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# Sexual Assault

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## Political and Social Forces

Brown's case- sadomasochism- argued there was consent, no permanent injuries, satisfying of sadomasochistic libido does not come within the category of good reason. Accepted sexual practices in UK in 1992- what law permits and doesn't permit. Sadomasochistic homosexual activity cannot be regarded as conducive to enhancement of family life.

Common law offence- the carnal knowledge of a woman forcibly and against her will- sir matthew hale 18<sup>th</sup> century- abolished in 1981

2007 Reforms:

- Substantial amendments to NSW sexual assault law commenced on 1 Jan 2008 as a result of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*.
  - flowed from Criminal Justice Sexual Offences Task Force Report (April 2006) with 70 recommendations

## Current Law

S61 Sexual Assault

Any person who has sexual intercourse with another person **without the consent** of the other person and **who knows that the other person does not consent** to the sexual intercourse is liable to imprisonment for 14 years.

## ACTUS REUS

2 AR: sexual intercourse with another person and without consent to sexual intercourse.

S 61H **Definition of "sexual intercourse" and other terms**

(1) For the purposes of this Division, *sexual intercourse* means:

(a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:

(i) any part of the body of another person, or

(ii) any object manipulated by another person,

except where the penetration is carried out for proper medical purposes, or

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or

(c) cunnilingus, or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

\* Cunnilingus need not involve penetration and refers to oral stimulation of the female genitals with the mouth or tongue: *BA v R* [2015] NSWCCA 189, [9].

## Sexual Intercourse with minors

sexual intercourse can be committed by any person upon any person s 61H

### Offenders who are minors

Section 61S *Crimes Act 1900* (NSW)

(1) For the purposes of any offence, a person is not, by reason only of age, to be presumed incapable of having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.

(2) Subsection (1) does not affect the operation of any law relating to the age at which a child can be convicted of an offence.

### Age or criminal responsibility

Section 5 *Children (Criminal Proceedings) Act 1987* (NSW)

It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.

## Mistaken Belief

S 61HA (5) A person who consents to sexual intercourse with another person:

(a) under a mistaken belief as to the **identity of the other person**, or

(b) under a mistaken belief that the other person is **married to the person**, papadimitriopolous

(c) under a mistaken belief that the sexual intercourse is for **health or hygienic purposes** (or under any other mistaken belief about the nature of the act induced by fraudulent means),

**does not consent to the sexual intercourse.**

**MENS REA:** For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.

- must be impersonation of another person not just lying about self to be more alluring.

## Negation of Consent

→ Fraudulent conduct inducing her consent (an inducing cause) Legislature deemed it does negate consent as a result of this case

### Consent Automatically negated

s61HA (4) a person does not consent to sexual intercourse if

a) person does not have capacity to consent to sexual intercourse including age of cognitive incapacity. (16 years old)

b) if person does not have opportunity to consent to sexual intercourse because person is unconscious or asleep.

c) if person consents to sexual intercourse because of threats of force or terror- terror is instilled in person,

d) if the person consents to sexual intercourse because the person is unlawfully detained.

And S61HA (5)- Mistaken belief: Identity; marriage; for health or hygienic purposes; nature of the act.

### Consent may be negated

R v Madden, R v Chant- 2 men raping one woman who was intoxicated

“Nevertheless that does not mean that a person in a state of euphoria or well being or intoxication induced by drugs or alcohol cannot consent to an act or acts of intercourse. They obviously can. It may depend on the question as to whether they were so intoxicated that they could not consciously and voluntarily give such a consent. That is a matter for you on the evidence.” Wood CJ

**•S 61HA(6) The grounds on which it may be established that a person does not consent to sexual intercourse include:**

(a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or

(b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or

(c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

**S61HA(2)- did they freely and voluntarily agree? ANSWER**

s61HA (8) Grounds listed in act are not exhaustive

- This section does not limit the grounds on which it may be established that a person does not consent to sexual intercourse-

## MENS REA

Did the complainant consent?

**R v Olugboja: consent is a question of fact for jury** : The jury should be directed to concentrate on **the state of mind of the victim immediately before** the act of sexual intercourse, having **regard to all the relevant circumstances**; and in particular, the **events leading up to the act** and her [or his] reaction to them showing their impact on her [or his] mind.'

( can be shown through words or actions)

**R v Holeman**: Consent may be given reluctantly and after persuasion but at common law that was still consent

S 61 HA (7) Crimes Act 1900: law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse ...

Definition of Consent: **S 61HA (2) Meaning of consent**: A person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.

Bench Book: The accused does not have to prove that [*the complainant*] consented; it is for the Crown to prove beyond reasonable doubt that [*she/he*] did not.

## Knowledge about consent s61HA (3)

**(a) the person knows that the other person does not consent to the sexual intercourse, or**

*This means actual knowledge. Need to establish BRD that the conclusion is available to be drawn from the evidence that the accused knew that the complainant did not consent.*

**(b) the person is reckless as to whether the other person consents to the sexual intercourse, or**

- *WE look to common-law- there are 2 forms of recklessness including advertent recklessness (hemley) and reckless inadvertance (tolmie).*
- *Advertant recklessness- where D had foresight of the possibility that there was no consent but went ahead with the sexual intercourse regardless of whether the complainant was consenting or not. Hemley- farmhouse*

- *Reckless Inadvertence: Where the accused has not considered the question of consent and a risk that the complainant was not consenting to sexual intercourse would have been obvious to someone with the accused's mental capacity if they had turned their mind to it:*
- *Tolmie: Justifications for culpable inadvertence include:*
- *need to punish an accused who is "so bent on gratification and indifferent to the rights of the victim as to ignore completely the requirement of consent"*
- *the invasion of human dignity, privacy, body and personality must be punished*
- *→ 'recklessness' arises when there is both conscious advertence **and** culpable inadvertence.*

**(c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.**

*must take in all circumstances of the case to ascertain whether or not there is consent. Removes morgan defence as cannot argue honest belief regardless of how unreasonable it might be.*

## Intoxication

s428D applies since Sexual assault s 61I is a crime of basic intent.

S61HA (3) (e) confirms exclusion of self induced intoxication:

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

(d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but

(e) not including any self-induced intoxication of the person.

## s61J Aggravated Sexual Assault provisions

- any person who has sexual intercourse with another person without consent of other person **AND in circumstance of aggravation** and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 20 years.
- CIRCUMSTANCES of aggravation **eg.in company**

s61JA- gang rape offence- a person must be in company of another person and

who inflicts bodily harm on victim or persons nearby, by means of instrument or deprives their liberty.

### **in company of another person or persons-**

this is a common law concept- offences which take place in company attract a higher penalty- the criminal liability of the other person is a different legal concept  
COMPLICITY.

- aggravating factor- in company of another person aggravates offence.
- R v Button, R v Griffen. aggravated sexual assault c) in company. defence argued that conduct took place away from group and did not amount to "in company". They were geographically separated from other people. Whether or not sexual assault perpetrated 50m from other people could be said to be done "in company".
- **R v Crozier- mere presence is not enough- other person has to assist in offence at least in encouraging.**
- **R v Button- Justice Kirby- Test of "in company"**
- 1. definition requires offender to be in company of another person or persons
- 2. offender and persons must share a common purpose eg. to sexually assault/rob
- 3. cases assume that each participant is physically present
- 4. participation in the common purpose without being physically present is not enough
- 5. perspective is relevant but not determinative

The test is coercive effect of group. there must be proximity as would enable the inference that the coercive effect of the group operated, either to embolden or reassure offender in committing crime.

- concept does not merely relate to physical distance but also purposive element and connection/communication. they found in griffin and button that despite physical distance, there was physical presence.