

## CHAPTER 34

# Sexual offences

---

### Rape p 949

The Court of Appeal has held that if a complainant has, in consequence of drink, temporarily lost her capacity to choose whether or not to allow intercourse any consent given is not a valid consent and there would be a rape. However, where a complainant has voluntarily consumed large quantities of drink but remains capable of choosing whether or not to have intercourse and agrees to do so, there is no rape. Capacity to consent may evaporate long before unconsciousness. As a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion: [*R v Bree* (2007) Times, 7 May] The above is equally applicable in the context of offences involving other types of non-consensual conduct under the SOA 2003.

Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. Therefore, the Court held, the fact that D might not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under SOA 2003, s 74 in relation to the sexual activity between D and the complainant. The Court noted that, however, the party suffering from the sexually transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease. [*R v B* [2007] 1 Cr App Rep 388]

---

### Sexual assault p 952

The Court of Appeal has held that the 'intentional touching' element of this offence falls into the category of a basic intent and voluntary intoxication cannot be relied upon to negate this intent. The 2003 Act has not altered the law so as to make voluntary intoxication available as a defence to an allegation of intentional touching. [*R v Heard* (2007) Times, 6 March] This decision is equally applicable to other offences under SOA 2003 involving intentional touching.

---

### Sexual assault of a child under 13 p 952

The offence of intentionally inciting a child under 13 to engage in sexual activity, contrary to the Sexual Offences Act 2003, s 8, can be committed even though it is not possible to identify any specific or identifiable child to whom the incitement was

addressed. It matters not whether the incitement was directed at a particular child, a very large group of children or whether they could be identified or not. [*Jones* [2007] EWCA Crim 1118] This decision is equally applicable to the other offences of incitement to sexual activity in SOA 2003.

---

### **Causing a child to watch a sexual act p 955**

SOA 2003, s 12 does not require that sexual gratification has to be taken immediately; ie the section does not require that the offence can only be committed if the purported sexual gratification and the viewed sexual act, or display of images, were simultaneous, or contemporaneous or synchronised. The offence under s 12 can be committed where the defendant's purpose involves immediate or deferred or immediate and deferred gratification. Thus, the offence can be committed, for example, where the defendant causes a child to watch a sexual act to put the child in the mood for future sexual abuse, as well as where he does so because he derives enjoyment from seeing him watch the sexual act [*Abdullahi* (2006) Times, 24 August]. This decision is equally applicable to other offences under SOA 2003 in which the phrase appears.

---

### **Schedule 3 offences p 976**

The Sexual Offences Act 2003 (Amendment of Schedules 3 and 5) Order 2007 added the following offences to the list in Sch 3: causing or inciting child prostitution or pornography, controlling a child prostitute or a child involved in child pornography, arranging or facilitating child prostitution or pornography.

---

### **Duration of notification requirement p 976**

There has been added to the category of offenders at the start of the material, 'Offenders who are sentenced to life imprisonment, or to thirty months or more', another category of offenders, persons sentenced to imprisonment for public protection under the Criminal Justice Act 2003, s 225. This amendment was made by the Violent Crime Reduction Act 2006.

---

### **Trafficking for sexual exploitation p 986**

The Violent Crime Reduction Act 2006 (VCRA 2006) inserted s 60B into SOA 2003. Section 60B provides that if a person has been arrested for an offence under SOA 2003, ss 57 to 59, a constable or a senior immigration officer may detain a relevant vehicle, ship or aircraft –

- (a) until a decision is taken as to whether or not to charge the arrested person with that offence;
- (b) if the arrested person has been charged, until he is acquitted, the charge against him is dismissed or the proceedings are discontinued; or
- (c) if he has been charged and convicted, until the court decides whether or not to order forfeiture of the vehicle, ship or aircraft.

A vehicle, ship or aircraft is a relevant vehicle, ship or aircraft, in relation to an arrested person if it is a land vehicle, ship or aircraft which the constable or officer concerned has reasonable grounds for believing could, on conviction of the arrested person for the offence for which he was arrested, be the subject of an order for forfeiture made by a court under s 60A (below).

A person (other than the arrested person) may apply to the court hearing proceedings against the arrested person (or if proceedings have not commenced, a magistrates' court) for the release of a land vehicle, ship or aircraft on the grounds that:

- (i) he owns the vehicle, ship or aircraft;
- (ii) he was, immediately before the detention of the vehicle, ship or aircraft, in possession of it under a hire-purchase agreement; or
- (iii) he is a charterer of the ship or aircraft.

By SOA 2003, s 60A (inserted by VCRA 2006) a forfeiture order may be made by the court on conviction on indictment under SOA 2003, ss 57 to 59 in respect of a land vehicle, ship or aircraft used or intended to be used in connection with the offence if the convicted person owned it or was a hire-purchaser of it, or was a director, manager or secretary of a company which owned it or was a hire-purchaser of it, or was its driver (land vehicle) or charter or captain (ship or aircraft). In some cases there are limitations on the forfeiture of a ship or aircraft under these provisions.