

## **W201 The Individual and the State**

### **Study notes on Sections 1 2 3 and 5 6 7 and 9 of the Sexual Offences Act 2003**

The Sexual Offences Act 2003 which came into force on 1 May 2004 replaces the 1956 Act.

Significant differences include:

1. The definition of 'rape' now includes oral penetration. Non consensual oral sex would previously have been prosecuted and punished as a lesser offence.
2. There is a statutory definition of 'consent' as 'agreement by choice'.
3. The accused's belief in consent must be reasonable (changing a subjective test to an objective one).
4. To help the prosecution prove both absence of consent and absence of reasonable belief in consent there are now evidential presumptions which the prosecution can rely on.

This course asks you to look at three sexual offences where there is an adult complainant:

Section 1 Rape	Life imprisonment
Section 2 Assault by penetration	Life imprisonment
Section 3 Sexual Assault	10 years

and three where there is a child complainant under 13:

Section 5 Rape	Life imprisonment
Section 6 Assault by penetration	Life imprisonment
Section 7 Sexual Assault	14 years

And finally one where the complainant is under 16:

Section 9 Sexual activity with a child 14 years

### **Rape**

#### **Actus reus**

1. Penetration

"penetrates the vagina anus or mouth of another person with his penis"

2. Consent

"that person does not consent to the penetration"

The complainant can be male or female. The accused can only be male (though an accomplice may be female).

Consent is defined in Section 74:

Where a complainant “agrees by choice and has the freedom and capacity to make that choice”.

Evidential presumptions are set out in Section 75:

If it is proved that the accused did the relevant act and any of the specified circumstances existed (and the accused knew they existed) then the complainant is to be taken not to have consented unless sufficient evidence is adduced to raise consent as an issue.

The specified circumstances are:

1. violence or fear of immediate violence against the complainant or another person
2. unlawful detention
3. asleep or otherwise unconscious
4. physical disability preventing communication
5. administering a substance (without the complainant’s consent) capable of causing or enabling the complainant to be stupefied or overpowered.

Conclusive presumptions are set out in Section 76

Consent is conclusively presumed where the accused did the relevant act and:

- the accused intentionally deceives the complainant as to the nature or purpose of the act or
- the accused intentionally induces the complainant to consent by impersonating a person known personally to the complainant.

What happens if a complainant is drunk? Being drunk is not one of the specified circumstances triggering an evidential presumption in Section 75.

If the complainant is drunk this can lead to evidential problems. In **R v Dougal** 2005 Swansea Crown Court (unreported) the complainant was so drunk she had no recollection of intercourse nor of whether she had consented. The prosecution abandoned the case. The judge (who agreed the case could not continue) commented “drunken consent is still consent”.

Clarification of the law was clearly needed. Can a drunken complainant still consent within the definition in Section 74?

In **R v Bree** 2007 C A the court said that this depends. First they said that the difficulties in this area arose not from the legal definition of consent but from the “infinite circumstances of human behaviour”.

Judge LJ said that “if through drink – or for any other reason – the complainant has temporarily lost her capacity to choose whether to have intercourse she is not consenting”.

Whilst the court accepted that a complainant who has voluntarily consumed even substantial quantities of alcohol would remain capable of choosing they also underlined

that capacity to consent may evaporate well before a complainant becomes unconscious.

The court went on to say that the outcome depended on the actual state of mind of the individuals involved.

### **Mens rea**

1. Intentional penetration
2. Absence of reasonable belief that the victim consents

Section 1 (2) states that:

“Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused has taken to ascertain whether the complainant consents”.

In addition the evidential presumptions listed above can apply either to

- establish mens rea (conclusive presumptions) or
- require sufficient evidence to be adduced to raise an issue of reasonable belief in the absence of consent (evidential presumptions).

The requirement that the accused’s belief be reasonable involves an objective test. This therefore represents an exception to the general tendency in modern times to adopt a subjective approach explained by Lord Steyn in **R v G and R** 2003 Lords (which abolished the objective test for mens rea in Caldwell).

Rape and the other sexual offences dealt with here remain crimes of basic intent and therefore drunkenness is no defence for the accused **R v Heard** 2007 C A (a case on Sexual Assault).

### **Assault by penetration**

#### **Actus reus**

1. Penetrates the anus or vagina with a part of his body or anything else
2. The penetration is sexual
3. The complainant does not consent

The conclusive and evidential presumptions apply as in rape.

The difference between the two offences is that rape requires penetration by penis. Before 2003 this conduct would have been charged as a lesser offence carrying a lesser sentence.

## **Mens rea**

1. Intentional penetration
2. Absence of reasonable belief in the complainant's consent.

The conclusive and evidential presumptions apply as in rape. Reasonable belief is determined by steps the accused has taken to ascertain consent.

## **Sexual Assault**

### **Actus reus**

1. Touching of another person
  2. The touching is sexual
  3. The complainant does not consent to the touching
- Touching can be by any part of the body or with anything else or through anything eg clothing.

Section 78 defines 'sexual' using an objective 'reasonable person' test. Behaviour is either:

- of its nature sexual
- ambiguously sexual (when the circumstances or the purpose may make it sexual)
- non sexual (this is outside the section and secret motives are irrelevant).

### **Mens rea**

1. Intentional touching
2. Absence of reasonable belief in the complainant's consent.

The conclusive and evidential presumptions apply as in rape. Reasonable belief is determined by steps the accused has taken to ascertain consent.

## **Offences with a child under 13**

### **Rape – Section 5**

#### **Actus reus**

1. Penetration

“penetrates the vagina anus or mouth of another person with his penis”

2. Complainant is under 13.

**Mens rea**

Intentional penetration

In **R v G** 2008 Lords a guilty plea had been accepted on the basis that the sexual intercourse was consensual and the accused believed the complainant to be 15. The court first held that a conviction under this section of a 15 year old did not violate his Article 6 right to a fair trial by virtue of the strict liability element of the offence. Secondly they held (by a majority of 3:2) that the 15 year old accused's Article 8 rights were not violated by the conviction.

**Assault by penetration – Section 6**

**Actus reus**

1. Penetrates the anus or vagina with a part of his body or anything else
2. The penetration is sexual
3. Complainant is under 13

**Mens rea**

Intentional penetration

**Sexual assault – Section 7**

**Actus reus**

1. Touching of another person
2. The touching is sexual
3. Complainant is under 13

**Mens rea**

Intentional touching

## General

These offences are identical to those for an adult complainant except that once age is proved there is no need to prove absence of consent as part of the actus reus. Once age and intentional penetration or intentional sexual touching is proved these offences involve strict liability as there is no mens rea requirement in respect of consent or age. Reasonable belief in consent is no defence and reasonable belief that the victim is 13 or over is no defence.

## **Sexual activity with a child – Section 9**

### **Actus reus**

1. Accused is 18 or over
2. touching another person
3. the touching is sexual
4. either the person is
  - (i) under 16 (when a defence of reasonable belief as to age applies)
  - (ii) under 13

### **Mens rea**

1. Intentional touching
2. Where the person is under 16 absence of a reasonable belief that the person is 16 or over.

This offence overlaps considerably with the earlier offences involving a complainant under 13.

### Points to note

- a) Under the old law of indecent assault honest belief (ie a subjective test) that the complainant was 16 or over was a defence - **R V K** 2001 Lords. Under the 2003 Act the belief must now be reasonable - an objective test - and an exception to the modern tendency to adopt a subjective approach.
- b) Controversially Section 13 of the 2003 Act includes an identical offence of Sexual Activity with a Child for an accused under 18 carrying 5 years imprisonment. The

Section 13 offence (outside this course) means that if a 15 year old sexually touches another consenting 15 year old (as young people sometimes do) they risk up to 5 years imprisonment.