



**IN WHAT CIRCUMSTANCES WILL DECEPTION VITIATE THE CONSENT OF THE
COMPLAINANT TO SEXUAL ACTIVITY UNDER SEXUAL OFFENCES ACT, 2003? IS
THE LAW IN NEED OF REFORM?**

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Consent is crucial to the offences under the Sexual Offences Act, 2003. ‘A person consents if he agrees by choice, and has the freedom and capacity to make that choice.’¹ It is for the Jury to decide under section 74 whether the victim has capacity to consent or not. Under section 74, the defendant must take steps to ascertain victim’s consent.

Section 76 of Sexual Offences Act, 2003 addresses defendant having ulterior intent or dual intent.² Section 76 provides two conclusive presumptions, the first being that the complainant did not consent to the activity and the second would be that the defendant did not believe that the complainant had consented. While the first presumption is based on the defendant intentionally deceiving the complainant as to the nature or purpose of the relevant act, the second is where the defendant induces the victim to consent by impersonating someone known to the complainant. When this is proven, the law states that it would then be conclusively presumed that the defendant did not believe that the complainant consented to the relevant act, and that the complainant did not consent to the relevant act.³

In *R v Elbekkay* [1995]⁴, the appellant was out drinking with a couple and they returned to the couple's flat. They continued drinking at the flat and the complainant went to bed leaving the appellant and her boyfriend in the living room. The boyfriend fell asleep on the sofa. The appellant climbed into bed with the complainant. She assumed it was her boyfriend and said I love you. He then started to have intercourse with her. After about 20 seconds when she realized it was not her boyfriend she punched him and cut him with a knife and then woke her boyfriend. The appellant was found guilty of rape and appealed contending she had consented to sexual intercourse. The

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¹ Section 74, Sexual Offences Act, 2003

² Section 76, Sexual Offences Act, 2003.

³ https://en.wikipedia.org/wiki/Sexual_Offences_Act_2003#Section_76

⁴ *R v Elbekkay* [1995] Crim LR 163 Court of Appeal



appeal was dismissed and the conviction was upheld. It was held that the rule relating to impersonation of a husband applied equally to impersonation of a boyfriend.

In *R v Jheeta* [2007] EWCA Crim 1699 where the defendant had deceived the complainant and pressured her into having sexual intercourse more often than she would have done otherwise, the conclusive presumption did not apply because there had been no deception as to the nature or purpose of sexual intercourse.⁵ The focus of the court was upon if this deception vitiated consent. It was held that certain deceptions are capable of vitiating consent but these deceptions were narrowly construed. Then emphasis was placed upon the phrase nature and purpose of the relevant act under section 76, which in the context of rape is sexual intercourse. The Court of Appeal thought that the only deception in this case was the fictitious situation that was created to obtain the complainant's frequent participation in sexual intercourse. There was no deception as to the nature or purpose of the act. The case law clearly shows that if the nature or purpose of sexual intercourse is not directly altered as a result of deception, no liability for rape will attach to a defendant.

In another case of *R v Tabassum* [2002] 2 Cr App R 328 where the defendant conducted breast examinations for his own sexual gratification, on the pretense that he was collecting data for a cancer screening programme there was no genuine consent because the complainants had consented only to an act of a medical nature and not for any other reason.⁶ There was consent to the nature of the act but not to the quality of the act. The defendant deceptively gained consent to touch the breasts of three women by telling them that the touching was being done for medical purposes. He was convicted of indecent assault. The Court of Appeal held that the women were consenting to the nature of the act but not its quality. Therefore there was no consent for the purposes of sexual offences. In the case of *R v Donald* [2008] EWCA Crim 527 the conviction of causing a person to engage in sexual activity without consent was upheld where the defendant in order to embarrass his victim, posed as a young woman and persuaded him to masturbate in front of a webcam. It is for the jury to decide what the purpose of the act is and whether there was

⁵ <https://webstroke.co.uk/law/cases/r-v-jheeta-2007>

⁶ "Internet Law Book Reviews" provided by Rob Jerrard LLB LLM



deception. It was held that there was deception as to the purpose of the act. Section 76 Sexual Offences Act 2003 was construed widely.⁷

Section 76 gives circumstances in which we conclude that the complainant did not consent, and that the defendant had no reasonable belief in consent. The circumstances cannot be rebutted by further evidence from the defense when proven, it must be concluded that there is no consent and no reasonable belief in consent. This inflexibility, it is believed, has led to judicial reluctance in using the presumptions where they at first seem appropriate. In the case of *R v McNally* [2013] (Court of Appeal), was found a general reluctance to use the conclusive presumptions against consent. The defendant, born a female pretended to be a boy and became sexually acquainted with his girlfriend. This gender deception was later discovered. It was held that the consent to sexual acts carried out by the defendant vitiated by the gender deception. Though section 76 was not invoked, but gender deception did vitiate consent on the facts. The appeal as to legal advice was dismissed, but lesser and suspended sentence substituted.⁸

Section 74 has recently been considered by the High Court and the Court of Appeal in a series of cases where apparent consent in relation to sexual offences was considered not to be true consent, either because a condition upon which consent was given was not complied with or because of a material deception (other than one which falls within section 76 of the Sexual Offences Act 2003). In *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), the President of the Queens Bench Division considered the situation in which Mr Assange knew that the victim would only consent to sexual intercourse if he used a condom. The President concluded that the issue of materiality can be determined under section 74 rather than section 76. On the specific facts the President said, it would plainly be open to a jury to hold that if victim had made clear that she would only consent to sexual intercourse if Mr Assange used a condom. Then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act 2003. The nature of the act was unaffected by the non-use of a

⁷ <https://webstroke.co.uk/law/cases/r-v-devonald-2008>

⁸ <https://webstroke.co.uk/law/cases/r-v-mcnally-2013>

condom, therefore section 76 did not apply, however the consent was not valid under section 74 Sexual Offences Act 2003.

In the case of *R (on the application of F) v The Director of Public Prosecutions and "A"* [2013] EWHC 945 (Admin), the claimant applied for judicial review asking the court to consider a Crown Prosecution Service decision not to prosecute her husband and in particular whether or not there was a realistic prospect of conviction. The claimant complained that she had been raped by her husband, who was an intervener in the proceedings. There had been a longstanding history of domestic violence and the intervener had on many occasions behaved aggressively and sought to exert power and control over the claimant. The allegation was that claimant had agreed to sexual intercourse with the intervener on the basis that he would not ejaculate inside her. Penetration is a continuing act and so consent can be withdrawn even after penetration has begun and this will transform an act that begins as consensual intercourse into rape. It was concluded that section 76 should be afforded a stringent construction given its status as a conclusive presumption. Further, the court held that even if there had been a deception, it was not a deception as to the nature or quality of the act and as such section 76 had no application in these circumstances. Therefore the issue of consent in this type of case falls to be considered under section 74 Sexual Offences Act 2003. The court made it clear that this would not extend to situations where there had been premature or accidental ejaculation. However, where deception had been used on the basis on which consent was given was deliberately ignored, the conduct fell within the statutory definition of rape.⁹

In the case of *Linekar*¹⁰, L persuaded a prostitute to have intercourse with him on the basis that she would receive a sum of money. After the intercourse he walked off without paying and she claimed that she had been raped. The Court of Appeal held that the issue was not that of fraud, but of whether the woman had consented to sexual intercourse with L. This she clearly had done; the fact that she would not have had intercourse but for the promise of money was irrelevant. There was no fraud relating to the nature of the act or to the identity of the person. It is clear that many people allow another to have intercourse with them because of some promise that has been made. This might be that the victim is offered money, status or marriage in return for sexual intercourse.

⁹ <https://webstroke.co.uk/law/cases/rf-v-dpp-2013>

¹⁰ [1995] QB 250



However, on one view the position may now be different under the 2003 Act. The deception as to payment may be viewed as coercive inducement, or in some circumstances as altering the nature or purpose of the act in question, consequently it could be argued that defendant should be classified as a rapist under the new provisions.

In the article *Mistaken Sex*¹¹, Herring argues that the criminal law wrongly favors the defendant, restricting what types of deception may vitiate consent. I agree with him as this fails to respect the sexual autonomy of complainants, which is the main purpose of enforcing the sexual offences. He proposes that where one party knows the other is mistaken as to an essential prerequisite to consent, then there is no true consent. Consent is only given where there is a ‘meeting of the minds’ on such crucial features, not just where one party says ‘yes’.

Consent to act A is not consent to act B. Just because there is consent to an act does not mean that there is consent to any act. To analyze this in terms of whether there is a deception as to the nature of the act is unnecessarily complex.

Unfortunately, in its current state, the criminal law is unlikely to recognize this subtlety. The law is failing to respect individual autonomy by denying the significance of a wide range of factors (that differ for everyone) which are crucial in an individual’s choice on whether to consent. It is not for the law to dictate what factors are critical to the question of consent and which are not. Ultimately, the law must prioritize the values of the victim.

We could formulate a legal rule that would look something like this :- If at the time of the sexual activity a person is mistaken as to a fact and had s/he known the truth about that fact would not have consented to it then s/he did not consent to the sexual activity. If the defendant knows (or ought to know) that s/he did not consent (in the sense just described) then s/he is guilty of an offence.

¹¹ *Mistaken Sex*- JONATHAN HERRING (2005)



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