

**Crime Exam 2007**  
**Question 3 – 87%**

Did Donald commit rape?

Donald may be charged with rape under s 48 CLCA. He clearly satisfies the physical act of intercourse under s 5(a) and s 73(i), although the physical circumstance of want of consent is not as clear.

For rape to occur, intercourse must take place without the other person's consent. Clearly here Valerie did not *want* to have intercourse, but the concept is not as clear and her reasons for submission must be assessed. The prosecution will argue that Valerie was threatened and blackmailed in a manner that vitiates consent. With regard to threats, *Hallett* provides that threats against the victim or threats against their family will mitigate consent. This is not as clear as Donald is threatening *himself*, although it may be argued that he is a person close to Valerie's heart. This is not a strong argument however; she is clearly distanced from him due to his drinking and failure to pay the rent, such that she broke up with him. Rather, it appears that he blackmailed her, and offered compliments and promises to change, all of which *Egan* provides do not change consent, and do not make it rape. The prosecution would argue that she was pressured to consent by false representations (s 60A CLCA) although there is nothing to suggest his promises are false. The fact that Valerie was ashamed does not mean she was pressured. Consequently it is arguable that consent was established although the argument could go back and forth and would be decided by the jury.

In the event it is held that consent was not present, the prosecution must prove Donald's fault element: that is, that he honestly, not necessarily reasonably, believed that Valerie was consenting (*Morgan*). The prosecution will argue that he realised the possibility of non-consent (but on the facts there was little to suggest that he did), or ought to have been alerted to it. As far as Donald knew, he had wooed Valerie back with his apologies and promises, and they had agreed "to make the baby." Consequently there is a strong argument that he did not possess the knowledge (s 48(1)(a)) or reckless indifference (s 48(1)(b)) required for rape.

Should the fault element be established, the defence may argue that intoxication rendered Donald's act involuntary pursuant to *O'Connor*. Evidence of intoxication is relevant in cases of alleged rape where the prosecution must prove recklessness and the defendant denies awareness of a risk. It also may adduce evidence that reveals a defendant was aware of a risk and was given more courage to go ahead with it, but that is hardly the case here. Nor did Donald become intoxicated to strengthen his resolve to commit rape (s 268(1)(b)): he became so intoxicated through the fact his drink was spiked by Neville, to Donald's unawares. Thus *O'Connor* provides that his actions may have become so involuntary that he was not criminally liable or able to form an intention to do a physical act. Clearly here he suffered from a high blood alcohol content and a large dose of rohypnol, which an expert can testify would have impaired his judgement. It seems that intoxication would act as a way of avoiding a chance of rape due to the impairment of his inability to appreciate consent, although as aforementioned, rape may not be successful anyway due to the controversy of Valerie's consent.

## Amendment Bill

Should the proposed amendment be adopted it would change the necessary fault element from an objective one to a subjective one, in line with the test approved of by the High Court in *Banditt*. This would affect the above facts should it be found that Valerie did not consent, and that Donald had an honest belief in her consent to the point that he did not even turn his mind to the fact that she might not be consenting.

This Bill would clarify the present state of SA law, which appears to endorse the use of an objective test (*Baltensberger*), but has not done so authoritatively, ultimately meaning that in most cases the prosecution will have to prove that there was some thought to the presence of consent or non-consent, not just a total inadvertence to the possibility, which would, under s 48(2)(b) of the proposed amendment, become included as a type of reckless indifference. Consequently an offender who does not even consider whether the other person is consenting will be deemed to know they are not consenting and be criminally reckless (*Banditt*).

The Bill would also potentially affect the consent issue in the problem, especially through s 47(3)(a)(ii), which provides that there is no consent where a victim may be humiliated or disgraced should they not submit to the accused's advances. This was one of Valerie's reasons for consenting: she was ashamed of what the neighbours would think. This would address a gap in the law which, under *Egan*, does not really address such acts as they do not clearly amount to threats, which may vitiate consent, but rather, more closely resemble acts of blackmail, which unequivocally do not.

### Should the amendment be adopted?

This amendment would arguably clarify the status of the present SA law, which *Baltensberger* left quite controversial. It would be in line with other states which already approve of this objective test over a test of "honesty" (ie NSW: *Kitchener*, *Tolmie* and *Banditt*), or are moving towards doing so. Of the latter, Victoria is relevant, where it has been recommended that the objective approach be adopted.

However, it is arguable that there are other provisions which could be adopted in line with this amendment, including the defence in the Code States, whereby the prosecution need not prove the defendant's advertence to the possibility of want of consent, but the defendant may have recourse to a defence of reasonable mistake of fact, where that mistake is reasonable. This has also been considered in the Victorian proposals for reform.

It is arguable that on moral grounds, the person who fails to turn his mind to want of consent in a way that is unreasonable is just as guilty as an accused who appreciates the risk and proceeds regardless (per Kirby P, as he then was, in *Kitchener*). Consequently the amendment provides greater protection to likely victims of rape and brings the law in line with common sense as opposed to drawing artificial distinctions.