

Law of Crime 2005 exam

Question 5(d)

Rape is a serious offence, carrying a maximum penalty of life imprisonment with it. To upset the balance of the scales one way or the other is to put the opposing parties at risk of serious miscarriages of justice.

The question of whether to adopt this recommendation first requires a look at whether the existing law accomplishes the task as it stands.

The decision in *Morgan*, followed in SA still, requires that a mistaken belief as to consent, however unreasonable, is a good defence to a charge of rape. As the situation stands, this apparently unfair rule is tempered by the requirement that the belief is honestly held.

The requirement works as a normative function to what might otherwise be seen as a 'rapist's charter' by the fact borne of experience that a jury, in deciding if a belief was truly and honestly held, are more likely to believe that a reasonable belief was honestly held than [an] unreasonable belief. The importance of this normative function must not be forgotten when discussing such an emotive subject.

A requirement for the belief to be reasonable is implicit in the current test, and as outlined in *Morgan*, requires the jury to take a 'hard look' at the evidence.

There is a real risk to be had in over-criminalising sexual behaviour, and as such, changes need to be thought out clearly.

The difference between the common law position and that of the code states is that the code states have a secondary requirement that if the belief was honestly held, that it be reasonable, but any benefits of change may not be of benefit to the most common victims of rape – women. In 'Rape and the Lack of Consent', S Bronitt argues that in those states that have a reasonableness test, juries are directed to give the 'reasonable person' the gender of the accused: *Daniels v The Queen*. By including a requirement of reasonableness explicitly, it may happen that dangerous rape myths such as 'no means yes' and the male stereotype of female sexuality as enjoying being hurt in sexual encounters may rise to the fore.

This danger of requiring a jury to take on certain characteristics of the accused in determining reasonableness runs counter to the argument that to better protect rape victims, reasonableness of the mistaken belief in consent should be an explicit concern of the 'reasonable person'.

In *He Kaw Teh*, Brennan J used the example of rape to highlight the requirement of a fault element for crimes where the penalty is high, the social stigma devastating and the risk of over-inclusiveness high.

Rape is such a crime. The consequences to the victim are terrible, and for most, last a lifetime. The consequences for the defendant may indeed be serious too, prison, with the risks that entails, and then the social stigma that comes from the betrayal of trust that comes with sexual encounters without consent.

Where the stakes are high, as here, the very real risk of people being convicted for what may be a borderline error of judgement are very real.

The sentencing discretion that judges enjoy may only be reflected in the severity of certain aspects of the sentence, but the verdict of guilty is a stamp that is carried forever. It is the one thing that others remember most, not any circumstances that may have mitigated the crime, but the verdict.

It may be argued that the current rules that govern rape law in SA are adequate in reflection to those of the code states, with no discernable difference in verdicts on similar factual issues.

As regards the evidential rules of rape, there is also a risk that if the law was to mandate that reasonableness be explicitly addressed, that this may lead to more stringent scrutiny of the victim and the circumstances surrounding the alleged offence, with more hinging on every detail as the defence seeks to show that what the defendant believed was, in the circumstances, reasonable.

This may lead to a reduction in rape convictions if victims were made to feel more than they already do, that it is they who are on trial, and not the defendant.

To implement the amendment of the Victorian Law Reform Commission, and to accomplish what they wish to achieve, would require that [CLCA] s48 be amended by outlining that the defence of mistaken belief be honest and reasonable, but it could also require mandatory directions to the jury as to who is the 'reasonable person', what characteristics they have (age, gender, background, etc) and what factors a jury may or may not look to when judging if conduct was reasonable.

I believe the current law already accomplishes this recommendation adequately, and would require much more research on the scope of relative convictions and moreover outcomes before making changes that may not help the victims of rape at all, despite best intentions.