

Answers to self-test questions

Chapter 8

1. Explain how rape differs from the offence of assault by penetration?

The *actus reus* of the offences differs. The *actus reus* of rape requires the penetration of the vagina, anus, or mouth with the penis without consent. The *actus reus* of assault by penetration requires the penetration of the vagina or anus with any part of the defendant's body or with anything else, the penetration must be sexual and must occur in the absence of consent.

Thus, rape requires penile penetration, while assault by penetration does not. Rape may be committed by penetration of the mouth, assault by penetration may not.

2. Can rape be committed by omission?

Rape may be committed by a failure to withdraw. Penetration is defined under s.79(2) of the SOA 2003 as "a continuing act from entry to withdrawal". Thus, if consent is withdrawn during the act of intercourse, or if consent was never present before penetration but the defendant forms the *mens rea* for rape during intercourse, a failure to withdraw will lead to a conviction for rape.

3. Explain how consent is relevant to the *mens rea* of rape.

The *mens rea* requirement in relation to consent is an absence of reasonable belief in consent.

4. How may the prosecution prove the absence of consent?

The prosecution may prove the absence of consent by establishing that the conclusive presumptions under s.76, Sexual Offences Act 2003 apply, or by establishing that the evidential presumptions under s.75 apply. If the statutory presumptions do not apply, the prosecution may use the definition of consent under s.74 (agreeing by choice with the freedom and capacity to choose) to establish that consent was not present at the time of intercourse.

5. How is “touching” defined?

Actual touching is required; a battery must be committed. Section 79(8) provides that “touching” includes touching with any part of the body, with anything else, through anything, and it includes touching amounting to penetration. The touching may involve direct bodily contact or touching the complainant with an object. It also includes touching the complainant on the outside of their clothes: *H* (2005).

6. What does “sexual” mean under the SOA 2003?

Guidance on the meaning of “sexual” is provided under s.78. This section provides an objective approach. Whether or not the touching or penetration is “sexual” is a question of fact for the jury.

Under s.78(a) sexual refers to touching which is obviously sexual (i.e., which the reasonable person would regard as sexual by its very nature). The defendant’s purpose and the circumstances of the touching are irrelevant. Section 78(b) covers touching which is rendered sexual by its circumstances and/or purpose.

7. S persuades B to have sexual intercourse with him by persuading her that he is a famous footballer. Is S guilty of rape?

The only issue here is that of consent. The prosecution would need to prove that B did not consent (*actus reus*) and that S did not reasonably believe that B was consenting.

The conclusive presumptions under s.76(2)(b) does not apply as this deals with situations where the defendant has intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant. This means that intentionally inducing the complainant to consent to sexual intercourse by pretending to be a famous Hollywood star or footballer would not trigger the conclusive presumptions under s.76(1), although pretending to be someone the complainant knows, such as his/her boyfriend or husband would. See *Elbekkay* (1995).

The evidential presumptions under s.75 do not apply either; thus, the prosecution would have to prove that B did not agree by choice under s.74. It appears that

she did agree by choice and she certainly had the freedom and capacity to choose. Thus, a conviction for rape would be extremely unlikely here.

8. Andy has been claiming benefits to which he is not entitled. Oliver threatens to tell the authorities unless Andy has sex with him. Is Oliver guilty of rape?

The issue here is whether Andy's submission to sexual intercourse amounts to consent. Neither the conclusive presumptions under s.76, nor the evidential presumptions under s.75 apply here. Be aware that s.75(2)(a) requires threats of violence and so does not apply here. Thus the definition of consent under s.74 must be applied. It would be for the jury to determine whether Andy agreed by choice with the freedom and capacity to choose. *Olugboja* (1982) considered the issue of consent and submission: the key question is whether or not the complainant genuinely consented to the intercourse.

9. Sandra has a shoe fetish. She strokes Ruth's shoes. Is Sandra guilty of any offence?

The offence of sexual assault under s.3, Sexual Offences Act 2003 requires the intentional touching of a person, where the touching is sexual and occurs without consent. The prosecution must also prove that the defendant did not reasonably believe that the complainant was consenting.

Here, there is clearly and intentional touching. Section 79(8) provides that "touching" includes touching with any part of the body, with anything else, through anything, and it includes touching amounting to penetration. Thus, touching Ruth's shoes is sufficient.

The next question is whether the touching is sexual under s.78. Under s.78(a) sexual refers to touching which is obviously sexual (i.e., which the reasonable person would regard as sexual by its very nature). The defendant's purpose and the circumstances of the touching are irrelevant. This does not apply here. Section 78(b) covers touching which is rendered sexual by its circumstances and/or purpose. The touching will be sexual under this section.

If the touching occurs without consent and without reasonable belief in consent, Sandra will be guilty of sexual assault.

10. Elizabeth, a 35 year old woman, persuades Jason, a 15 year old boy, to have sexual intercourse with her after plying him with alcohol. Is Elizabeth guilty of any offence?

Elizabeth might be convicted of the offence of the aggravated form of sexual activity with a child under s.9(2), Sexual Offences Act 2003. It would need to be proved that she is over 18 (which she clearly is), she intentionally touched Jason, who is under 16, and the touching was sexual. There is a requirement that Elizabeth does not reasonably believe that Jason is 16 or over. Finally, in order for the aggravated form of the offence to be proved, there would have to be a further requirement of penetration – here it is likely that Jason has penetrated Elizabeth's vagina, anus or mouth with his penis, so this element is likely to be made out. Consequently, Elizabeth's liability will likely depend upon whether or not she reasonably believed Jason to be 16 or over.

She might also be guilty of the offence of the aggravated form of causing or inciting a child to engage in sexual activity, under s.10(2), Sexual Offences Act 2003. The defendant must be aged 18 or over and must intentionally cause or incite a person to engage in an activity which is sexual (as defined under s.78), and the complainant is under 16 and the defendant does not reasonably believe that the complainant is 16 or over.