing before he moved his hand to her groin. Therefore in this jurisdiction it is arguable that an assault by Rhett could not be proved beyond reasonable doubt even without considering whether the physical contact was indecent.	
At the time of or immediately before or after the assault committed an act of indecency (NSW & SA); The intentional and non-consensual touching must be sexual and the accused does not	As above	Is the assault accompanied by an act of indecency?  Is the touching sexual? Does Rhett reasonably believe that Kasey consents to the touching?	<i>Crimes Act 1958</i> (Vic) s 37E(3); <i>Fitzgerald v Kennard</i> (1995) 38 NSWLR 184; <i>R v Harkin</i> (1989) 38 A Crim R 296; <i>Tabet v The Queen</i> (2011) VSCA 124; <i>R v C, M</i> (2014) SASFC 116; <i>Eades v DPP (NSW)</i> (2010) 77 NSWLR 173.	What amounts to indecent assault at common law is subject to prevailing social attitudes and standards of decency <sup>13</sup> . Importantly, the conduct must have some sexual connotation, which can be sufficiently derived from the body area of the victim that is touched by the accused, or by the part of the accused’s body that is used to do the touching. <sup>14</sup> Equally in Victoria, touching may be sexual due to the area of the body that is touched or used in the touching, including the genital or anal region, or sexual gratification is sought or achieved by the person doing the touching. <sup>15</sup> In this case Rhett moved his right hand to Kasey’s groin after kissing and caressing her all over. This puts Rhett’s hand close to Kasey’s genitals and the close proximity may be sufficient to prove that Rhett committed an act of indecency at the same time as an assault or an intentional sexual touching.  This conduct must be without Kasey’s consent and Rhett must be aware of that lack of consent or be reckless as to the existence of consent in proceeding with the conduct. <sup>16</sup> In	No - there is not a particularly strong case for charging indecent assault in NSW or SA, or sexual assault in Victoria. <sup>19</sup>

<sup>13</sup> *R v Manson* (Unreported, NSWCCA, 17 February 1993); *Eades v Director of Public Prosecutions (NSW)* (2010) 77 NSWLR 173.

<sup>14</sup> *R v Harkin* (1989) 38 A Crim R 296; *Tabet v The Queen* [2011] VSCA 124; *R v C, M* [2014] SASFC 116.

<sup>15</sup> *Crimes Act 1958* (Vic) s 37E(3)(a) – (b).

<sup>16</sup> *R v Bonora* (1994) 35 NSWLR 74; *R v Kuckailis* [2001] NSWCCA 333; *Criminal Law Consolidation Act 1935* (SA) s 47.

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<p>reasonably believe that the other person consents to the touching (Vic)</p>				<p>South Australia there is the additional requirement that Rhett knew Kasey ‘might reasonably object’ as outlined above<sup>17</sup>. In Victoria, the prosecution must prove that Rhett did not reasonably believe that Kasey consented to the touching.<sup>18</sup> In this particular situation it is questionable whether in the context of Kasey seemingly allowing Rhett to put his arm around her shoulder and then kiss and caress her, that Rhett moving his hand to Kasey’s groin would amount to an indecent assault or sexual touching. Rhett may be viewed as taking advantage of Kasey when she was distressed, but it would be difficult to prove beyond reasonable doubt that Rhett was aware of or reckless as to Kasey’s lack of consent or didn’t reasonably believe Kasey consented to the touching when all the circumstances are considered particularly the fact that Rhett’s hand did not actually touch Kasey’s genitals. In South Australia this difficulty would extend to proof of Rhett’s knowledge that Kasey might reasonably object to the contact.</p>	
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<sup>19</sup> This earlier conduct may ultimately be subsumed as part of the factual matrix of the more serious criminal sexual conduct by Rhett analysed in the primary charge of sexual assault or rape.

<sup>17</sup> See above n 12.

<sup>18</sup> *Crimes Act 1958* (Vic) s 40(1)(d).