

## Answers to Exam questions

### Question 1

Discuss the criminal liability of the parties in the scenarios below:

- (a) Graham has sexual intercourse with his wife, Sandra, while Sandra is asleep. He claims that she likes to be woken up in this way.
- (b) On a night out with Michelle, Joseph places a sedative in Michelle's drink. Brian sees this and rescues Michelle from Joseph. Brian then takes Michelle home and has anal sex with her.
- (c) Simon persuades Helen to perform oral sex on him by telling her that he is a famous actor and that he could get her a part in his latest film.
- (d) Kevin has sexual intercourse with Norman, who is extremely intoxicated at the time.
- (e) Jane kidnaps Pamela and tells Steven to have sex with Pamela.

### Bullets

- You should begin by providing a definition of rape under s.1, Sexual Offences Act 2003. You should then take each scenario in turn and consider whether the elements of the offence are satisfied. Particular attention should be given to the issue of consent.
- In part (a), we are told that they have sexual intercourse, thus most of the elements of rape (bar those relating to consent) are satisfied. The key issue will be whether the evidential presumptions under s.75(1) apply or not. The circumstances in section 75(2)(d) are made out because Sandra was asleep at the time of the act. There is a requirement that Graham must know that she is asleep, which appears to be made out. Thus, it will be presumed that Sandra was not consenting and that Graham did not reasonably believe that she was consenting, unless evidence is adduced to the contrary. Here, it is quite possible that evidence may be adduced that Sandra consented, or at the very least, that Graham reasonably believed that she was consenting in light of their sexual history. The burden of proving an absence of consent and lack of reasonable belief in consent rests with the prosecution.
- In part (b), we are told that Brian and Michelle have anal sex, which would fall under s.1, SOA 2003. The issue again is consent. These circumstances fall under s.75(2)(f) because a substance (sedative) has been placed in her drink without her consent which was capable of causing her to be stupefied or overpowered.

Thus, the evidential presumptions under s.75(1) will apply if Brian has knowledge of the administration of the drug, which he does. It does not matter that a third party placed the drug in her drink since s.75(2)(f) applies where “any person” administers the drug. Furthermore, there is no evidence that the presumptions might be rebutted. This is likely to result in a conviction for rape.

- In part (c), non-consensual oral sex constitutes rape, so rape is the correct charge here. The issue again is one of consent. Attention should be drawn to the conclusive presumptions under s.76(1). However, the circumstances in s.76(2)(b) do not apply since Simon is not impersonating someone who Helen actually knows (e.g. see *Elbekkay*). Thus the conclusive presumptions under s.76(1) do not apply and the prosecution will need to rely on the definition of consent under s.74. Thus, the prosecution will need to prove that Helen did not “agree by choice” and that Simon did not reasonably believe that she was consenting.
- In part (d), the issue is again one of consent. It is clear that non-consensual anal intercourse is covered by the offence of rape under s.1, SOA 2003. The intoxication of the complainant is not covered by the provisions dealing with conclusive or evidential presumptions (unless Norman is so intoxicated that he is unconscious at the time of intercourse, in which case the evidential presumptions under s.75(1) will apply due to s.75(2)(d)), thus the prosecution would have to rely on s.74 to prove that due to his intoxicated state, Norman did not agree by choice and thus was not consenting. The prosecution would also have to prove that Kevin had no reasonable belief in consent. Consideration should be given to the case of *Bree*.
- Finally, in part (e), Steven may be guilty of rape if the circumstances under s.75(2)(c) are present, which they will be if Steven is not unlawfully detained. Thus, the evidential presumptions under s.75(1) will apply. In these circumstances, Jane may also be guilty of aiding and abetting rape. If Steven is also unlawfully detained, he might have a defence of duress, although there is not much evidence to support this on the facts.

## Question 2

To what extent has the Sexual Offences Act 2003 improved the law relating to rape?

### Bullets

- Students are expected to explore the differences between the law on rape under the SOA 2003 and the previous law. Students are also expected to give an opinion on whether the SOA 2003 has improved the law relating to rape or not.

The SOA significantly changed the law on rape. Students are expected to discuss changes such as:

- The extension of rape to cover non-consensual oral sex. Is this serious enough to be included within the definition of rape? Risks of infection, but not pregnancy. Labelling theory.
- The SOA dispenses with the phrase 'sexual intercourse' - phrase was vague as to when intercourse begins – now clear only slight penetration is required. Also, penetration is a continuing act under the Act.
- The SOA dispenses with gender specific words – can apply now to transsexuals - old law was discriminatory. SOA now reflects changes in society.
- The Act defines consent for the first time under s.74. Some definition was needed. But definition is very broad and general.
- There is no longer any requirement of recklessness in the MR - difficulty over test of recklessness to be applied now will not exist.
- The defendant's belief as to consent must now be reasonable – cf. *DPP v Morgan*. - old law re: honest belief gone. No longer a purely subjective test. Belief must be reasonable.
- There are new presumptions re: consent (both conclusive and evidential). Codified much existing case law. Presumptions not easy to explain to a jury. Why does deception qualify as a conclusive presumption but the use of violence only an evidential presumption? Are conclusive presumptions satisfactory?
- Codification of many common law cases - but leaves many situations unexplored – to be dealt with by the broad definition of consent under s.74.