CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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CHAPTER 5

ACTIVE LEARNING QUESTIONS

1. What are the elements of rape and sexual penetration?

Queensland and Western Australia use different terminology to describe sexual intercourse without consent. Queensland uses the term 'rape' and defines the offence of rape in s 349 of the *Criminal Code 1899* (Qld). Western Australia uses the term sexual penetration without consent and the offence is found in s 325 of the *Criminal Code 1913* (WA).

Queensland

The act or physical element of the offence of rape is the penetration. As can be seen from the definition of sexual penetration in s 6 and s 349(2) of the Criminal Code (Qld), penetration has a broad meaning. The essence of the offence of rape is lack of consent. However, the legislation is silent on a mental element, such as whether the person was reckless as to whether the other person was consenting. This then leaves the circumstances under which the penetration occurred, in order to establish lack of consent.

Western Australia

Western Australia uses the term 'sexual penetration without consent' as opposed to rape. The offence is defined in s 325 of the Criminal Code (WA) as: 'A person who sexually penetrates another person without the consent of that person is guilty of a crime.' Thus, as in Queensland, the act is the sexual penetration and there is no mental element prescribed in the offence. Whether the other person was consenting is determined by whether consent was freely and voluntarily given.

2. What factors or circumstances vitiate consent?

Both the Griffith Codes define consent in similar terms as 'freely and voluntarily given' (s 348(1) in Qld and s 319(2) WA). The question then becomes what factors or circumstances vitiate consent. Section 348(2) of the Criminal Code (Qld) sets out a non-exhaustive list of factors whereby consent is not freely or voluntarily given.

> 348 Meaning of consent
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> (1) In this chapter, consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
> (a) by force; or
> (b) by threat or intimidation; or
> (c) by fear of bodily harm; or
> (d) by exercise of authority; or
> (e) by false and fraudulent representations about the nature or purpose of the act; or
> (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

In Western Australia, s 319(2)(a) sets out the factors which vitiate consent in similar terms to s 348(2) above, although there is a broad reference to 'any fraudulent means': see *Michael v State of Western Australia* [2008] WASCA 66. However, s 319(2)(b) states that 'where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act'. This provision statutorily adopts the position taken by the court in *Ibbs v The Queen* [1988] WAR 91.

The victim's capacity to consent may also be relevant to whether circumstances vitiate consent. Here capacity refers to an adult whose capacity to consent is affected by alcohol, or who is not fully conscious when aroused from sleep, or is unconscious. Similarly, there are persons who are incapable of consenting by virtue of age or mental impairment.

3. What is meant by the 'continuing act' doctrine?

In the event that initially consent is given by the complainant to sexual penetration but is later withdrawn, then under the 'continuing act' doctrine, the offence of rape or sexual penetration without consent is committed. In Western Australia this is specifically covered in s 319(1)(e): '(e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).' In Queensland, see *R v Mayberry* [1973] Qd R 211 at 229 per Hanger J. Another relevant case to the same effect is *Kaitamaki v The Queen* [1985] 1 AC 147, where the Privy Council held that the *actus reus* of rape was a continuing act, and that when the appellant realised consent was withdrawn and he therefore formed the *mens rea*, the necessary coincidence for criminal responsibility crystallised.

4. What are the elements of sexual assault and indecent assault?

The elements of sexual assault and indecent assault are the same in both Codes, notwithstanding the difference in heading, excepting procuring under s 352(1)(b) (Qld), where no unlawful assault is required: (1) an assault, which is defined in s 245 (Qld) and s 222 (WA) and includes without the consent of the other person; (2) indecent, which is not defined in the Codes and relies on the common law: see *Drago v The Queen* (1992) 8 WAR 488; and (3) unlawful, meaning without authorisation, justification or excuse: see s 246 (Qld) and s 223 (WA).

The mental element is a mixture of subjective and objective factors. The assault requires the fault element of intention, whether the assault is constituted by the direct application of force or a bodily act/gesture threatening or attempting to apply force. By contrast, indecency is defined objectively against the standard of offensive to common propriety, judged by standards which ordinary decent-minded people accept: *Drago v The Queen* (1992) 8 WAR 488. The principal excuse under the rubric of 'unlawful' is 24 Mistake of fact.

It should be noted that the physical act itself may not be indecent, such as putting an arm around the person's shoulder, but if accompanied by a suggestion that the person might like to engage in sexual activity, then in combination the act and the words constitute an indecent assault: *R v Leeson* (1968) 52 Cr App Rep 185.

5. How has the word 'reasonable' been interpreted in s 24 Mistake of fact, the principal defence to sexual offence charges?

The principal defence to a charge of unlawful intercourse without consent is under s 24 Mistake of fact, where the defendant admits intercourse took place but contends that he believed the complainant was consenting.

The key word in s 24 is the word 'reasonable'. Does this mean an objective test of what the reasonable person would have thought under the circumstances of the act of sexual intercourse, or a more subjective test of whether there were reasonable grounds for the defendant's mistaken belief? A subjective approach to the question of reasonable but mistaken belief was taken in *R v Mrzljak* [2004] QCA 420. A similar subjective approach was taken in *Aubertin v State of Western Australia* [2006] WASCA 229 at [43] per McLure JA.

> [43] For there to be an operative mistake under s 24, an accused must have acted under an actual belief in the existence of a state of things (subjective element) and the accused's belief must be reasonable (mixed element). The focus in this case is on the mixed element. The mixed element is not wholly objective; reasonableness is not to be adjudged by the standard of the hypothetical ordinary or reasonable person. The mixed element is a combination of

> subjective and objective aspects. The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself. However, the ambit of what constitutes the personal attributes and circumstances of a particular accused has not to my knowledge been identified or exhaustively enumerated. It covers matters over which an accused has no control such as age (maturity), gender, ethnicity, as well as physical, intellectual and other disabilities. This list does not purport to be exhaustive.

The identification of a mixed element in relation to the accused's belief, referred to by McLure JA in Aubertin above, was reaffirmed in *R v Rope* [2010] QCA 194 by Chesterman JA at [47]: 'Before it exonerates an accused from criminal liability, s 24 requires two things (1) a belief in a state of fact actually held by the accused and (2) the belief is reasonable. It does not require … a reasonable person in the circumstances of the accused to make an honest mistake; or a belief that a reasonable man would entertain.' See also *Butler v State of Western Australia* [2013] WASCA 242 at 159 per Hall J: 'The question was not whether a reasonable person could have held a mistaken belief as to consent but whether the appellant could have honestly and reasonably held such a belief.'

PROBLEM QUESTION 1

ASSUME THE FOLLOWING FACTS

Max and Thelma had been drinking together in a hotel and returned to Thelma's flat just before midnight. They started to kiss and cuddle on the sofa, and then Max began to undress Thelma who did not object. Max sexually penetrated Thelma who groaned but otherwise said nothing. Shortly before ejaculation Max thought Thelma might just have fallen asleep, but he was not sure and continued until climax.

Discuss any criminal responsibility that might attach to Max.

THE ISSUES

This question raises three issues: (1) whether Thelma's capacity to consent has been affected by alcohol and/or has fallen asleep and is therefore unconscious; (2) the continuing act doctrine; and (3) the defence of mistake of fact under s 24 of the Griffith Codes.

THE RELEVANT LAW

Self-evidently, a person who is asleep is not capable of consenting: *R v Love* (1986) 24 A Crim R 449, where the only evidence that the accused had penetrated the prosecutrix came from the accused's

admission. In *R v Getachew* [2012] HCA 10, the High Court considered s 36(d) of the *Crimes Act 1958* (Vic) which states that a person does not freely agree where 'the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing'. The High Court held at [34]:

> In the present case the complainant did not consent to the sexual act if, as she asserted, she was asleep when penetrated. Because there was no evidence led at trial and no assertion made that the accused believed that the complainant was consenting, demonstration beyond reasonable doubt (1) that the complainant was asleep at the time of penetration and (2) that the accused was aware that the complainant was then asleep or might then have been asleep would, without more, demonstrate in this case that the accused was aware that the complainant was not or might not be consenting to the sexual act.

Intoxication can be the trigger for the victim falling asleep as in *R v Millar* [1998] QCA 276, where the complainant and the accused had jointly consumed a bottle of bourbon. The complainant awoke to find the accused digitally penetrating her. In *R v Francis* [1993] 2 Qd R 300, it was held that a man who had carnal knowledge of a woman with her consent did not commit rape notwithstanding that her consent was induced by her excessive consumption of alcohol, but a man who had carnal knowledge of a woman who by reason of sleep or a drunken stupor was incapable of deciding whether to consent or not, committed rape. In *Saibu v The Queen* (1993) 10 WAR 279, 292 per Franklyn J, it was held that consent requires an effective agreement as to what it is that is being consented to. Once unconsciousness intervenes there arises an inability to agree or consent. Thus consent to penetration cannot normally be deemed to continue into unconsciousness.

In the event that initially consent is given by the complainant to sexual penetration but is later withdrawn, then under the 'continuing act' doctrine, the offence of rape or sexual penetration without consent is committed. In Western Australia this is specifically covered in s 319(e). In Queensland, see *R v Mayberry* [1973] Qd R 211 at 229 per Hanger J. Another relevant case to the same effect is *Kaitamaki v The Queen* [1985] 1 AC 147, where the Privy Council held that the *actus reus* of rape was a continuing act, and that when the appellant realised consent was withdrawn and he therefore formed the *mens rea*, the necessary coincidence for criminal responsibility crystallised.

PUTTING THE FACTS INTO THE LAW

The facts in the question do not specify when Thelma fell asleep and lost consciousness, nor how much alcohol she and Max had each consumed before they returned to Thelma's flat. This scenario can be distinguished from *R v Pryor* [2001] QCA 341 where an intruder had sexual intercourse with a sleeping woman. Here, there is no question of impersonation. Thelma knew it was Max who was undressing her. The critical issue is one of timing: exactly when did Thelma fall asleep and when did Max become aware of the possibility that Thelma was asleep.

If Thelma's statement to the police is to the effect that she had no recollection of events after kissing Max on the couch until she woke up to find Max inside her, then as in *R v Getachew* [2012] HCA 10

at [34], the Crown must prove beyond reasonable doubt (1) that Thelma was asleep at the time of penetration, and (2) that Max was aware that the Thelma was then asleep or might then have been asleep.

However, both Thelma and Max had been drinking. While alcohol can induce sleep it can also confuse memory. On the authority of *R v Francis* [1993] 2 Qd R 300, if Thelma's initial consent was induced by her excessive consumption of alcohol, then Max did not commit rape at the time he commenced sexual penetration provided Thelma was still capable of deciding whether to consent or not. We are told Thelma 'groaned but otherwise said nothing' which leaves open the possibility of implied consent under the circumstances. It is only when Max approaches ejaculation that he thinks Thelma 'might just have fallen asleep', but decides to continue until climax. At this point in time, Max's criminal responsibility crystallises on his own admission as in *R v Love* (1986) 24 A Crim R 449.

Max's criminal responsibility can be approached in two ways: (1) Thelma was asleep and therefore incapable of effectively agreeing to sexual intercourse: *Saibu v The Queen* (1993) 10 WAR 279, 292 per Franklyn J; (2) Under the continuing act doctrine, Thelma was impliedly withdrawing consent when she fell asleep, and Max came within the doctrine when he decided to continue until climax.

Does Max have a defence? The Griffith Codes are silent on a mental element, such as whether the person was reckless as to whether the other person was consenting. This then leaves the circumstances under which the penetration occurred, in order to establish lack of consent. There is no equivalent of s 192(4A) of the Criminal Code 1983 (NT) which states that the fault element of recklessness includes not giving any thought as to whether or not the other person is consenting. This narrows the scope of the only defence to lack of consent, namely, mistake of fact, and effectively places the onus on the defendant to show that he took steps to positively establish consent.

The mental element of sexual intercourse without consent in the Griffith Codes falls to be determined not in the offence itself, but instead in the defence of mistake of fact and whether, against a mixed objective and subjective standard of reasonableness, the defendant's mistake was so grossly negligent as to bar the defence.

The principal defence to a charge of unlawful intercourse without consent is under s 24 Mistake of fact, where the defendant admits intercourse took place but contends that he believed the complainant was consenting. The key word in s 24 is the word 'reasonable'. The courts have adopted the subjective test of whether there were reasonable grounds for the defendant's mistaken belief.

In *R v Rope* [2010] QCA 194 Chesterman JA held at [47]: 'Before it exonerates an accused from criminal liability, s 24 requires two things (1) a belief in a state of fact actually held by the accused and (2) the belief is reasonable. It does not require … a reasonable person in the circumstances of the accused to make an honest mistake; or a belief that a reasonable man would entertain.' See also

Butler v State of Western Australia [2013] WASCA 242 at 159 per Hall J: 'The question was not whether a reasonable person could have held a mistaken belief as to consent but whether the appellant could have honestly and reasonably held such a belief.'

Applying the above test, the question is whether Max could have honestly and reasonably held a mistaken belief that Thelma was still consenting because she had not yet fallen asleep. Once Max has satisfied the evidential burden by convincing the court that there is a reasonable possibility the defence of mistake of fact exists, then the onus of proof switches to the Crown to negative that defence beyond reasonable doubt.

CONCLUSION

On the facts, Max's criminal responsibility crystallises on his own admission when he thinks Thelma 'might just have fallen asleep', but decides to continue until climax. However, Max can argue under s 24 that he honestly and reasonably held a mistaken belief that Thelma was still consenting because she had not yet fallen asleep. If the Crown cannot negative this defence beyond reasonable doubt, then Max will be acquitted of rape (Qld) or sexual penetration without consent (WA).

PROBLEM QUESTION 2

ASSUME THE FOLLOWING FACTS

Tony was the star of his local baseball team. One day, after a game, Tony was walking home idly swinging his baseball bat when he saw Jasmine, the sister of his friend, James, up ahead. James had told Tony that Jasmine thought he was cute. Tony caught up with Jasmine and they fell into conversation. Tony suggested that they detour into the nearby park as it was a lovely afternoon. Tony was encouraged when Jasmine happily agreed, and they ended up sitting side by side on a park bench.

Tony was nervously fiddling with his baseball bat when he told Jasmine he really liked her. Jasmine replied that she greatly admired his sporting ability. Thereupon, Tony dropped the bat, grabbed Jasmine and pulled her towards him. Then, he kissed Jasmine while putting his hand under her T shirt and fondling her right breast. Jasmine screamed and told Tony to stop, which he did immediately. As Jasmine ran off, Tony yelled after her, 'I thought you liked me, too!'

Discuss Tony's criminal responsibility.

THE ISSUES

This question raises two issues: (1) the elements of sexual assault (Qld) under s 352 of the *Criminal Code 1899* (Qld) and indecent assault (WA) under s 323 of the *Criminal Code 1913* (WA); and (2) the defence of mistake of fact under s 24 of the Griffith Codes.

For present purposes, Tony's baseball bat is not considered to constitute a circumstance of aggravation, and therefore s 324 Aggravated indecent assault of the *Criminal Code 1913* (WA) is not applicable.

THE RELEVANT LAW

In Queensland, the offence of sexual assault comprises any non-consensual contact or behaviour excepting rape. The distinguishing feature between an assault and a sexual assault relates the areas of the body involved, such as the genitals, the anus and the breasts.

> **352 Sexual assaults**
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> (1) Any person who— (a) unlawfully and indecently assaults another person; or (b) procures another person, without the person's consent— (i) to commit an act of gross indecency; or (ii) to witness an act of gross indecency by the person or any other person; is guilty of a crime.

It can be seen that sexual assault covers both assault and procuring another person to commit or witness an act of gross indecency.

In Western Australia, the offence of indecent assault is covered in s 323 in identical language to s 352(1)(a) (Qld) above, save the use of indecent rather than sexual in the heading: 'A person who unlawfully and indecently assaults another person is guilty of a crime and liable to imprisonment for 5 years.'

The elements of sexual assault and indecent assault are the same in both Codes, notwithstanding the difference in heading, excepting procuring under s 352(1)(b) (Qld) above, where no unlawful assault is required: (1) an assault, which is defined in s 245 (Qld) and s 222 (WA) and includes without the consent of the other person; (2) indecent, which is not defined in the Codes and relies on the common law: see *Drago v The Queen* (1992) 8 WAR 488 below; and (3) unlawful, meaning without authorisation, justification or excuse: see s 246 (Qld) and s 223 (WA).

The mental element is a mixture of subjective and objective factors. The assault requires the fault element of intention, whether the assault is constituted by the direct application of force or a bodily act/gesture threatening or attempting to apply force. By contrast, indecency is defined objectively against the standard of offensive to common propriety, judged by standards which ordinary decent-minded people accept: *Drago v The Queen* (1992) 8 WAR 488. The principal excuse under the rubric of 'unlawful' is 24 Mistake of fact, which comprises a mixed element of a combination of subjective and objective aspects.

It should be noted that the physical act itself may not be indecent, such as putting an arm around the person's shoulder, but if accompanied by a suggestion that the person might like to engage in sexual activity, then in combination the act and the words constitute an indecent assault: *R v Leeson* (1968) 52 Cr App Rep 185.

As to whether in a case of indecency there is need to direct the jury on motive, in *R v Jones* [2011] QCA 19 at [32] White JA proposed: 'The quality of "indecency" is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision.'

However, this proposition was qualified in *R v McCallum* [2013] QCA 254 at [37] by Gotterson JA: 'Jones is not to be taken to propound that a direction requiring the jury to consider motive in the context of indecency must be given on every occasion where indecency is an element of the offence. White JA was careful to identify the circumstances which would require it as those where there is evidence capable of casting doubt upon the sexual quality of the alleged assault.' In Jones, a paramedic had brushed the complainant's left breast with his wrist during an ECG procedure, whereas in McCallum the appellant had touched the vagina of the complainant, who was under 16 years of age, during a number of massages.

PUTTING THE FACTS INTO THE LAW

On the facts, Tony grabbed Jasmine and pulled her towards him. Then, he kissed Jasmine while putting his hand under her T shirt and fondling her right breast. Thus, an assault has occurred if it was committed without Jasmine's consent. The only indication that Jasmine might be willing to at least be kissed was (1) James had told Tony that Jasmine thought he was cute, and (2) Jasmine told Tony that she greatly admired his sporting ability. If Tony had limited his advances towards Jasmine to a kiss, then objectively this may not have constituted either sexual or indecent assault judged by standards which ordinary decent-minded people accept (*Drago v The Queen* (1992) 8 WAR 488), although Tony did grab Jasmine and pulled her towards him giving her little opportunity to indicate his intended kiss was unwelcome.

However, the issue is put beyond doubt given Tony put his hand under Jasmine's T shirt and fondled her right breast. Tony's assault on this area of Jasmine's body transforms the assault into one of sexual assault. Ordinary decent-minded people would readily accept that Tony's action was offensive to common propriety.

The principal defence to a charge of sexual assault or indecent assault is under s 24 Mistake of fact, where the defendant admits the assault took place but contends that he believed the complainant was consenting. The key word in s 24 is the word 'reasonable'. The courts have adopted the subjective test of whether there were reasonable grounds for the defendant's mistaken belief.

In *R v Rope* [2010] QCA 194 Chesterman JA held at [47]: 'Before it exonerates an accused from criminal liability, s 24 requires two things (1) a belief in a state of fact actually held by the accused and (2) the belief is reasonable. It does not require … a reasonable person in the circumstances of the accused to make an honest mistake; or a belief that a reasonable man would entertain.' See also *Butler v State of Western Australia* [2013] WASCA 242 at 159 per Hall J: 'The question was not whether a reasonable person could have held a mistaken belief as to consent but whether the appellant could have honestly and reasonably held such a belief.'

Applying the above test, the question is whether Tony could have honestly and reasonably held a mistaken belief that Jasmine was impliedly consenting to being kissed and fondled because of her admiration of his sporting ability and his knowledge that she thought he was cute. Once Tony has satisfied the evidential burden by convincing the court that there is a reasonable possibility the defence of mistake of fact exists, then the onus of proof switches to the Crown to negative that defence beyond reasonable doubt.

CONCLUSION

On the facts it is clear that Tony has committed either a sexual assault (Qld) or an indecent assault (WA). The only defence available to Tony is under s 24 Mistake of fact. It is doubtful whether Tony could have honestly and reasonably held such a mistaken belief that Jasmine was consenting to being kissed and fondled because of her admiration of his sporting ability and his knowledge that she thought he was cute. Tony is likely facing conviction under s 352 (Qld) or s 323 (WA) for which the maximum penalty is 10 years imprisonment (Qld) or 5 years imprisonment (WA).