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I. CRIMINAL LIABILITY - CRIME

Under s38 of Crimes Act 1958 (CA), to establish the offence of rape, the prosecution must prove that:

- the accused intentionally sexually penetrated the complainant.
- the complainant did not consent to the sexual penetration.
- the accused did not reasonably believe that the complainant consented to the sexual penetration.

There is no issue with a finding of sexual penetration here, so the contentious issues would be: whether _____ (the complainant) consented to the sexual penetration, and whether _____ (the accused) held a reasonable belief in consent at the time of sexual penetration.

A. Penetration

- 1991: 'to any extent' / vagina includes 'external genitalia' (no requirement that penetration be 'sexual'). See Henshaw [2021] VSCA 356)
- 2005: s35 (1) – "sexual penetration": the introduction (to any extent) by a person of his penis/an object/part of his or her body into vagina (includes the external genitalia and surgically constructed vagina) /anus/mouth if penis (2005 consolidation)
- 2014: s37D - sexual penetration includes A, having introduced a part of A's body or an object into B's vagina or anus, continues to keep it there.
- 2015: s34C(2)(1) 'having initially given consent...later withdraws' – becomes a defined circumstance of non-consent

B. Consent

1 Current law

In the current law which applies to conduct committed from 30 July 2023 onwards after the 2022 amendment, introduces the Government's promised 'affirmative consent' laws, and involve a rewrite of the consent, deemed non-consent and reasonable belief in consent provisions.

- S37A(ab) emphasises the principle that consent to an act is not to be assumed. Instead, it involves ongoing and mutual communication, which requires each person to seek the consent of each other person in a way and at a time that makes it clear whether they consent.
- s 36 of the Crimes Act 1958 is replaced with new ss 36 and 36AA.
 - S 36 contains the **definition of consent**, which means "free and voluntary agreement"
 - S36AA(a): Circumstances in which a person **does not consent** to an act include the person does not say or do anything to indicate consent to the act.
 - Section 36AA(1) now contains the deemed non-consent circumstances previously in s 36(2). These circumstances have been reordered and expanded. The new or significantly modified circumstances are:
 - ✓ Recognition that consent vitiated due to force, harm or fear may arise from conduct that is not contemporaneous with the sexual act, and may be either a single incident or part of a pattern. – s36AA(b)
 - ✓ Further, the new section contains an extensive example of what is meant by 'harm', which includes economic, financial, reputational and psychological

harms, as well as harms to family, cultural and community relationships, harm to the person's employment and sexual harassment (s 36AA(1)(b)).

- ✓ A new circumstance of vitiated consent due to coercion or intimidation which is separate from the circumstance of vitiated consent due to force, harm or fear (s 36AA(1)(c)).
- ✓ A new circumstance of vitiated consent due to the complainant's will being overborne by abuse of a relationship of authority or trust (s36AA(1)(e)).
- ✓ A new note that the circumstance where a person being so affected by drugs or alcohol as to be incapable of withdrawing consent might apply where the person gave consent when not so affected by alcohol or another drug as to be incapable of consenting (s 36AA(1)(h)).
- ✓ A new circumstance that a false or misleading representation that the person will pay for commercial sexual services is deemed non-consent reversing R v Linekar [1995] 3 All ER 69. This false or misleading representation may be by words, conduct or omissions and may be explicit or implicit (s 36AA(1)(m), (2))

- **Jury Directions**

- s46 – direction on consent
 - ✓ S46(3)(a) - a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act; or
 - ✓ S46(3)(b) - where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place.
 - ✓ s46(4)(b): if the jury is satisfied beyond reasonable doubt that a circumstance specified in s36AA (***deemed non-consent circumstances**) existed, the jury must find that the complainant did not consent to the act.

2 In 2021

- **S36(1): consent means free agreement**

- 'the person does not say or do anything to indicate consent to the act' becomes a defined circumstance of non-consent – s36(2) Deemed non-consent circumstances
 - ✓ (a) the person submits to the act because of force or the fear of force, whether to that person or someone else;
 - ✓ (b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;
 - ✓ (c) the person submits to the act because the person is unlawfully detained;
 - ✓ (d) the person is asleep or unconscious;
 - ✓ (e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;
 - ✓ (f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;
 - ✓ (g) the person is incapable of understanding the sexual nature of the act;
 - ✓ (h) the person is mistaken about the sexual nature of the act;
 - ✓ (i) the person is mistaken about the identity of any other person involved in the act;
 - ✓ (j) the person mistakenly believes that the act is for medical or hygienic purposes;
 - ✓ (k) if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;
 - ✓ (l) the person does not say or do anything to indicate consent to the act;

- ✓ (m) having given consent to the act, the person later withdraws consent to the act taking place or continuing.

3 In 2010

- S36 – consent means free agreement.
- S37AAA(d) - **Jury directions** on consent: the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement

C. **Belief in consent**

1 Current law

- s.38 amended to **require belief must be reasonable** in 2014 – 'A does not reasonably believe that B consents to the penetration' is the new element added to establish the offence of Rape
- **Failure to take reasonable steps warrant a non-finding of reasonable belief (disabling fact)**
 - S36A(2) provides that the accused's belief on the complainant's consent is not reasonable if, within a reasonable time before or at the time the act takes place, the accused does not say or do anything to find out whether the complainant consents to the act.
- **Jury Directions**
 - S47(3)(a): if the jury concludes that the accused knew or believed that a circumstance referred to in section 36AA of the Crimes Act 1958 existed in relation to a person, that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act (the knowledge or belief in a deemed non-consent circumstance is enough to defeat reasonable belief)
 - S47(3)(d): in determining whether the accused had a reasonable belief in consent, the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent.
 - S47(3)(e): in determining whether the accused had a reasonable belief in consent, the jury may take into account any personal attribute, characteristic or circumstance of the accused.

2 In 2021

- S36A provides that whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances and relevant circumstances relevant to the determination of reasonable belief include any steps taken by the accused to find out consent.
- **Case law**
- Case law
 - *Hubbard v The Queen* [2020] VSCA 303 - Jonathan Hubbard first sentenced by the County Court to 4 years imprisonment after found guilty of rape.. Hubbard had been partying with the victim the night before. They went back to Hubbard's home where the victim went to sleep, only to awake to being digitally penetrated by Hubbard. At first she believed it to be her partner but only after a few minutes realised that it was actually Hubbard. At trial Hubbard argued that he held a genuine belief that she was consenting based on her physical reaction. Subsequently **acquitted** by the Victorian Court of Appeal which controversially held that the victim may have 'positively'