

1. Page 525: Fraud & the Conclusive Presumptions against Consent

Section 76(2)(a) Sexual Offences Act 2003

Two cases on consent induced by fraud arose in 2007:

R v B [2006] EWCA Crim 2945, [2007] 1WLR 1567

Complainant alleged D had raped her using force. D pleaded consent. D was HIV positive and sexual intercourse had been unprotected. The judge directed the jury on two alternatives: they could decide that the complainant had not consented 1) due to force or 2) due to the fact that she would not have consented to have sex with an HIV+ man had she known of his medical condition. D appealed. The Court of Appeal stated that D could have committed a s20 OAPA 1861 offence (GBH) had HIV been transmitted without consent but there was no fraud under s76(2)(a) for the purposes of rape because her ignorance of the risk of infection did not negate consent to sexual intercourse.

R v Jheeta [2007] EWCA Crim 1699

In order to prevent his relationship with C from ending, D perpetuated an unusual and unpleasant fraud over many years in which he sent her anonymous threatening email and text messages ('We are going to kidnap you' etc) and then, at her request, purported to lodge a complaint to the police. He then sent messages to her from bogus police officers threatening that she must continue her relationship with him or he would commit suicide and she would be fined. She continued the relationship unwillingly for another two or three years but would not have done so had it not been for the threats. D was eventually prosecuted for rape and pleaded guilty on legal advice. Some occasions of sex he admitted were not consensual. On appeal to the Court of Appeal it was held that s76(2)(a) did not apply. The deception was as to neither the nature nor the purpose of the act. C was sexually experienced and knew both the nature and purpose of intercourse and the identity of D. S76 should be defined narrowly. Fraud as to nature/purpose would exclude cases like *Linekar*. It might include cases such as *Tabassum*. It would certainly include a case such as *Green* [2002] EWCA Crim 1501 where bogus medical examinations on young men for impotence were conducted by a qualified doctor. They were wired up to monitors while they masturbated. This was a clear deception as to purpose. However, D's conviction was confirmed on the basis that C had sometimes not consented to sex under s74 (ie: lack of free choice).

JR Spencer in 'Three New Cases on Consent' Cambridge Law Journal [2007] at 493 argues that this case reveals a gap in the law produced by the abolition of s3 SOA 1956 (procuring a woman to have sexual intercourse by false pretences).

2. Page 518 - S75(2)(d) Capacity and Voluntarily Induced Intoxication

Two new cases on the issue of capacity to consent when a complainant is drunk but conscious:

R v Nathan Wright [2007] EWCA Crim 3473 (16.11.2007)

The Bree direction concerned two alternatives: whether 1: Complainant had capacity to consent notwithstanding drunken consciousness and 2. Complainant had consented notwithstanding drunkenness. If capacity and consent were absent, then it would be rape. This did not affect the sort of case where there was a stark conflict between the accounts

of complainant and defendant as to whether there was consent. Of course there are cases in which, not least following the decision of this court in *Bree*, judges must be careful to give a studied direction about capacity to consent when drink is involved and there is a semiconscious complainant. On the facts this was not one of them.

R v H [2007] EWCA Crim 2056

The issues of consent and capacity to consent were ones of fact for the jury and should not have been withdrawn from the jury without clear evidence.