

Ten years on - Consent under the Sexual Offences Act 2003

by Catarina Sjölin

As the clock ticked over from 30th April to 1st May 2004 the Sexual Offences Act 2003¹ came into force and the Sexual Offences Act 1956² was repealed, fundamentally changing the law on sexual offences in England and Wales. Perhaps the most major changes were in respect of consent. This article examines on the changes the Act made to three aspects of consent: the provision of a statutory definition, the effect of deception of C on the validity of C's consent and the role of D's belief in C's consent. To this end the article considers the pre-SOA 2003 law on consent, the impetus and proposals for reform, the Act and how it has been implemented by the courts and finally how the Act could be improved to provide greater clarity substantively and procedurally to achieve the aims which lay behind the reform of consent in the first place.

Consent

Consent is at the heart of rape and the other non-consent offences, but it is a complex concept, both in the sense of being difficult and in the sense of comprising of a number of related parts. The three most important questions arising from the concept of consent in sexual cases are:

1. What do we mean when we say C did, or perhaps more importantly did not, consent?
2. If C was deceived when giving his/her consent, was that consent valid in law?
3. How aware must D have been of C's lack of consent for D to be guilty of a crime?

The SOA 2003 changed the answers to all three questions. To understand how and why, an examination of the previous law and the path which led to the SOA 2003 is necessary.

The law pre-SOA 2003

(i) The definition of consent

Although originally a common law offence, rape has been mentioned in statute from the time of Edward I³, although it was only in 1976 that the

¹ Hereinafter referred to as the SOA 2003.

² Hereinafter referred to as the SOA 1956.

³ The Statute of Westminster 1285 (13 E 1, st 1) stated that rape was a felony.

offence gained any statutory definition⁴, but even then 'consent' remained undefined. It had long been assumed that the absence of consent had to be due to force, fear or fraud⁵ but in 1982 the Court of Appeal in *Olugboja*⁶ stated that if this had once been the case, it certainly was no longer, although 'one or more of these factors will no doubt be present in the majority of cases of rape'⁷. In 1992 the House of Lords decided in *R v R*⁸ that consent to sex within marriage was no longer assumed. In *Malone*⁹ in 1998 the Court of Appeal stated that there was no need for C to communicate or demonstrate his/her lack of consent. This helped, perhaps, with what was *not* necessary for there to be an absence of consent, but it did not help as to what *was* necessary, or indeed what consent is.

As to direction to the jury, in *Olugboja* the Court of Appeal stated that¹⁰

Although "consent" is [a]... common word it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent: per Coleridge J. in Reg. v. Day, 9 C. & P. 722, 724. In the majority of cases, where the allegation is that the intercourse was had by force or the fear of force, such a direction coupled with specific references to, and comments on, the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or the fear of it, ... we think that an appropriate direction to a jury will have to be fuller. They 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

⁴ The Sexual Offences (Amendment) Act 1976, s.1 provided definitions for the SOA 1956, s.1 following the recommendations of the *Report of the Advisory Group on the Law of Rape* (Cmnd. 6352) (London: HMSO, 1975) also known as the *Report of the Heilbron Committee*.

⁵ The 38th edition of Archbold Criminal Pleading Evidence and Practice from 1973 for instance makes this assertion at paragraph 2871 and cites East's Pleas of the Crown and Hale's Pleas of the Crown. This is cited as the 'classic' definition of rape by Lord Hailsham in *DPP v Morgan* [1976] AC 182 at 210. However, neither of these works uses the phrase, speaking instead of rape being "by force and against her will" (1 East's Pleas of the Crown 434) or simply "against her will" (1 Hale's Pleas of the Crown 628).

⁶ *Olugboja* [1982] QB 320.

⁷ *Ibid.* at 331.

⁸ *R v R* [1992] 1 AC 599.

⁹ *Malone* [1998] 2 Cr App R 447 at 457.

¹⁰ See *Olugboja*, above n.6 at 332.

and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.

The effect of this approach was an absence of clarity and consistency as to the meaning of consent, leaving the difficult question of where to draw the line between consent and 'mere submission' up to the jury.

Tellingly Coleridge J's 1841 comment¹¹ that every consent involves a submission, mentioned above in *Olugboja*, was still being quoted by the Court of Appeal in 2004.¹² Despite male rape being brought within the offence in 1994, the common law concept of consent still used the paradigm of an acquiescence by the weaker party to the will of the stronger rather than an agreement between equals. This skewed view of sexual relationships, together with a desire to leave the difficult decisions to the jury, made common law development of a modern definition of consent difficult to envisage.

(ii) Deception

Under the pre-SOA 2003 law some deceptions vitiated consent and some did not. Which side of the line they fell depended on the type of deception.

Deceptions which went to the essence of the act - its *nature* (for example, suggesting that the act of intercourse was a singing exercise¹³) or its *quality* (for example touching of the breasts as a medical examination done by a man who turned out not to be medically qualified¹⁴) or D's identity (where D impersonated C's husband¹⁵ or boyfriend¹⁶) - vitiated consent for the purpose of the offence of rape.

¹¹ *Day* (1841) 9 C. & P. 722 at 724.

¹² *Groves, Groves and Holt* [2004] EWCA Crim 1545 at [58] quoting with approval from *Malone* [1998] 2 Cr App R 447.

¹³ *Re Williams* (1923) 17 Cr App R 56 or a surgical procedure to cure fits *Re Flattery* (1877) 2 QBD. 410.

¹⁴ *Tabassum* [2000] 2 Cr App R 328.

¹⁵ s.1(3) SOA 1956 as amended by the Criminal Justice and Public Order Act 1994 (previously found in s.1(2)).

¹⁶ *Elbekkay* [1995] Crim. L.R. 163.

Deceptions which did not go to the essence of the act were considered insufficient to vitiate consent. In *Linekar*¹⁷, for instance, the issue was whether failure to pay £25 (which D claimed had been the fee agreed with C for sex) vitiated consent. The court considered that as C had consented to sexual intercourse with D and that was the same with or without payment, her consent was not vitiated. The court pointed out that D would probably have been guilty of the offence of procuring sexual intercourse by false pretences under s.3 of the SOA 1956.¹⁸ The offence under s.3 is how cases of 'lesser' deception were dealt with, at least in theory, by the criminal law. However, s.3, and the offence of procuring sexual intercourse by threats under s.2, appear to have been little used by the turn of the 21st century.¹⁹

(iii) D's belief in consent

As noted above, there was no requirement for C to demonstrate her lack of consent, but the prosecution still had to prove that D was either aware of C's lack of consent or did not care whether s/he was consenting or not.²⁰ D could not rely on a mistake he had made due to self-induced intoxication²¹ but could rely on his sober mistaken belief, however unreasonable, as long as it was genuine.²² Under the Offences (Amendment) Act 1976 s.1(2) the jury had to consider the presence or absence of reasonable grounds for D's belief in consent when determining whether he did have the claimed belief, but the fact was that a genuine belief in consent, however unreasonable, was sufficient to see D acquitted. It was easy, in theory and in practice, to lose sight of the fact that D had to believe in C's consent, otherwise, assuming all other elements are made out, he was guilty.

Proposals for reform: the road to the SOA 2003

The Criminal Law Revision Committee's Fifteenth Report²³ in 1984 and the Law Commission's Draft Criminal Code²⁴ in 1989 had touched on consent in

¹⁷ *Linekar*[1995] QB 250.

¹⁸ It is understandable that *Linekar* did not face a count under s.3 SOA 1956 as C made a clear allegation of rape; it was D who claimed that she was disgruntled when he refused to pay her £25. Prior to the SOA 1956 a similar provision was found in s.3(2) of the Criminal Law Amendment Act 1885.

¹⁹ There do not appear to be any figures on this, despite the assertion being made in the literature, e.g. *Setting the Boundaries*, paragraph 2.18.2, *Consent in Sex Offences*, paragraph 5.40.

²⁰ *DPP v Morgan* [1976] AC 182, HL and *Satnam and Kewal* (1984) 78 Cr. App. R 149, CA. Simon Gardner argues that *Satnam* extends liability to the situation when D failed to turn his mind to C's consent at all which he suggests was not previously covered (*Reckless and inconsiderate rape* [1991] Crim. L.R. 172).

²¹ *Fotheringham* (1989) 88 Cr App R 206 following *DPP v Majewski* [1977] AC 443, HL.

²² *DPP v Morgan* [1976] AC 182, HL.

²³ Criminal Law Revision Committee, *Fifteenth Report: Sexual Offences* (London: HMSO, 1984), Cmnd 9213.

²⁴ The draft Bill found in Volume 1 of the Law Commission's Report, *A Criminal Code for England and Wales* (London: HMSO, 1989), Law Com No. 177.

relation to sexual offences but did nothing more than seek to codify the law as it already was. It was not until the turn of the current century that large scale reform started to be advocated in influential law reform reports. The Law Commission's 2000 report, *Consent in Sex Offences*²⁵ was produced to assist the Home Office-sponsored free-standing review, *Setting the Boundaries*.²⁶ Both reports provided proposals which themselves fed into the government's White Paper, *Protecting the Public*²⁷ which culminated in the SOA 2003. The feeling of the reports is best summed up in *Setting the Boundaries*²⁸

We... thought it was vital that the law was clear and well understood, particularly in this field of sexual behaviour where there is much debate about the ground-rules. There is no Highway Code for sexual relations to give a clear indication of what society expects or will tolerate. The law should ensure respect for an individual's own decisions about withholding sexual activity and protect every person from sexual coercion and violence.

Society has undergone rapid and fundamental change in the past century. Our perception of the roles of men and women have changed.

The current law does not adequately reflect these changes.... It is silent on most aspects of consensual sexual behaviour in private...

We recognised that the law does not readily meet the needs of police and prosecutors in tackling sexual assault, abuse and exploitation We also recognised the vital importance of providing a fair trial and the ability for a defendant, who is innocent until proved guilty, to mount an effective defence.

(i) Definition

Consent in Sex Offences recommended a definition of consent rather than simply judicial explanation as the approach most likely to assist juries. Their recommendation was 'subsisting, free and genuine agreement'. *Setting the Boundaries* also rejected the common law no-definition approach to consent noting '[t]he full legal meaning of consent was not clearly understood'²⁹ and concluding³⁰

[i]t is vitally important that in this most private and difficult area of sexual relationships the law should be as clear as possible so that the boundaries of

²⁵ Law Commission, *Consent in Sex Offences*, Law Commission (London: HMSO, 2000) hereinafter referred to as '*Consent in Sex Offences*', also annexed to *Setting the Boundaries* (below) in Volume 2.

²⁶ *Setting the Boundaries: Reforming the Law on Sex Offences, Vol. 1* (London: HMSO, 2000), hereinafter referred to as '*Setting the Boundaries*'.

²⁷ White Paper, *Protecting the Public* (London: HMSO, 2002) Cm. 5668, hereinafter referred to as '*Protecting the Public*'.

²⁸ *Setting the Boundaries*, above n.26, paragraphs 0.8, 1.1.4, 1.1.5 and 1.1.6.

²⁹ *Setting the Boundaries*, above n.26, paragraph 2.3.1.

³⁰ *Setting the Boundaries*, above n.26, paragraphs 2.7.2 and 2.10.1.

what is acceptable, and of criminally culpable behaviour, are well understood. This understanding is essential for all those involved in the criminal justice system in practicing and interpreting the law (and we had evidence that it was not always well understood even by professionals).

...

The law sets the ground rules of what is and is not criminal behaviour, and all citizens need to know and understand what these are. This is particularly important because consent to sexual activity is so much part of a private relationship where verbal and non-verbal messages can be mistaken and where assumptions about what is and is not appropriate can lead to significant misunderstanding and, in extreme cases, to forced and unwelcome sex.

They recommended that this was best achieved by having both a definition and assistance as to how that definition should be applied.³¹ They noted in particular³²

It is important for society as a whole for sexual relationships to be based on mutual respect and understanding.

...

One of the messages that had come to us in consultation was that consent was something that could be seen as being sought by the stronger and given by the weaker. In today's world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status. In defining consent we are not seeking to change its meaning, rather to clarify the law so that it is clearly understood.

Agreeing with the Law Commission, they advised a statutory definition of consent, which they suggested should be 'free agreement'.³³ To clarify and explain this definition they provided a non-exhaustive list of examples where consent was not present, which was intended to assist practitioners and juries³⁴

- *Where a person submits or is unable to resist because of force, or fear of force;*
- *Where a person submits or is unable to resist because of threats or fear of serious harm or serious detriment of any type to themselves or another person;*
- *Where a person was asleep, unconscious, or too affected by alcohol or drugs to give free agreement;*
- *Where a person did not understand the nature of the act, whether because they lacked the capacity to understand, or were deceived as to the purpose of the act;*

³¹ *Setting the Boundaries*, above n.26, Recommendation 5 and paragraph 2.10.6.

³² *Setting the Boundaries*, above n.26, paragraphs 2.7.2 and 2.10.3.

³³ *Setting the Boundaries*, above n.26, Recommendation 5 and paragraphs 2.10.3 to 2.10.5 and *Consent in Sex Offences*, above n.25, paragraphs 2.5 to 2.12.

³⁴ *Setting the Boundaries*, above n.26, Recommendation 6 and paragraphs 2.10.6 to 2.10.9.

- Where the person was mistaken or deceived as to the identity of the person or the nature of the act;
- Where the person submits or was unable to resist because they are abducted or unlawfully detained;
- Where agreement is expressed by a third party not the victim.

(ii) Deception

The Law Commission took the view that there were different types of deception which merited criminal sanctions. Some deceptions are so fundamental that they mean that consent was not in fact given; deceptions as to the nature of the act or the identity of the other party fall into this category. A second category involves deceptions which do not nullify consent, although they are sufficiently serious to come within an extended and updated version of s.3 SOA 1956.³⁵ Other deceptions would not fall within the scope of the criminal law. The suggested categories were very much dictated by the then law.

Setting the Boundaries did not explicitly endorse the Law Commission's differentiation into three types of deception, although the net effect of its proposals is the same. Some forms of deception appeared in the non-exhaustive list of situations where consent was not present. *Setting the Boundaries* also recommended updated versions of the offences under ss.2 and 3 of the SOA 1956 mentioning trafficking, forced and sham marriages as being the types of situations to be covered by the updated offences.³⁶ Deceptions short of this would not be caught by the criminal law.

(iii) D's belief in consent

The Law Commission and *Setting the Boundaries* were not particularly radical when it came to D's belief in consent. Both were content that the mainly subjective approach continue, albeit with some more checks upon it. The Law Commission suggested additional judicial directions.³⁷ *Setting the Boundaries* stated that "*the doctrine of honest but mistaken belief in consent was widely criticised*"³⁸ but took a similar approach recommending only a further limitation where the defendant did not take all reasonable steps in the circumstances to ascertain consent at the time.³⁹

(iv) The White Paper

³⁵ *Consent in Sex Offences*, above n.25, Law Commission, paragraphs 5.14 to 5.46.

³⁶ *Setting the Boundaries*, above n.26, Recommendation 14 and section 2.18.

³⁷ *Consent in Sex Offences*, above n.25, paragraph 7.44.

³⁸ *Setting the Boundaries*, above n.26, paragraph 2.3.1

³⁹ *Setting the Boundaries*, above n.26, Recommendation 9 and section 2.13.

The Home Office produced a White Paper, *Protecting the Public* which led to the SOA 2003. The Home Office gave one of the stated aims of the new legislation as setting out clearly what constitutes unacceptable behaviour⁴⁰ noting that⁴¹

[i]t is vital that the law is as clear as possible about what consent means in order to prevent miscarriages of justice... There is little general guidance in the case law as to the meaning of consent, except that it has been held that consent is different from submission. We intend to make statutory provision on this issue that is clear and unambiguous.

Setting the Boundaries' non-exhaustive list of situations where consent was not present mutated in *Protecting the Public* into presumptions of a lack of consent which D could rebut on the balance of probabilities. Despite the references to clarity, there was no proposed definition of consent in the White Paper.

Deception as to identity was to remain a deception which vitiated consent.⁴² Other than that, there was no mention of deception and no updated version of SOA 1956 s.3.

Most radically, the Home Office decided to abandon rather than simply limit the essentially subjective test in relation to D's belief in consent and stated that there would be added to the requirement of belief in consent a test of reasonableness: reasonableness judged by '*an objective third party*' taking into account '*the actions of both parties, the circumstances in which they have placed themselves and the level of responsibility exercised by both*'.⁴³

The SOA 2003

(i) The statutory scheme

After significant amendments on its Parliamentary journey, the SOA 2003 emerged. Consent is defined by s.74 which provides that '*a person consents if he agrees by choice, and has the freedom and capacity to make that choice*'.

Further, there are also two classes of situation, in ss. 75 and 76, which lead to twin presumptions: that C did not consent *and* that D knew that.

Section 75 provides *rebuttable* presumptions: if the factual situation in the presumption is proved by the Crown to exist, there is a rebuttable presumption C did not consent. D can still make the issue 'live' at trial by producing some evidence disputing the situation giving rise to the

⁴⁰ *Protecting the Public*, above n.27, foreword.

⁴¹ *Protecting the Public*, above n.27, paragraphs 28 and 30.

⁴² *Protecting the Public*, above n.27, paragraph 30.

⁴³ *Protecting the Public*, above n.27, paragraph 34.

presumption, leaving the Crown to prove lack of consent and belief in consent without recourse to the presumption. The situations covered by s.75 are:

- a) Violence or the threat of violence was used against C or another person at the time of the sexual act or immediately before;
- b) C was unlawfully detained at the time of the sexual act and D was not;
- c) C was asleep or otherwise unconscious;
- d) C's physical disability meant that C could not communicate his/her consent or lack thereof to D;
- e) C had been administered, without his/her consent, a substance capable of stupefying or overpowering C at the time of the sexual act.

Section 76 provides two *conclusive* presumptions:

- a) D intentionally deceived C as to the nature or purpose of the relevant act;
or
- b) D intentionally induced C to consent to the relevant act by impersonating a person known personally to C.

Where s.76 applies, assuming D admits the act, s/he is left with no defence.

No updated version of s.3 SOA 1956 appeared in the Act.

D's belief in consent only removes culpability if D '*reasonably believes*' that C is consenting. Whether a belief is reasonable '*is to be determined having regard to all the circumstances, including any steps [D] has taken to ascertain whether [C] consents*'.⁴⁴

The definition in s.74, the presumptions in ss.75 and 76 and the requirement for D's belief in consent to be reasonable apply equally to the four non-consent offences of rape, sexual assault by penetration, sexual assault and causing sexual activity without consent (ss.1 to 4).

(ii) Interpretation of ss.74, 75 and 76 – an overview

'Freedom' and 'capacity' themselves are not defined in the Act. Professors Ashworth and Temkin have criticised s.74 as involving two '*ideas which raise philosophical issues of such complexity as to be ill suited to the needs of criminal justice*'.⁴⁵ The Explanatory Notes deal with the philosophical complexities by telling us that '[a] person might not have sufficient capacity because of his age or because of a mental disorder'. This is even less that useful than would first appear as these situations are covered by other sections: mentally disordered complainants who lack the capacity to consent should fall within the offences

⁴⁴ See ss.1(1)(d) and (2) SOA 2003. Sections 2 to 4 contain identical provisions.

⁴⁵ J. Temkin and A. Ashworth, *The Sexual Offences Act 2003 (1) Rape, Sexual Assaults and the Problems of Consent* [2004] Crim. L.R. 328 at p336.

in ss.30 to 41 (which deal with complainants with a mental disorder) rather than the basic non-consent offences⁴⁶ and those who are physically unable to consent or unconscious are covered by one of the s.75 presumptions.

The courts have been scrupulous in avoiding giving any general interpretive guidance on the terms 'freedom' and 'capacity'. Baron Judge (the most active appellate judge in this area so far) summed up the judicial approach saying that '*the evidence relating to choice and the freedom to make any particular choice must be approached in a broad commonsense way*'⁴⁷ and in another case emphasised the importance of '*the actual state of mind of the individuals involved on the particular occasion*'⁴⁸.

Baron Judge and his colleagues could be criticised for simply harking back to the pre-SOA 2003 approach but this would be a lazy criticism. There are two more interesting drivers behind the case law on ss.74, 75 and 76. First is the judicial desire not to interfere with a statutory definition by providing a judicial gloss if it can be avoided. Second is a profound dislike of rigid compartmentalisation in sexual cases, which after all deal with some of the most private and fundamental human activity; some of the most extreme human behaviour comes before the courts in these cases and there is a judicial desire for flexibility in dealing with them. The desire for flexibility has ended up overriding the dislike of interfering with statutory terms. The result has been that the SOA 2003 provisions on consent have been applied in a rather different way to that envisaged to retain flexibility. In retrospect, this was not a surprising result. Sexual relations are an area of infinite variety and choice in the modern age. The kind of judgments in which private, personal sexual morality is criticised now rarely feature in the law reports. The courts appear desirous of giving effect to this freeing of societal-moral constraints. Sections 75 and 76 hamper that ability by creating rigid categories which are hard to use in court in a way which a jury will understand and which will result in a fair trial for D as well as C. The judicial response has been to move decisions out of the ss.75 and 76 statutory categories and into the realm of s.74 jury decisions. However, the effect of this approach has been an interference with statutory definitions, especially s.76. The knock-on effect of this overreliance on s.74 has been a reduction in judicial guidance to juries. Neither is a particularly laudable result. It would be easy to blame the judiciary, but again, that would be a simplistic view. The judicial line taken, and its results, are the symptoms rather than the cause of the problem in the SOA 2003.

⁴⁶ Although *R. v A.(G.)* [2014] 2 Cr.App.R. 5 stated that the Mental Capacity Act 2005 test should be used to determine C's capacity for the purposes of s.74 where C is said to lack mental capacity due to a mental disorder, the court also noted that the offences under s.30 onwards cover the full range of criminal sexual activity and should be given measured consideration when charging decisions are made.

⁴⁷ *R. (F.) v D.P.P.* [2013] 2 Cr.App.R. 21.

⁴⁸ *R v Bree* [2008] QB 131, [2007], 2 Cr.App.R. 13.

Careful examination of the symptoms will help us identify the underlying malady and, hopefully, provide a prescription for it.

(iii) The cases on interpretation of ss.74, 75 and 76

The case law which has interpreted s.74 has been driven almost entirely by deception cases; both because of the conclusive presumptions in s.76 and because of the absence of an updated version of s.3 SOA 1956. The role of deception cases in the development of s.74 may well not have been anticipated by those who brought forward the original draft of the SOA 2003⁴⁹ and some have argued that s.74 should not cover deception cases.⁵⁰ However, the route taken in the case law is the result of the way in which the s.76 presumptions were drafted and the way in which they take effect. The term “purpose” in the first presumption, for instance, is extremely broad (whose purpose? his/her main purpose? subsidiary purposes?) Certainly it is a lot broader than the pre-SOA 2003 case law examined above. As a result it potentially catches very many deceptions and once the presumption applies D has no defence. The result is a sledgehammer to crack the nut of the very few cases which merit it. The courts’ desire not to use the sledgehammer of s.76 made the wide use of s.74 in cases of deception inevitable.

In *Devonald*⁵¹ there was a dalliance with a literal reading of s.76. D was a middle-aged man who pretended to be a 20 year old female called Cassey to get C, a 16-year old boy, to masturbate over a webcam link. D’s purpose was some sort of revenge C who had ended a relationship with D’s daughter. The Court of Appeal found that the ‘purpose’ of the act went beyond C’s own sexual gratification and extended to the sexual gratification of a 20 year old called Cassey. As C was deceived about Cassey’s existence, D was guilty. This reasoning was criticised⁵² and has not been followed in subsequent cases.

The case of *Jheeta*⁵³ preceded *Devonald* and took a different line. In that case D created a bizarre fantasy world through which he persuaded his partner, C, who repeatedly tried to break up with him, to stay in the relationship and continue having sexual intercourse with him. D deceived C into believing that her life was in danger. He sent her text messages from a fictitious police officer telling her that she had pay for private security and that D would kill himself if she left him, so she needed to keep having sex with him or else she

⁴⁹*Protecting the Public*, above n.27, made no mention of deception outside what became the s.76 presumptions.

⁵⁰ J. Miles, “Sexual offences: consent, capacity and children” [2008] Archbold News 6, J. Rogers, “The effect of ‘deception’ in the Sexual Offences Act 2003” (2013) 4 Archbold Rev. 7.

⁵¹ [2008] EWCA Crim 527.

⁵² D. Ormerod, *Smith & Hogan’s Criminal Law* (Oxford, OUP, 2011) 13th edn., p634 and F. Gerry and C. Sjölin, *The Sexual Offences Handbook* (London, Wildy, Simmonds and Hill, 2010) 1st edn., p262.

⁵³ *R v Jheeta* [2007] EWCA Crim 1699, [2007] 2 Cr.App.R.34.

would be fined. The President of the Queen's Bench Division (as Baron Judge then was) concluded that s.76⁵⁴

is limited to the 'act' to which it is said to apply. In rape the 'act' is... intercourse... No conclusive presumptions arise merely because the complainant was deceived in some way or other by disingenuous blandishments of or common or garden lies by the defendant... Beyond this limited type of case, and assuming that, as here, section 75 has no application, the issue of consent must be addressed in the context of section 74.

The reasoning in *Jheeta* has held sway and solidified into two points: (1) issues involving deception and consent are to be resolved under s.74 if they can be⁵⁵ and (2) when s.76 is relied upon, it is given a stringent construction which ignores the troublesome term 'purpose' and focuses instead on whether the deception goes to the essence of the act of intercourse. Hallett LJ summarised the approach in *Bingham*, where she stated that *Jheeta* should be preferred to *Devonald* and noted that as s.76 'effectively removes from an accused his only line of defence...it will be a rare case in which section 76 should be applied'.⁵⁶ The effect is that where s.76 does not apply, the statutory presumption simply does not go before the jury *at all* and they are simply directed about s.74.

What kind of 'rare case' does fall within s.76? Baron Judge's comments in *Jheeta* suggest they will be few and far between. When it comes to specifics, deceptions as to gender (*McNally*⁵⁷), use of a condom (*Assange v Sweden*⁵⁸), withdrawal before ejaculation (*R (F) v DPP*⁵⁹), liability for prosecution for failing to have intercourse (*Jheeta*⁶⁰) and identity of the party at the other end of a webcam (*Bingham*⁶¹) have all been dealt with under s.74 rather than s.76, and in all these cases C has been found to have been deprived of the ability to choose whether to consent.

For different reasons the s.75 presumptions have also fallen rapidly into disuse. Section 75 does give D a defence, as the presumptions can be rebutted, but as these presumptions can so easily be rebutted, they have become about as forceful as a feather. Once there is an evidential issue about the presumption circumstances then the presumption itself no longer goes before the jury.⁶² For example, C says she was asleep when D had sex with

⁵⁴ *Jheeta* [2007] 2 Cr.App.R.34 at [24].

⁵⁵ see for example *Assange v Sweden* [2011] EWHC 2849 (Admin); (2011) 108(44) L.S.G. 17

⁵⁶ *Bingham* [2013] 2 Cr.App.R. 29 (sometimes referred to as *R v B*) at [20].

⁵⁷ *R v McNally* [2013] 2 Cr.App.R. 28.

⁵⁸ *Assange v. Sweden* (2011) 108(44) L.S.G. 17.

⁵⁹ *R (F) v DPP* [2013] 2 Cr.App.R. 21.

⁶⁰ Above n.54.

⁶¹ The appeal against the first trial where s.76 was used is *Bingham* [2013] 2 Cr.App.R. 29 (sometimes referred to as *R v B*). *Bingham* was convicted at his retrial based on s.74 alone (<http://www.hulldailymail.co.uk/Facebook-sex-blackmailer-Darrell-Bingham-jailed/story-20025241-detail/story.html>).

⁶² *White (Gavin)* [2010] EWCA Crim 1929 and *Mba (Lewis)* [2012] EWCA Crim 2773.

her. D says that C was not asleep and was in fact taking an active role in the sexual act. The result is that the presumption is rebutted *and* the jury will not be told about the s.75 presumption of lack of consent where C is asleep. It will be rare that D does not make a claim, however spurious, that C was consenting in a situation covered by the rebuttable presumptions. The problem with the presumptions is then laid bare: judicial directions to the jury then cannot mention the presumption. In fact, it goes further than that. The judge will need to be very careful about how s/he directs the jury to avoid an appeal based on the presumption going before the jury when it should not have done. The jury will be directed in less clear and forceful terms than the facts are likely to merit *because of* the presumption. It is no surprise that the Crown Court Bench Book (which is a reference manual for judges provided by the Judicial Studies Board) provides no guidance on the appropriate directions under ss.75 and 76 on the basis that the presumptions seldom apply.⁶³

The effect is that the aims of the proposals in *Setting the Boundaries* and *Protecting the Public*, that the law be as clear and unambiguous as possible and the boundaries of what is acceptable well understood, fail. The effect of the procedural failures of the ss.75 and 76 presumptions is that that they prevent what they were meant to achieve.

The way ahead for the ss.74, 75 and 76: Guiding and trusting rather than presuming

How to improve the situation? Can ss.75 and 76 be saved? Should they be? The practical problems of the presumptions are not their only difficulty. The lists themselves are problematic. That is not to say that the concept of situations where consent is presumed not exist is a problem, or that the non-exhaustive list in *Setting the Boundaries* was wrong; each situation does look, without further information, like one where consent will not exist. The difficulty comes when the ideas were put into practical form.

First, there is no compelling reason why particular situations were put into the rebuttable (s.75) or conclusive (s.76) presumption categories. Although the conclusive presumptions were intended to represent the common law position⁶⁴, this no justification in a statute which was intended to create new law rather than merely codify the old. There is nothing intrinsic to the situations in s.76 which makes them so much worse than, for instance, the situation where C is unconscious or physically unable to communicate consent, both of which fall into s.75.

⁶³ *Crown Court Bench Book. Directing the Jury* (London: Judicial Studies Board, 2010)

http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf at p371.

⁶⁴ See comments made by Beverly Hughes (Home Office Minister) during the committee stage of the Bill: Hansard, HC Standing Committee B, 1st Sitting, September 9, 2003, col.26.

Second, s.76 deals with deceit rather than mistake; D must have *intentionally deceived* C to engage s.76. The situation where C made a mistake of which D took advantage does not fall into either s.75 or s.76, yet the culpability of D and the effect on C may be the same as for a D-led deception.

Third, the fact that they are closed lists accentuates the problem as development based on new or previously unconsidered situations is not possible. Legislation is always weak when it tries to be over-prescriptive and pre-empt all possible situations which may arise, a problem seen throughout the SOA 2003. Closed lists were not the proposal in *Setting the Boundaries* for good reason: the meaning of consent had to be set out clearly, but the view was that '[t]here will always be a continuing role for the common law to develop as cases raise new issues over time'.⁶⁵

Fourth, legal presumptions with shifting burdens of proof may make sense for lawyers and judges, but the point of the presumptions was, in the main, to assist the public and the lay participants in a trial and they are unlikely to be assisted. In fact, the mental legal gymnastics required to use the rebuttable presumptions are wholly counter-productive when people are dealing what tend to be difficult factual scenarios. It is not surprising that the judiciary have effectively removed them from the trial process.

Illogical, closed lists given effect by legal presumptions and their contrived legal workings were unlikely ever to provide much in the way of clear and unambiguous assistance for juries about what consent means in the particular case before them. The broadness of the definition of consent in s.74 has so far been a saviour, enabling the courts to make the SOA 2003 more just to D in practice, but C's interests have suffered, due to the inability of judges to refer to the presumptions, and juries, who are making the ultimate decision, still need assistance.

Perhaps the simplest solution, building on progress made in this country and the experience in Australia⁶⁶, is to use mandatory judicial direction to assist juries with the application of the broad terms of s.74 and pass on Parliament's views about situations where consent is unlikely. Although there remain important issues around the efficacy of judicial directions⁶⁷, they remain the most direct means of communicating with a jury. Moreover, judicial direction in England and Wales has evolved in another area in sex cases: tackling stereotypes. The, now common, 'experience shows' direction which challenges stereotypes about sexual offending and its perpetrators and

⁶⁵ *Setting the Boundaries*, above n.26, paragraph 2.7.4.

⁶⁶ See helpful summaries of the Victorian experience and the Australian Model Criminal Code in *Setting the Boundaries*, above n.27, paragraphs 2.11.2 to 2.11.3.

⁶⁷ Helpfully summarised in C Thomas, *Are Juries Fair?* (London, HMSO, 2010), at section 1.4.

victims⁶⁸ has already provided some of the assistance to juries which was envisaged in *Setting the Boundaries*⁶⁹.

If ss.75 and 76 were repealed and replaced with a mandatory judicial direction that would enable the judge to use their direct line of communication to deal with the issues which touch on consent. The direction could be required to be used in cases which involve the scenarios currently listed in ss.75 and 76 (with the unhelpful and unnecessary word 'purpose' removed from the latter and the addition of the situation where D has knowingly taken advantage of C's mistake to gain consent) but judges should also be allowed to use the direction in other situations where it would be of assistance to the jury. The direction could state that consent is very unlikely in the particular situation, but that it is for the jury to determine on the particular facts and issues in the case [which would then be detailed] whether there was in fact consent in this instance. The direction retains a line of defence for the s.75 situations, and provides one for the s.76 situations, but still enables the jury to be given clear directions about what is, and what is not, consent. For example, D is charged with the rape of C. C says that he was asleep and did not consent. D says that C was asleep, but they were in a long term sexual relationship and D often, consensually, woke C by having sex with him. The jury are then able to bear in mind that it is highly unlikely that where C is asleep he was consenting, but they are also able to find that C might have been consenting in view of the context of the relationship, and importantly that D might have reasonably believed that C was consenting. Providing the direction in written form (an increasingly common practice⁷⁰) as well as oral would do much to deal with the concern that a jury might misinterpret the direction.⁷¹

Such a change would enable all relevant evidence to go before the jury and for them to be as well equipped as possible to reach a proper verdict based upon it. The law would finally do what *Protecting the Public* claimed was its aim, to clearly set out what constitutes unacceptable behaviour whilst allowing for the complexities of people's private lives.

Is there space left here for an updated version of the s.3 SOA 1956 offence to deal with deceptions which do not vitiate consent, or should criminal deception be left to s.74 and the non-consent offences alone? Professor Spencer has actively argued in favour of the re-enactment of s.3 SOA 1956⁷² and the current edition of Smith & Hogan also advocates this approach⁷³ to

⁶⁸ *Crown Court Bench Book*, above n.63 at pp353-362. This type of direction was suggested by the author in *Inconsistent Victims?* Counsel [2007] Feb, 10-11.

⁶⁹ Section 2.11 and Recommendation 7 of *Setting the Boundaries*.

⁷⁰ *Crown Court Bench Book*, above n.63 at p3.

⁷¹ Written directions were shown to increase juror understanding in *Are Juries Fair*. A summary of the findings can be found in that report at section 3.3, pp38-39.

⁷² J. Spencer, *Sex by Deception* [2013] 9 Archbold Review 6.

⁷³ Above, n.52 at p734.

fill a perceived gap and avoid over-criminalisation and/or under-conviction. Despite the initial attraction of this suggestion, it may not be the best route for the law to take now, ten years into the life of the SOA 2003.

It is important not to lose sight of where the law now is and how it has developed over the last ten years. To either take deceptions falling short of s.76 out of the ambit of s.74 completely by decriminalising them or belatedly enacting a new s.3 SOA 1956 involves rejecting the status quo. Is there any reason to do this? We now have effectively two types of deception in relation to sexual activity – the type which curtails C’s freedom and capacity to choose to consent and the type which does not – rather than the three envisaged by *Consent in Sex Offences* and *Setting the Boundaries*. Deception which curtails C’s freedom and capacity to choose to consent may lead to a conviction under ss.1 to 4 of the SOA 2003 and while all other deceptions result in no criminal sanction. Is this an unacceptable state of affairs? It is clear that conduct which would previously have been caught by s.3 SOA 1956 is now caught by s.74. In *Jheeta*, for example, D’s conduct pre-dating the coming into force of the SOA 2003 was charged under s.3 SOA 1956, whilst the later offending was charged as rape. Keith Laird argues cogently that D’s conduct in *Jheeta* is “a paradigmatic example” of the kind of activity which should be caught by s.74.⁷⁴ An updated version of s.3 SOA 1956 would therefore involve either a substantial narrowing of the s.3 offence to criminalise conduct not currently criminalised by the non-consent offences, or a fundamental rethinking of s.74 and the non-consent offences to limit them and cover some of situations they currently cover with an updated s.3 offence. There is no need for any such change, in fact there are now four arguments against a re-enacted version of s.3 SOA 1956.

First, s.3 SOA 1956 is simply too caught up with the gender-imbalanced notions of consent which have bedevilled this area of criminal law for so long. Even the articles on the point tend to look at an ‘evil’ man deceiving a ‘gullible’ woman.⁷⁵ But consent under the SOA 2003 is no longer trapped within this paradigm; Coleridge J’s view of consent as necessarily involving submission is no longer quoted with approval in the appellate courts. The point of s.3 SOA 1956 and its predecessor⁷⁶ was to catch wicked men who trapped women into having what the women knew was sexual intercourse. Such deception still occurs, now with both men and women as its victims. The situations where such deceptions occur are trafficking and forced or sham marriages (areas identified in *Setting the Boundaries*)⁷⁷ and duping of those

⁷⁴ K Laird, *Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003* [2014] Crim. L.R. 492 at p509.

⁷⁵ For example H. Gross, *Rape, Moralism and Human Rights* [2007] Crim. L.R. 200.

⁷⁶ s.3(2) Criminal Law Amendment Act 1885.

⁷⁷ *Setting the Boundaries*, above n.26, paragraphs 2.18.4 to 2.18.6.

who are particularly vulnerable to threats or deceit due to a mental disorder. There are now specific offences to deal with all of these situations.⁷⁸

Second, a broad deception offence risks catching those who currently, rightly, are not criminalised. We then run the risk of making a reality of Professor Herring's suggestion that any party to a sexual act, if mistaken about a fact in relation to it, is a victim of a non-consent sexual offence.⁷⁹ A major problem with Professor Herring's argument is that both sides of a sexual act might find themselves in the dock. Consider the situation where C definitely did not want to get into a relationship and D definitely did not want to have a one night stand. They had sex, both assuming that the other was of the same view. Both have failed to generate a meeting of minds and so, on Professor Herring's thesis, both are victim and perpetrator. Both knew they were having sex with the other person and would be extremely surprised at being both victim and perpetrator of a sexual offence, as would any jury expected to try them. Professor Herring's principle is not a practical solution for heartbreak. An updated s.3 offence would have to be carefully drafted to avoid catching C and D in the above example. Every 15 year old couple having a kiss is already criminalised by ss.9 and 13 of the SOA 2003.⁸⁰ Adding potentially every adult engaged in sexual activity to the list of criminals is surely not a sensible step.

Third, assuming that s.3 SOA 1956 could be redrafted to avoid duplicating offences like trafficking or catching behaviour which is simply causing heartbreak, the only way for the offence to go would be to cover the same situations as the non-consent offences: it would end up becoming 'rape lite'. Less serious versions of criminal offences are hardly unknown; ss.18 and 20 of the Offences Against the Person Act 1861 are an obvious example. However, the co-existence of ss.18 and 20 is readily understandable and necessary: sometimes great harm is done by those intending rather less and as such they are less culpable. The necessity for 'rape lite' rather more difficult to see. If C's consent is not vitiated, does this not fall into the heartbreak category mentioned above; there is no harm for the criminal law to be involved with. If C's consent is vitiated, that is a non-consent offence. There is thus a conceptual problem, as highlighted above, but there is also a practical problem. The by-product of a scheme with lesser alternatives is the situation when there is a guilty plea to, or a conviction for, the lesser offence when the proper offence was the more serious ones. In difficult cases the middle way looks very attractive. There is a great risk of 'difficult' rape cases being

⁷⁸ Forced, and arguably sham, marriages are covered by the Anti-social Behaviour, Crime and Policing Act 2014 s.121, trafficking is covered by s.59A SOA 2003 and paying for the services of an exploited person is covered by s.53A SOA 2003. The use of threats or deception to coerce those vulnerable due to a mental disorder is covered by the offences in ss.34 to 37 SOA 2003.

⁷⁹ See J. Herring, *Mistake Sex* [2005] Crim. L.R. 511.

⁸⁰ The offences covering sexual activity with children (ss.9 to 12) which can be committed by someone who is themselves a child due to s.13.

charged as 'rape lite' to try and secure a conviction. Also, with the further difficulty of 'rape lite' as a jury alternative on an indictment which could result in a middle way guilty verdict which does not reflect the evidence, but does reflect how difficult sex cases can be to try. D who ought to be acquitted risks being convicted of 'rape lite'; C who knows the offence was really rape is left feeling even more badly used by the criminal process than s/he already does.

Fourth is a misreading of the problem. The claim that catching deceptions under s.74 rather than s.3 SOA 1956 over-criminalises with the linked concern that juries simply will not convict is anecdotal and ignores what has happened in reported cases. In all the deception cases discussed above, juries have convicted of offences under the non-consent offences (ss.1 to 4 SOA 2003). Even in the oft-quoted case of *Linekar*⁸¹ (where the issue was whether D's failure to pay £25 for sex meant that the sex was rape) the jury convicted of rape; it was the Court of Appeal which determined that this was not rape, but would have been the offence under s.3 SOA 1956. The fact that juries will convict in an area notorious for high acquittal levels would suggest societal support for s.3 SOA 1956 situations being covered by the offence of rape. If it looks like rape, it sounds like rape and is convicted as rape, then there is a very good argument for saying that it *is* rape.

The strongest criticism of the status quo is that it falls back on 'commonsense' to determine which kind of deceptions vitiate consent and which do not. However, that line drawing exercise would still be necessary, and indeed would require two lines rather than one, if a further deception-based sexual offence was enacted. To refuse to draw any line means accepting Professor Herring's argument discussed above.

It was unfortunate that *Protecting the Public* failed to even mention deception, let alone explain why it was not including an updated s.3 SOA 1956 offence. However, that debate is now behind us. When we consider where the law on deceit in sexual cases actually is, we see a rather better place – in this respect at least – than we saw on 30th April 2004. There is no place for an updated version of s.3 SOA 1956, and the law is better for it.

The role of D's belief in C's consent under the SOA 2003

The last great change to consent in the SOA 2003 was in relation to D's state of mind. D is saved only by *reasonably* believing that C was consenting; a genuine but unreasonable belief in consent will not save D. The reasonableness of the belief is to be determined having regard to *all* the circumstances, including any steps the defendant has taken to ascertain whether C consents.⁸² This was an emphatic change from the mainly

⁸¹ See above n.17.

⁸² ss.1 to 4 SOA 2003.

subjective approach in *DPP v Morgan*⁸³. It was arguably the most fundamental, and radical, change to consent⁸⁴ and had not been recommended by any of the official reports and reviews which preceded the SOA 2003⁸⁵.

There have been few appeal cases under the SOA 2003 where reasonable belief has featured as an issue. This is, perhaps, because the judiciary, at first instance and appeal, have embraced it. The criminal bar and the police appear to have been in favour before the change in the law took place⁸⁶, making acceptance of the new law more likely.

There was some ambiguity engineered into the final wording of the provisions. The original clauses in the Bill would have made for a stark reasonableness test with, it was feared, no space for D's personal characteristics to be considered at all. There followed amendment as the Bill progressed through Parliament to provide some space for consideration of D's characteristics. The Home Affairs Committee greeted the amendment warmly stating that '*the new test will allow the jury to look at characteristics – such as a learning disability or mental disorder – and take them into account*'.⁸⁷ But the government did not make so great a concession stating merely that '*the revised version of the reasonableness test moves away from the concept of the “reasonable person” and requires the prosecution to prove that the defendant did not have a reasonable belief in consent*'⁸⁸. Which is the better description of the effect of the final legislation depends on one's reading of the requirement to consider '*all the circumstances*' when deciding whether it is proved that D did not reasonably believe in consent.

In dealing with a drunken defendant in *Whitta*⁸⁹, the Court of Appeal unsurprisingly took a line consistent with the pre-SOA 2003 case law and the intention behind the Act in deciding that '*all the circumstances*' did not include D's intoxication. D, whilst drunk, mistook a girl's mother for the girl and digitally penetrated the mother. The Court of Appeal, dealing with an AG's referral of sentence, commented that the⁹⁰

⁸³ See above, n.20.

⁸⁴ See discussion in J. Temkin and A. Ashworth, *The Sexual Offences Act 2003 (1) Rape, Sexual Assaults and the Problems of Consent* [2004] Crim. L.R. 328 at pp340-342.

⁸⁵ See *Setting the Boundaries*, above n.26, Recommendations 8 and 9 and paragraphs 2.12.1 to 2.13.14, and *Consent in Sex Offences*, above n.25, paragraphs 7.34 to 7.44.

⁸⁶ Approval of the Criminal Bar Association and Metropolitan Police Service as noted by Baroness Noakes during debate on the Bill: HL Deb, 31 March 2003 c1070.

⁸⁷ Home Affairs Committee, *Sexual Offences Bill* (Fifth Report of Session 2002-03, HC 639, 2003) at paragraphs 23.

⁸⁸ Baroness Scotland of Asthal QC, HL Deb, 17 June 2003, c669.

⁸⁹ *Whitta* [2007] 1 Cr App R (S) 122.

⁹⁰ *Ibid.* at [15]. No appeal against conviction was heard by the full court on behalf of Whitta.

the offence is committed if a reasonable (and therefore sober) person would have realised that the person penetrated or sexually touched was not the person whom the defendant thought he was consensually penetrating or touching.

In *R v M(M)*⁹¹ the Court of Appeal acknowledged that the wording of the SOA 2003 test *might* be 'looser' than the reasonable man test and could result in a defendant's mental disorder being part of the consideration of what he reasonably believed. The issue was revisited in *R v B(MA)*⁹² where the Court of Appeal stated emphatically that⁹³

A delusional belief in consent, if entertained, would be, by definition, irrational and thus unreasonable, not reasonable. If such delusional beliefs were capable of being described as reasonable, then the more irrational the belief of the defendant the better would be its prospects of being held reasonable.... It does not follow that there will not be cases in which the personality or abilities of the defendant may be relevant to whether his positive belief in consent was reasonable. It may be that cases could arise in which the reasonableness of such belief depends on the reading by the defendant of subtle social signals, and in which his impaired ability to do so is relevant to the reasonableness of his belief.... But once a belief could be judged reasonable only by a process which labelled a plainly irrational belief as reasonable, it is clear that it cannot be open to the jury so to determine without stepping outside the Act.

In *R v B(MA)* the Court appeared to be driven by two arguments. First that the law on provocation showed the problems of an overly subjective approach to a reasonable person test when it tried to fathom the likely actions of a reasonable glue-sniffer⁹⁴ and the court had no desire to enter that legal cul-de-sac again. Second, that this conscious move by Parliament away from the *DPP v Morgan* approach meant that the objective approach had to be paramount.

In neither *R v M (M)* nor *R v B (MA)* did the possibility in fact arise that D had a belief, reasonable or otherwise, in C's consent. The relative ease with which both cases dealt with unreasonable, delusional beliefs does not assist with the more difficult area which arose in *R v TS*⁹⁵ which fell under the pre-SOA 2003 law. In that case D had Asperger's syndrome which made it harder for him to understand his wife's denials of consent. Under the SOA 2003, how emphatic must C's refusals be before D's Asperger-based belief in her consent becomes unreasonable? Deciding this may make for a difficult task for the courts but

⁹¹ *R v M(M)* [2011] EWCA Crim 1291.

⁹² *R v B(MA)* [2013] 1 Cr App R 36.

⁹³ *Ibid* at [41].

⁹⁴ *R. v Morhall* [1996] AC 90; [1995] 2 Cr App R 502.

⁹⁵ *R v TS* [2008] EWCA Crim 6.

both *R v M(M)* and *R v B(MA)* leave it open to the courts to find that D's belief in these circumstances could be reasonable.

In general the reasonable belief test has succeeded thus far because it has been quickly accepted and is clear, concise and, so far, easy to apply. The objective nature of the test, so different from the direction of travel in relation to the mental element in crime generally, acknowledges that sexual offending is different to other offending in private and political terms. This Act's pragmatic, protective approach may be difficult for die-hard subjectivists to stomach, but the law here must look wider than the dictates of strict legal consistency for consistency's sake. It is trite but nonetheless true that the cost to D of checking that C is consenting is very slight whereas the cost to C of being subjected to unwanted sexual activity is very high indeed.

Conclusion

The SOA 2003 was a radical Act, more radical in some ways than *Setting the Boundaries* and *Consent in Sex Offences*. The reformulation of consent as no longer something sought and given but as something freely agreed by parties with the capacity to make that choice was a landmark in sexual offences law. Clarification of the law on consent and provision of guidance for practitioners and citizens as to how it was to be applied was much needed. It is very unfortunate that the means used to achieve the aim of guiding juries – the presumptions – have had the opposite effect and prevented direction for juries on the tricky job of putting the broad concepts in s.74 into effect in particular cases. The radical work begun by the Act can be completed by the reformulation of the presumptions as judicial directions, as suggested above, enabling juries to have the guidance to consider all the evidence properly to do justice to both C and D in every case. Continuing with the presumptions will mean that juries continue to be deprived of guidance about what Parliament considers are situations when consent will not exist; this area of reform is only half-complete.

The success of s.74 has left behind the argument about an updated s.3 SOA 1956 offence: there is no need or room for it now. The broad terms of s.74 have enabled that elusive and difficult thing, the commonsense balance to be struck. The fears of over-criminalisation have not been realised and it is evident that juries are willing to convict of the non-consent offences where there has been deception. With laws on trafficking, forced marriages and threatening and deceiving those vulnerable due to a mental disorder, there is no longer a need for s.3 SOA 1956 to be re-enacted.

The most radical change of all, that sweeping away of *DPP v Morgan* and replacing it with the need for D not just to believe in C's consent but to be *reasonable* in that belief, has been the most straightforward change in its application. There will undoubtedly be difficult cases to come, but the clear

legislative intent behind the Act (as outlined in *R v B(MA)*) means that the interpretation of this part of the non-consent offences is likely to be less troublesome than ss.74, 75 and 76 have been.

This radical Act has made great strides in the area of consent, but there is more to do. It has led to submission no longer being part of consent, culpable deception no longer being side-lined into a little-prosecuted, lesser offence and judges directing juries to leave stereotypes and preconceptions about victims and perpetrators at the court door. But the presumptions have been an abject failure. It is to be hoped that now a brave decision can be made in government to do away with the presumptions and trust the judges, lawyers and juries at trial, at least a little.

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