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Sexual Assault

Introduction

- Originally called 'rape' and was merely the penile penetration of a woman by a man who;
 - o Knew the woman wasn't consenting, or
 - o Realised she might not be
- Common law offence of rape has now been abolished and replaced by statutory categories of sexual assault
 - o In NSW the statutory offence is 'sexual assault' as defined in [section 61 I of the Crimes Act 1900 \(NSW\)](#)
 - o Is still necessary to look at the common law offence as some cases are still relevant
- The key legislative provisions are now found in Part 3, Division 100;
 - o [Section 61H](#): provides the definition of sexual intercourse and other terms
 - o [Section 61HA](#): consent in relation to sexual assault offence
 - Section 61HA(2): definition of consent
 - o [Section 61I](#): sexual assault
 - o [Section 61J](#): aggravated sexual assault
 - o [Section 61JA](#): aggravated sexual assault in company
- The legislation is centred on 3 sexual offences:
 - o Sexual assault – [s 61I](#)
 - o Indecent assault – [s 61L](#)
 - o Act of indecency – [s 61N](#)

Section 61 I – 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."

Elements

Actus Reus	Mens Rea
1. Sexual intercourse	1. Knowing that V does not consent to sexual intercourse, where <i>knowledge</i> is deemed to include: <ul style="list-style-type: none">(a) Being aware that V does not consent s 61HA(3)(a);(b) Being reckless as to whether or not V consents s 61HA(3)(b); or(c) Having no reasonable grounds for believing that V consents to sexual intercourse s 61HA(3)(c).
2. Without consent	
<i>Actus reus and mens rea at the same time</i>	

No need to address causation.

[Section 61I](#) makes no reference to recklessness or reasonable grounds. [Section 61HA\(3\)](#) refers to these as factors amounting to knowledge of non-consent.

Actus Reus

1: Sexual Intercourse

Defined in [section 61H\(1\)](#) – not in common law

- Sexual connection occasioned by the penetration to any extent of the genitalia (including surgically constructed vagina) of a female person or the anus of any person by;
 - o Any part of the body of another person or,
 - o Any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or
- Sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
- Cunnilingus, or
- The continuation of sexual intercourse as defined in paragraph (a), (b), or (c)

Papadimitropoulos (1957) found only the slightest penetration is necessary.

2: Without consent

- The Plaintiff must prove that the act of sexual intercourse took place without the Victim's consent
 - o [Section 61I](#)
- A person consents to sexual intercourse if they **freely and voluntarily agree to sexual intercourse**
 - o [Section 61HA\(2\)](#)
- Provides that the failure to offer actual physical resistance is **not** to be regarded as consent

Consent **will** be negated/vitiated if:

- The victim lacks capacity to sexual intercourse
 - o [Section 61HS\(4\)\(a\)](#) address children
 - Provides that children under 10 are presumed incapable of consenting ([section 66A](#))
 - For those under 16 consent is no defence **unless** the defendant can establish on the **balance of probabilities** that they honestly believed on reasonable grounds that the victim was over 16 years of age ([section 77](#))
 - o [Section 61HA\(4\)\(a\)](#) addresses cognitive incapacity
- [Section 61HA\(4\)\(b\)](#) – the victim was unconscious or asleep
- [Section 61HA\(4\)\(c\)](#) – threats of force or terror
- No need for the victim to physically resist in order to show lack of consent BUT may lead to evidential difficulties for prosecution – [section 61HA\(7\)](#)
- [Section 61HA\(4\)\(d\)](#) – unlawfully detained
- [Section 61HA\(5\)](#) – mistaken belief as to:
 - o Identify of D - [s 61HA\(5\)\(a\)](#)
 - *Gallienne (1964)*
 - o D is married to V – [s 61HA\(5\)\(b\)](#)
 - *Papadimitropoulos (1957)* – now overturned by this section
 - o Nature of the act – [s 61HA\(5\)\(c\)](#)
 - For medical or hygienic purposes
 - Anything induced by fraudulent means
 - This must be of the act itself and not the quality of the act
 - *Mobilio (1991)*

Consent **may** be negated/vitiated if:

- The victim is substantially intoxicated by drugs or alcohol
 - o Section 61HA(6)(a)
- The threats don't involve force – intimidating or coercive conduct
 - o Section 61HA(6)(b)
- Abuse of position of authority or trust
 - o Section 61HA(6)(c)

Mens Rea

1: Intention to engage in non-consensual sexual intercourse – section 61HA(3)(a)

- The mens rea for sexual assault will be established if the defendant intends to have sexual intercourse with knowledge that the victim does not consent
 - o Section 61HA(3)(a)
- It requires **subjective awareness**
 - o Prosecution must prove that the defendant knew of the victim's lack of consent
- Where the victim's consent is vitiated due to a relevant mistake it is sufficient if the defendant **knows** that the victim consents **due to mistake or is reckless as to the reasons** for the victim's mistake
 - o Section 61HA(5)
- If the defendant has reasonable grounds for thinking the other person consents they do not have the MR for sexual assault
 - o Objective test – must consider all circumstances of the case including the steps taken to ascertain consent
 - o Section 61HA(3)(c)

2: Reckless as to whether the victim consent to sexual intercourse – section 61HA(3)(b)

- D has MR if they have sexual intercourse knowing V **might not be** consenting
 - o *Daly (1968)*
- Or with the **knowledge** of the **possibility of non-consent**
 - o Reckless as to consent
 - o *Saragozza (1984)*
- Any risk the V might not consent is enough, as long as it is not fanciful or minimal
 - o *Egan (1985)*
 - Proof that D realised V might not consent but recklessly carried on without resolving the doubt = constituted sexual assault
- **Subjective advertence** to the possibility that V was not consenting is **required** for this MR element
 - o *DPP V Morgan (1975)*
- If D is aware of the possibility V is not consenting and proceeds, then they have done so recklessly
 - o *Banditt (2005)*
- Recklessness is not defined in the Crimes Act – 2 types of reckless MR outlined in *Kitchener*:
 - o Reckless advertence – subjective
 - Realises possibility of non-consent but proceeds anyway
 - *Daly (1968)*
 - *Tolmie (1995)*
 - o Reckless **inadvertence** – subjective *and* objective

- Doesn't consider the issue of consent where D *should not have ignored* consent
- **Does not turn their mind to the issue**
- *Kitchener (1993)*
- *Banditt (2005)*

3: No reasonable grounds for believing that the other person consents to sexual intercourse – section 61HA(3)(c)

- D has no reasonable grounds for believing that V consents to sexual intercourse
 - Section 61HA(3)(c)
- Objective test – reasonableness
- Subjective test – defendant's belief
- The trier of fact must have regard to the circumstances of the case, including whether D had taken reasonable steps to ascertain to get grounds for believing consent was given
 - Section 61HA(3)(d)
- The defendant's self-induced intoxicant **cannot** be taken into account
 - Section 61HA(3)(e)
- The grounds must be reasonable
 - Historically, D would be acquitted if they had an 'honest belief', even if that belief wasn't reasonable

Temporal coincidence

To be criminally liable for the offence, D must have had the requisite MR at the time of committing the AR.

Cases

R v Papadimitropoulos [1957]

- V, a young migrant woman, was duped by D into believing they were married
 - Due to this mistaken belief, V had sexual intercourse with D
 - The HC held that this was not a fundamental mistake, but a mistake as to social identity regarding their marital status
 - Was thus held that V had consented to the physical act with the D
- This decision has been **overturned** by statute
 - V's consent to sexual intercourse due to a mistaken belief that D is V's husband **will vitiate V's consent** under s 61R(2)(a)(ii)
- Case found that even *slight* penetration will constitute sexual intercourse
 - Also found consent obtained by threats of physical and non-physical kind will be vitiated
 - Now codified in s 61HA(4)(c)
 - Found there is no need for V to physically resist to show lack of consent
 - Codified in s 61HA(7)

R v Mobilio [1991]

- A radiographer introduced an ultrasound transducer into the vagina of women for the purpose of sexual gratification
- It was held that V had consented on the grounds of the **nature and quality of the act**

- The nature or quality of the act did not change because of D's hidden sexual motives
- This decision has been **overturned**
- Under **section 74(5)(c)**, where V consents to sexual intercourse under a mistaken belief that it is for medical or hygienic purposes, V's consent will be vitiated

R v Kitchener (1993)

- The issue was whether recklessness was only actual advertence to the possibility of non-consent, or whether the concept could be extended to a failure to advert at all to the possibility of non-consent
- The Court held that D could be reckless if they failed to advert at all to the possibility of non-consent
 - Thus, D will be reckless 'not only where the accused adverts to the possibility of consent, but ignored it; but also where the accused is so bent on gratification and indifferent to the rights of the victim as to ignore completely the requirement of consent'

Tolmie (1995)

- The complainant and the appellant were among a group of people who had been drinking
 - As they walked down a path the appellant asked the complainant to come to him at the back of the group and propositioned her
 - She repeatedly told him to stop and they ended up on the ground where he sexually assaulted her
- HELD: recklessness can be shown where the accused adverts to the possibility of consent, but ignores it
 - Also where the accused is so bent on gratification and is therefore indifferent to the rights of the victim thus completely ignores consent

Banditt [2005]

- The accused broke into the victim's home and commenced intercourse with her while she was asleep
- The court held that 'he was reckless in the sense that he did not even consider whether she was going to consent or not, or at least he recognised that there was a possibility that she may not consent, but he went ahead anyway'

DPP v Morgan [1976]

- Four appellants appealed against convictions of rape and aiding and abetting rape
 - Morgan had invited the three co-defendants to have sex with his wife
 - Told them she was kinky, and that if she struggled, it was to get turned on
- House of Lords held that where D honestly believes V is consenting, even if this belief is unreasonable, MR will not be established
 - The reasonableness of the belief will be a factual matter for the jury in determining whether D actually had that belief
- The jury did not accept that D actually had believed V was consenting
 - The accused were found **guilty**
- Decision affirmed in *R v Saragossa [1984]*
- Codified in **section 74(3)(c)** which provides that D is deemed to know that V is not consenting if D 'has no reasonable grounds for believing that the other person consents'

Lazarus v R [2016]

- High profile case – Saxon Mullins on Four Corners
- Convicted of rape
 - o Was quashed due to claim that the judge in the trial misdirected the jury
 - o Judge Huggett had told the jury that it needed to decide whether there were reasonable grounds to believe that the woman had consented to having sex with Lazarus
 - o Instead, the jury should have been told that they needed to decide whether the accused in fact had a ‘reasonable belief’ at the time of the incident that the victim had consented

Day v R [2017]

- Appeal against conviction and sentence for sexual intercourse without consent
- Applicant claimed he was intoxicated and mistook the sleeping complainant for his partner
- Appeal dismissed