Model Answers to Potential Exam Questions

Chapter 10

Provide a critical commentary about the new law of rape under s.1 of the Sexual Offences Act 2003

The old law on sexual offences was described as a “patchwork quilt of provisions” by the Setting the Boundaries (2000) review. The old common law rules and values were codified in the Sexual Offences Act 1956. Rape was governed by s.1 of the Sexual Offences Act 1956. The Government published their own White Paper entitled: Protecting the Public — Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences (2002). The Sexual Offences Act 2003 entered into force on 1st May 2004. It covers the following offences in order of severity: rape, assault by penetration, sexual assault, offences against children and incestuous family relationships.

Rape is a statutory offence under s.1(1) of the Sexual Offences Act 2003. It now attracts a maximum sentence of life imprisonment to reflect the seriousness of the crime. The definition is as follows:

“A person (A) commits an offence if he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis; B does not consent to the penetration, and A does not reasonably believe that B consents.”

The actus reus and the mens rea of the crime can be split up into two categories. The actus reus is: penile penetration of vagina, anus or mouth, and lack of consent by the victim. The mens rea is: intention to penetrate, and a lack of reasonable belief in consent. These will be examined in turn.

The actus reus of rape has been expanded to include the mouth of the victim and the courts now take oral rape very seriously. The new law was applied in Ismail (2005). Rape under the 2003 Act requires penetration by a penis, which has been defined as “a continuing act from entry to withdrawal” by s.79(2). It follows that only a man can commit this particular offence.

A woman can, however, be a secondary party to rape by ordering a victim to remove clothes and have intercourse, as was seen in DPP v K and C (1997). This establishes that women can be just as blameworthy as men under the offence of rape. A defendant also commits rape if he penetrates with the other person’s consent and then fails to withdraw when consent is revoked. This was confirmed in Kaitamaki (1984) and Cooper and Schaub (1994).

Part of the actus reus of rape is a lack of consent by the victim. There is no need for the use of force or for the victim to submit (i.e. surrender) to intercourse as a result of threats. In Olugboja (1982) Dunn J said:
“It is not necessary for the prosecution to prove that what might otherwise appear to have been consent was in reality merely submission by force, fear or fraud. The jury should be directed that consent, or the absence of it, is to be given its ordinary meaning.”

Therefore, the preconception that rape must be a violent act in order to be an offence is rejected. Kidnapping a victim and then having intercourse with her is sufficient evidence that consent was not made by choice as seen in McFall (1994). Tricking a victim into a relationship is also evidence that her consent was not a free choice as seen in Jheeta (2007). A victim must consent by choice and have the freedom and capacity to make that choice according to s.74 of the 2003 Act. The cases illustrate that many different scenarios can point to a lack of free choice. The 2003 Act has much more to say on the issue of consent. Section 75(1) of the 2003 Act makes presumptions about consent. The victim is presumed not to have consented in certain circumstances and it is then up to the defendant to submit evidence to prove otherwise. These provisions are known as evidential presumptions. The circumstances are listed in s.75(2) and include the following:

(a) any person was, at the time of the act or immediately before, using violence against [V] or causing [V] to fear that immediate violence would be used against him;
(b)... or against another person;
(c) [V] was, and [D] was not, unlawfully detained at the time;
(d) [V] was asleep or otherwise unconscious at the time;
(e) because of [V]’s physical disability, [V] would not have been able at the time of the relevant act to communicate to [D] whether [V] consented;
(f) any person had administered to or caused to be taken by [V], without [V]’s consent, a substance which, when it was administered or taken, was capable of causing or enabling [V] to be stupefied or overpowered at the time.

If one of the criteria above is satisfied, then there is a presumption that the victim did not consent and the burden of proof falls to the defendant to prove that the victim did in fact consent. In Larter and Castleton (1995) it was held that a sleeping victim does not consent, now under s.75(2)(d). In Camplin (1845) it was held that an involuntarily intoxicated victim does not consent, now under s.75(2)(f). In Malone (1998), however, it was held that this evidential presumption does not exist when the victim in voluntarily intoxicated. The repercussions of this case are that drunken women are deemed to be consenting in law unless they can prove otherwise. In Bree (2007) Sir Igor Judge said:

“A drunken consent is still consent. Where [V] has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape.”

In addition to these evidential presumptions about consent, section 76 of the 2003 Act also makes conclusive presumptions about consent. This means that the victim is
presumed not to have consented if she was deceived in some way, and this time the defendant is not allowed to produce evidence to prove otherwise. This could include instances where the defendant has lied about his real identity. A defendant cannot argue that he had a reasonable belief in consent or provide evidence to prove consent, because he knew from the beginning that the victim was being misled. These provisions support the victim of rape in that the defendant cannot wriggle out of his charge by claiming that the victim genuinely consented at the time.

The deception must relate to the nature or purpose of the intercourse. An impersonation of the victim’s husband, fiancé or boyfriend will suffice, as it did in Elbekkay (1995). However, if the defendant simply lies about his financial status or professional prospects, the nature and purpose of the intercourse remains unaffected. In Flattery (1877) the victim thought that intercourse was surgery to cure her fits. In Williams (1923) the victim thought that intercourse would help her vocal performance. In Linekar (1995) deception as to wealth and professional status did not affect consent. In Jheeta (2007) Sir Igor Judge said:

“The ambit of s.76 is limited to the “act”. In rape cases, the “act” is vaginal, anal or oral intercourse. Section 76(2)(a) is relevant only to the rare cases where [D] deliberately deceives [V] about the nature or purpose of one or other form of intercourse. No conclusive presumptions arise merely because...of common lies by [D].”

This statement by Sir Igor Judge makes it clear that the deception must relate to the nature and purpose of the intercourse itself, not personal trivialities of the parties. A victim is therefore not protected against all deception.

The mens rea of rape is a lack of reasonable belief in consent. The defendant must also intend to penetrate the victim with his penis — it cannot be an accident and he cannot be negligent or reckless. Before the 2003 reform, the defendant was allowed to argue that he had an honest but unreasonable belief in consent. This meant, in practice, that he could have a completely ridiculous belief in consent as long as it was honestly held. It must now be proved that the defendant had a reasonable belief in consent, and the word “reasonable” implies a reasonable man test. The jury must therefore ask themselves: “did the defendant believe that his girlfriend consented and would the reasonable person agree?” The jury will ignore intoxication if the defendant was drunk at the time and simply ask the same question, whether his belief was reasonable, as seen in Woods (1981). To illustrate this point, in Fotheringham (1989), the defendant was drunk and climbed into the marital bed where the babysitter was sleeping. He had intercourse with the babysitter under the genuine belief that she was his wife. The trial judge said:

“the reasonable grounds are grounds which would be reasonable to a sober man.”

Watkins LJ (in agreement) said on appeal:
“in rape, self-induced intoxication is no defence, whether the issue be intention, consent or, as here, mistake as to the identity of the victim.”

This is a very strict test which supports the victim: a defendant cannot use his voluntary intoxication to argue that he genuinely believed that the victim gave consent, even though this may genuinely have happened.

A final thought may be said on the recent developments in diseased sexual intercourse and the issue of consent. Sexually transmitted diseases and sexual intercourse are treated separately by the criminal courts. If a victim does not consent to sexual infection, the defendant will be charged with a non-fatal offence such as grievous bodily harm. This was established in Dica (2004). However, the victim still consented to the act of intercourse and so it is not rape, as confirmed in the recent case of B (2006). Latham LJ said:

"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 is not thereby vitiated (i.e. cancelled). The act remains a consensual act. However... such consent does not include consent to infection by disease."

It is technically correct to say that the victim does consent to the intercourse, but not the disease. If she is held not to consent to either the intercourse or the disease, the defendant would face charges of grievous bodily harm and rape. This may not be an accurate account of what really happened.