

## DECEPTION, CONSENT TO SEX, AND *R v LAWRENCE* [PART 2]

Mark Dsouza

*In Part 1 of this blogpost, I argued that the doctrinal logic in the CACD's recent judgment in R v Lawrence [2020] EWCA Crim 971 was seriously flawed, and that its ruling on which deceptions vitiate consent to sex is therefore dubious. In this Part, I suggest that we replace the CACD's rule with a 'Disjunctive Approach' to deciding when false premises vitiate consent. I argue that this Disjunctive Approach adequately protects sexual autonomy in a manner that is compatible with the words of the Sexual Offences Act 2003 (the 'SOA') and the liability outcomes of (the vast majority of) the cases applying it.*

*\*This post is written with a lay and student audience in mind. My thanks to David Ormerod for his comments/suggestions. Any errors that remain are mine.\**

- 1 The Home Office's *Setting the Boundaries: Reforming the law on sex offences* report [2000], which led to the passing of the SOA made it clear that the protection of sexual autonomy should be central to the new law of sexual offences [para 2.7.2]. That would suggest that under the SOA 2003, V should be able, in the exercise of her sexual autonomy, to make any belief so important to her decision to consent to sex that its falseness would vitiate the consent. Logically, V's sexual autonomy – her right to choose whether to engage in sexual activity – must also include the ability to choose the conditions under which she will engage in it. The FALSE PREMISE explanation of why incorrect beliefs vitiate consent, which I described in Part 1 of this blogpost, is consistent with this proposition, and having previously been rejected in *R v Linekar* [1995] QB 250, it was revived post the 2003 Act in *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).
- 2 Some academics support this proposition. For instance, in his 2005 *Criminal Law Review* article 'Mistaken Sex', Herring argued that V's sexual autonomy would only truly be protected by a rule to the effect that if at the time of the sexual activity V is mistaken as to any 'dealbreaker' belief (i.e. a belief that, if V knew it was false, V would not have consented to sexual activity), then legally, V did not consent to it.
- 3 Most however, agree with the courts that not all false beliefs can vitiate consent to sex, because it would be too harsh to make someone liable to a conviction for rape on the basis of certain deceptions. Thus, V's false beliefs as to D's wealth or social (including marital) status are taken not to destroy consent to sex – observations to this effect can be found at least as far back as in *R v Dee* [1884] 14 LR Ir 468, and as recently as in *R v McNally* [2014] QB 593, *R (Monica) v DPP* [2018] EWHC 3508 (Admin), and of course, *Lawrance* itself.
- 4 But this leaves us with difficult questions: How do we draw a line between false beliefs that vitiate consent and those that do not? Is it possible for our answer to be consistent with a commitment to protecting V's sexual autonomy? Or must we abandon the protection of sexual autonomy, at least on this issue, and settle for drawing the line by mechanically applying the rules of statutory interpretation and precedent, and filling in any gaps by reference to the law's miscellaneous grab bag of public policy considerations?
- 5 In this part of my post, I describe a new approach to addressing these questions, which I call the 'Disjunctive Approach'. The Disjunctive Approach is an argument about how best to interpret the statute we currently have. It is not an argument in favour of the retention of all aspects of the current law. In particular, I express no view for, or against, proposals to once again make procuring sex by deception a separate offence with a different label and sentence, as it was under s.3 of the Sexual

Offences Act 1956. I argue that the effect of false beliefs on consent should be decided by reference to sexual autonomy, but that this does not mean that the falseness of any ‘dealbreaker’ belief will vitiate V’s consent to sex. In fact, on a proper understanding of how sexual autonomy is exercised, the liability outcomes of most decided cases can be preserved. The outcomes in *Lawrance* and a handful of other cases, however, continue to be problematic.

6 This view is at an early stage of development, and it’s very possible that my ideas will evolve as my thinking develops in response to your comments/feedback.

## 7 **How we exercise sexual autonomy**

7.1 Most decisions about whether to engage in sexual activity are not the product of a careful considerations of the pros and cons. While there is no reason why one cannot make such decisions in this way, more often, people have consensual sex when ‘one thing just naturally leads to the next’ or ‘it just feels right’. To put it in doctrinal terms, the decision-making process is often, per the CA in *IM v LM, AB, and Liverpool City Council* [2014] EWCA Civ 37 [para 80], the CACD in *R v A(G)* [2014] EWCA Crim 299 [para 28], the House of Lords in *R v C* [2009] UKHL 42 [para 15], and the Law Commission in its report on *Consent In Sex Offences* [2000] [para 4.59], “largely visceral rather than cerebral, and owes more to instinct and emotion rather than to analysis”.

7.2 Since these observations were made while discussing the capacity to consent, their significance in understanding when misapprehensions of fact vitiate consent is underappreciated. We can exercise our sexual autonomy cerebrally and think through the pros, cons, and conditions for our grant of consent to sex. When doing this, we can consciously elevate certain beliefs to a position of critical importance by thinking to ourselves, “I believe that D is wealthy, unmarried, and will use protection, so alright, I’ll have sex with D.” But let’s be honest – that is not how it usually goes. And when it does go that way, then as Gardner hinted at in his 2008 *Oxford Journal of Legal Studies* article ‘The Opposite of Rape’, there is already something less than ideal about the sexual activity that ensues. More often, we make, at most, a very attenuated calculation when exercising sexual autonomy – it will either ‘just feel right’, or not. Such decisions are largely visceral, but visceral decisions to have sex are just as valid exercises of sexual autonomy as cerebral ones. To see what this implies for the effect of false beliefs on consent, consider these examples:

VISCERAL AGREEMENT: D and V1 meet through a dating app. They really enjoy each other’s company, and later, V1 makes the visceral decision to have sex with D. D is married but going through a divorce. Had V1 known that D was married, she would never have slept with him.

CEREBRAL AGREEMENT: Same facts, except this time, D meets V2. V2 would also never sleep with a married man. When deciding whether to have sex with D, V2 does not want to ‘ruin the mood’ by asking D about his marital status. But she reasons to herself that D seems honest and sensitive, and if he were married, he would surely have mentioned that fact. Accordingly, on the understanding that D is unmarried, she sleeps with D.

7.3 V1 and V2 have both exercised their sexual autonomy – they have both made decisions about whether to engage in sexual activity. And if D had been unmarried, their exercises of sexual autonomy would generate consents that are equally valid in law and principle. The FALSE PREMISE view of why incorrect beliefs vitiate consent shows clearly why V2’s consent might be vitiated. V2 chooses to exercise her sexual autonomy cerebrally and makes her belief as to D’s marital status a premise for her consent. If that premise turns out to be false, V2’s consent never arises. Note that V2 can also advert to other beliefs that she has, and decide that their truth is immaterial to how she exercises consent. Perhaps she also believed that D is Muslim, but decided that D’s religion was immaterial to her decision on

whether to sleep with D. Or she may think “It believe D is Muslim, and it would be good if my belief is correct”, but not actually make its correctness a premise of her consent. In either case, the fact that D is Jewish would make no difference to V2’s consent.

7.4 By contrast, the FALSE PREMISE view gives us no reason to think that V1’s consent is vitiated. Even though V1’s belief that D was unmarried is also a ‘dealbreaker’ belief, V1 did not exercise her sexual autonomy to elevate that belief to the status of a premise for her consent. Hence D’s marital status makes no difference to the validity of V1’s consent. Since we need to take different approaches depending on whether sexual autonomy was exercised viscerally or cerebrally, I call this the ‘**Disjunctive Approach**’ to deciding when false beliefs vitiate consent.

7.5 In reality, these examples are simplifications – exercises of sexual autonomy will typically have both visceral and cerebral elements, although as has been noted, usually, the visceral elements will predominate. The key point though, is that the truth of a belief will only matter to the validity of V’s purported consent when V has, through a (partially, at least) cerebral exercise of sexual autonomy, made that belief a premise. When deciding whether this has happened, the jury will, as in any case, draw inferences from the available evidence.

7.6 Also, to be clear, in arguing that consent can, and often is, validly given without much cerebral engagement, I am not suggesting that purely physiological responses to stimulus, such as getting an erection, or becoming lubricated, suggest consent. Even visceral consent involves V choosing to invite, or at least grudgingly permit (as opposed to submit to), the sexual activity. The difference between cerebral and visceral exercises of consent lies not in whether V makes a choice, but in whether V deliberates about it intellectually, on the one hand, or chooses emotionally and instinctively on the other. Whether granted viscerally or cerebrally, consent is an exercise of sexual autonomy, and autonomy cannot be exercised through uncontrolled physiological responses to stimuli.

8 It might be helpful to highlight a few features of this argument.

9 **Any premise can (but will not always) do**

9.1 On the Disjunctive Approach, any false belief, no matter how trivial or seemingly unworthy, can in principle vitiate consent, because to respect V’s sexual autonomy is to respect her choices about the matters that she makes crucial to her decisions on how to exercise it. Accordingly, the liability outcomes in cases like *Assange*, and *R (F) v DPP* [2013] EWHC 945 (Admin) are easily explained. These are cases in which V chose to exercise her autonomy cerebrally, and made the truth of certain beliefs – that D would wear a condom in the former case, and that D would not ejaculate inside her in the latter – prerequisites for her consent. When this happens, the falseness of the prerequisite (or ‘premise’) will vitiate her seeming consent.

9.2 The same analysis applies in the facts of *Lawrance*. V exercised her sexual autonomy cerebrally to make her belief that D had had a vasectomy, a premise for her consent to unprotected sex with him. Since the premise was false, her consent never arose. It was clear that D realised that V’s belief that he’d had a vasectomy was critical to her consent, and so it is unlikely that D would be able to deny mens rea. On the Disjunctive Approach therefore, the acquittal in *Lawrance* must be rejected. So also, the acquittal in *Linekar*, where V, a prostitute, only consented to sex with D on the express premise that D intended to pay her, but D, who never had any such intention, had sex with V anyway.

9.3 But while the Disjunctive Approach makes space for any false belief to vitiate consent, it does not imply that every false belief *will* vitiate consent. Only beliefs that were elevated to the status of a premise by the (cerebral) exercise of sexual autonomy matter to consent. So, despite initial

appearances to the contrary, the Disjunctive Approach also explains rulings to the effect that V's consent to sex was not vitiated by D's non-disclosure of his HIV positive status (*R v B* [2006] EWCA Crim 2945), or that he was actually an undercover police officer pretending to be an environmentalist (*Monica*). It seems unlikely that in those cases, V consciously thought to herself "I believe that D is not HIV positive", or "I believe that D is truly an environmentalist, as he has presented himself to be" at the point of exercising her sexual autonomy to consent to sex with D.

9.4 To be clear, it may well be that had V not held certain (false) beliefs, things would never have gotten this far. In *Monica*, V was clear that had she known that D was an undercover policeman, she would never even have considered having sex with him. But V exercises sexual autonomy only when she actually considers whether to agree to the sexual activity. At that time, the truth of any background beliefs that V held but did not elevate to premises while exercising her sexual autonomy will not affect the validity of her consent to sexual activity, even if these were 'dealbreaker' beliefs. The consent granted in these cases may be mistaken consent, but its legal validity in respect of the sexual activity is nevertheless defensible in principle. I leave open the possibility that the mistakenness of the consent may vitiate it in domains that extend beyond the sexual domain. I will return to this point when I discuss the *McNally* case later in this post.

## 10 **Categorical claims about the worthiness of premises**

10.1 This way of looking at when false beliefs undermine V's exercise of sexual autonomy to attempt to grant consent means that we cannot make the categorical claim that a particular premise is too unworthy to ever vitiate consent. Nor for that matter, can we make the categorical claim that the falseness or appropriateness of any particular premise will *always* undermine V's exercise of sexual autonomy to attempt to grant consent.

### 10.2 **Categorical negative claims**

10.2.1 Courts often doubt that the falseness of V's beliefs as to D's wealth can vitiate consent (*McNally* [para 25]; *Monica* [para 83], *Lawrance* [para 34]). Now, perhaps it is true that most people do not consciously think to themselves, "I believe that D is wealthy and so I will consent to sex with D", when exercising their sexual autonomy, and so D's poverty does not vitiate their consent to sex with D. But some people might. And if they do, then respecting their sexual autonomy means letting them make D's (lack of) wealth a 'dealbreaker' for the grant of their consent, even if we personally deem that exercise of sexual autonomy 'unworthy'. And quite apart from matters of principle, if the worthiness of V's chosen premises were material, by what metric would one judge worthiness? Courts have expressed scepticism about the prospects of success in such a line drawing exercise since at least 1884 in *Dee*, and with good reason. Hitherto, many courts have tended to try and solve this problem by being extremely reluctant to go beyond existing authority – the judgments in *Linekar*, *Monica*, and *Lawrance* are good examples of this tendency. But in trying to justify this approach even when V has clearly exercised her sexual autonomy to make something (like D's infertility) a precondition for consent to sex, they have had to abandon any claim to be protecting V's sexual autonomy. At least after the passing of the 2003 Act, with its clear focus protecting sexual autonomy, that approach is very difficult to defend.

10.2.2 Doubts are also often expressed about whether the falseness of V's belief as to the validity of her marriage to D can vitiate consent. Observations to this effect are made in *R v Clarence* (1888) 22 QBD 23 [pg 43], *Papadimitropoulos v The Queen* (1957) 98 CLR 249 [pg 260-61] (High Court of Australia), *Linekar* [pg 260], *Monica* [para 83] and even *Lawrance* [para 34, 41]. This is perhaps a bit more surprising, given the apparent 'worthiness' of this belief, but the worry here is that if a false belief as

to D's marital status vitiates consent, then every bigamist will be guilty of rape, and that seems wrong, given the disparities in the sentences for bigamy and rape.

- 10.2.3 But again, on my view, every bigamist would not necessarily be guilty of rape, because recall, being validly married to D is only a necessary premise for V's consent to sex with D if V exercises her sexual autonomy cerebrally to make it one. It may well be that V would never have considered having sex with D at all unless they were married, but, as in the case of *Monica*, if that belief is not made a critical premise when V exercises her sexual autonomy, its falseness does not vitiate V's consent to sex (though D would still commit the offence of bigamy). That said, if the evidence showed that V did make the validity of her wedding to D a premise for consenting to sex, then I see no reason not to convict D of rape, in addition to bigamy. Consider the Australian case of *Papadimitropoulos*. D, a Greek man who also spoke English, convinced V, a Greek girl who didn't, to marry him in a civil ceremony at the registry office. They went together and filled out and signed some forms (V not understanding what they said), and afterwards, D told V that they were married. In fact the forms were just a notice of an intention to marry, which had to be posted at the registry office for several days before a wedding could be performed. From the registry office, having not previously had intercourse, D and V obtained a room at a lodging house, consummated their 'marriage', and lived together for 4 days, having intercourse a few more times. Then D, suddenly and without explanation, left. The court refused to convict D under the jurisdictional law then in force, but a properly instructed jury could well have found that V had exercised her sexual autonomy to cerebrally make being validly married to D a premise for consenting to at least the first instance of intercourse with D, and that D was well aware of this. Accordingly, V's seeming consent, at least to the first instance of intercourse, would be vitiated. Moreover, it seems hard to argue that D believed that V's consent was valid. So, on these facts, under the Disjunctive Approach, D would be convicted. *Papadimitropoulos* was not a bigamy case, but even if it had been, I don't think it would be unfair to have convicted D of bigamy *and* rape – there is no reason to think that committing one crime somehow immunises one to liability for another.

### 10.3 **Categorical positive claims**

- 10.3.1 Notice that on this view, we also cannot make categorical claims in the other direction i.e. that the falseness of any particular premise will *always* undermine V's exercise of sexual autonomy to attempt to grant consent. No matter what the proposition, V should be able, in the cerebral exercise of her sexual autonomy, to choose to make it unimportant. But s.76 creates irrebuttable presumptions as to V's consent if D obtains V's consent by deceiving her as to the nature or purpose of the relevant act, or by impersonating a person known personally to V. So, in law, we should be able to categorically state that at least these false beliefs always vitiate consent, at least when brought about by D's deception. If so, then the apparent tension between the Disjunctive Approach and this statutory provision might undermine my claim that the 2003 Act incorporates the Disjunctive Approach. But on closer inspection, much of this apparent tension dissipates.

#### 10.3.2 Deceptions as to nature

- 10.3.2.1 The pre-2003 cases of *R v Flattery* [1877] 2 QBD 410 and *R v Williams* [1923] 1 KB 340 are generally taken as exemplars of the sorts of cases to which this provision would apply. In *Flattery*, V was deceived into thinking that sex was a medical procedure to cure her fits, and in *Williams*, V was deceived into thinking that sex was a medical procedure to improve her singing voice. In both cases, D was convicted of rape after V's apparent consent was held to be invalid. Arguments based on deception as to the nature of the relevant act have also been made post the 2003 Act, in *Assange* and *McNally*, but they did not succeed. The state of the law apparently is that D deceives V as to the nature of the relevant act, when D makes V think that the act is not sexual in nature at all.

10.3.2.2 When V does not understand that the act to which she is agreeing is sexual at all, there is a clear sense in which V's exercise of autonomy is not an exercise of *sexual* autonomy – not realising that her sexual autonomy is being called upon, V does not even purport to exercise it. This means that the rule on deceptions as to nature is compatible with the Disjunctive Approach, since the latter applies only when V *does* exercise sexual autonomy.

### 10.3.3 Deceptions as to purpose

10.3.3.1 Now consider the jurisprudence on deceptions as to the purpose of the relevant act. In *R v Devonald* [2008] EWCA Crim 527, D, a 37 year-old male, assumed a fake online identity as 'Cassey', a 20 year-old girl, befriended V, the ex-boyfriend of his teenage daughter, and convinced him to masturbate in front of a webcam for 'Cassey's' sexual gratification. In fact, D's motivation was to humiliate V and teach him a lesson for dumping his daughter. D was charged with an offence under s.4 of the SOA (Causing a person to engage in sexual activity without consent), to which ss.74-76 also apply. Here, D made V think that D's/Cassey's purpose in respect of V's masturbation was deriving sexual gratification, whereas that formed no part of D's actual purpose. The converse happened in *R v Matt* [2015] EWCA Crim 162. D, a plumber, advertised in a reputable website giving work to actors, that he was casting for a TV remake of the Hollywood film *Basic Instinct*. V responded to the ad, and the two met at a hotel, where V went through what she believed to be a casting process. This involved D and V performing various sexual acts, short of sexual intercourse. D was charged with an offence under s.3 of the SOA (Sexual assault) to which also, ss.74-76 apply. Here, D made V believe that D's purpose in relation to the sexual activity was to simulate sexual pleasure for an audition, but this formed no part of D's purpose, which was to derive actual sexual pleasure.

10.3.3.2 Both cases were decided by the CACD, and in both, it was held that D had deceived V as to the purpose of the relevant act, and that therefore the irrebuttable s.76 presumptions applied. In all other reported cases in which it has been argued that D had deceived V as to the purpose of the relevant act, the argument has been rejected. The rule that emerges is that D deceives V as to the purpose of the relevant act (as defined in s.77) when D makes V think that D's purpose in relation to it is something that actually forms no part of D's actual purpose in relation to it.

10.3.3.3 I doubt that we can say that V fails to exercise *sexual* autonomy when V is led to believe that D's purpose in relation to the relevant act is something that actually forms no part of D's purpose. It is not clear that D's purpose in relation to the relevant act can play a role in constituting (or failing to constitute) V's exercise of autonomy in permitting or performing it, an exercise of *sexual* autonomy. I think that V does exercise sexual autonomy in these cases, so I agree that the Disjunctive Approach is incompatible with this interpretation of the phrase 'purpose of the relevant act' in s.76. But I think we should reject the interpretation given to that phrase in *Devonald* and *Matt*. Neither judgment examines in detail the development of the law in this area, or even mentions the Home Office's *Setting the Boundaries* report [2000] which prompted the passing of the 2003 Act. A reference to that report makes it clear that the Home Office understood the purpose of an act to be *part of* its nature. In para 2.10.9, the report offers this as an example of when a person does not consent to sexual activity: "Where a person did not understand the nature of the act, whether because they lacked the capacity to understand, or were deceived as to the purpose of the act". The report continues, explaining that "[t]his would cover both where the victim lacked the capacity to understand the act or submitted because they were persuaded that it was necessary for other purposes – a medical examination for instance." [Emphasis supplied]

10.3.3.4 Clearly, the terms 'nature' and 'purpose' were not meant to cover different ground, despite the disjunctive 'or' between them in s.76. In fact, there is no evidence in any of the reports that fed into

the drafting of the SOA 2003, that Parliament intended for the irrebuttable presumptions in s.76 to go beyond the deceptions that hitherto vitiated apparent consent to sex. But it appears that in trying to avoid attributing nominal redundancy in drafting to Parliament, the CACD extended the provision beyond what Parliament intended. Unsurprisingly, the *Devonald* line of authority as to how we should interpret the purpose of a relevant act has been doubted by the CACD in *R v Bingham* [2013] EXCA Crim 823 [paras 14, 19,20].

10.3.3.5 Normatively, there's no particular reason to elevate for special legal treatment V's belief *as to D's purpose in relation to the relevant act* above all V's other beliefs surrounding the act. Nor is there any normative reason to think that V should be unable to choose to make D's purposes irrelevant to her consent. Consider this example:

THE CAMGIRL AND THE ANTHROPOLOGIST: V is a 'Camgirl' – she performs various acts for the sexual pleasure of paying patrons who watch her over a webcam. D is an anthropologist interested in studying how Camgirls interact with their patrons to get them to offer higher tips. D has no interest in deriving sexual gratification from interacting with V, but to preserve the purity of his research, he does not disclose his research interests, and behaves like any other client. V also believes that D is an ordinary client, but realises that this sort of anthropological study has become very trendy recently, and that roughly 1 in 100 of her clients is an anthropologist with no interest in deriving sexual gratification. Having thought about it, she decides that she could not care less, so long as they pay.

10.3.3.6 Here, D lets V believe his purpose in relation to the sexual acts he pays her to perform is to derive sexual gratification, but that is in fact, no part of D's purpose in relation to the acts. In this respect, the facts are similar to those in *Devonald*. If so, then the irrebuttable presumptions under s.76 should apply, and regardless of V's attitude to the materiality of D's purpose, V should be deemed a victim of a sexual offence, and D should be convicted of it. This conclusion seems illogical and absurd.

10.3.3.7 Would reading the word 'purpose' in s.76 as explanatory of the word 'nature' in that provision, rather than as an extension of it mean that the defendants in *Matt* or *Devonald* would have to be acquitted? Clearly not. In *Matt*, V cerebrally, and by conscious consideration, made her understanding that she was performing a genuine audition a premise for her consent, and in *Devonald*, V did the same for his understanding that he was 'performing' for a 20 year old girl called Cassey. The falseness of these beliefs would vitiate consent under s.74.

10.3.3.8 In sum, the Disjunctive Approach is compatible with the liability outcomes in *Matt* and *Devonald*, but suggests that their interpretation of the term 'purpose of the relevant act' is to be regretted.

#### 10.3.4 Deceptions as to identity

10.3.4.1 We face no such complications when reconciling the Disjunctive Approach with s.76(2)(b), since that provision only triggers the s.76 presumptions when D's deception *induces* V to consent. This means that V can validly exercise her sexual autonomy to cerebrally make the identity of D irrelevant to her consent. In such (admittedly rare) cases, D's impersonation would not induce V's consent, and so the presumptions would not apply.

10.3.5 In sum therefore, the Disjunctive Approach is compatible with the majority of the jurisprudence on s.76. To the extent that there is a divergence, arguably it is the relevant jurisprudence that should be rejected, especially since doing so would not affect the liability outcomes in any relevant cases.

11 **In principle, it doesn't matter how V comes to hold the false belief**

11.1 As a practical matter, it will almost always be easier to prove both, that V genuinely made the truth of a belief material to her decision to agree to sex, and that D did not reasonably believe that V had validly consented to sex, if D actively deceived V. This might be why the HC in *Assange* [para 90], and the CA in *McNally* [para 24], hinted that active deception might more readily vitiate consent than non-disclosure. But false beliefs may be premises even when not induced by deception – CEREBRAL AGREEMENT is an example. Equally, we can imagine cases in which D may have a reasonable belief as to V's consent despite actively deceiving V to obtain it. Consider this example:

VENIAL DECEPTION: V makes it clear to her husband, D, that she will only sleep with him if he washes all the dishes. D does the dishes, but as he is heading for the bedroom, he spots an unwashed teaspoon that was left on the countertop. He decides that it's not a big deal, and he will wash it tomorrow. He enters the bedroom and announces that he's done the dishes.

11.2 Even in the unlikely event that V really made it so important to her decision to consent to sex with D that D wash every last utensil, it is plausible that D's belief that surely, one teaspoon couldn't matter *that* much to V's consent would, in the absence of any further information, be reasonable.

11.3 So, rather than making so much turn on whether D actively deceived V, or just let V believe what she did, the better view is that in principle, it does not matter how V came upon the false belief. Even in non-disclosure cases like CEREBRAL AGREEMENT, if we can prove that V had made her belief as to D's unmarried status crucial (perhaps she slipped away momentarily to phone a friend for advice, and described her thought process on the call), and that D knew this (perhaps D overheard the call, and texted his friend about it), we should be able to convict D of rape when he has sex with V anyway. It will be a rare case indeed in which we had such evidence conveniently available, but the point of principle stands. This is because it is the falseness of a critical premise that vitiates apparent consent, rather than the manner in which V came to hold the belief. Support for this proposition can be found in observations made by various courts, including the High Court of Australia in *Papadimitropoulos* [pg 260-61], the CA in *Linekar* [pg 260], and even the CACD in *Lawrance* [para 41] over the years.

## 12 **McNally – a difficult case**

12.1 I now return to the case of *McNally*, with the caveat that it is a difficult case on any explanation of the law, and the views I express on it are even more tentative than the rest of my arguments in this post.

12.2 D was born biologically female, but identified as male at all relevant times. Reportedly, D now identifies as female, and so I use feminine pronouns to refer to her. Going under the name of 'Scott', when she was 13, D struck up a long-distance online friendship with V who was a year younger. Over the next several years, their friendship turned romantic, though they never physically met. Then D travelled to meet V when V turned 16. Over the next few months, on three occasions, they enthusiastically engaged in sexual activity involving D, who remained clothed, digitally penetrating and performing oral sex on V, in a darkened room. Then V discovered that D was biologically female. D came to be convicted of an offence under s.2 SOA 2003 (assault by penetration).

12.3 On appeal, the CA took the view [para 26] that D had actively deceived V as to her gender, and that although this did not change the nature or purpose of the relevant acts it did change their 'sexual nature', such that they were no longer heterosexual sexual acts. Accordingly, it found that V did not consent to the sexual activity that actually happened, and D did not reasonably believe that V had consented. D's conviction was upheld.

12.4 The CA was strongly influenced by its finding that D had actively deceived V as to D's 'gender', so we cannot say how it would have ruled if it had found differently on that point. On the facts stated, it is



not clear that D did actively deceive V as to her gender. Since, at the time, D identified as male, for her to present as male was not to deceive as to gender at all – it was to be true to her gender identity as she experienced it. Perhaps, what was meant was that D actively deceived V as to D’s biological sex. But again, it is not clear that D actually claimed to be biologically male. Her representations were as to gender, and although in contemporary society, gender and biological sex are almost invariably conflated, due to her lived experience, D was obviously alive to their distinctness when making her representations. There is limited evidence that D saw herself as lying or misleading V, and so the conclusion that D actively deceived V is dubious.

12.5 But even without an active deception as to biological sex, V’s false belief that D was biologically male *could* vitiate V’s consent to the sexual activity, if V cerebrally made D’s biological sex a premise when exercising her sexual autonomy. But I’m not sure it can be proved that she did so. Perhaps she would have made it a premise had she thought to. She clearly regretted what happened after she discovered D’s sex, but by all accounts, when the sexual activity occurred, it was welcomed. It seems unlikely therefore that, at the time she exercised her sexual autonomy to agree to sexual activity with D, V cerebrally made her belief as to D’s biological sex a premise. *McNally* appears to be a case of mistaken consent – i.e. consent given against the backdrop of false beliefs – that is nevertheless legally valid. The liability outcome cannot be supported on the Disjunctive Approach, but I suspect this points to a flaw in the ruling, rather than the Disjunctive Approach.

### 13 In closing

13.1 The Disjunctive Approach would not make the law any harder for the jury to apply than it already is. Under the Disjunctive Approach, based on the evidence available, the jury will be asked to judge whether they are sure that V gave thought to the impugned belief, and made its truth a precondition for consent. That’s essentially what it would do in an *Assange* style case, and what it did in *R(F)*.

13.2 By focusing not on the worthiness of the matters that V *would* consider deal-breakers, but rather on whether V exercised her sexual autonomy to actually make them deal-breakers, we can draw a sexual autonomy-protecting line that does not criminalise every background white lie, embellished fact, and half-truth, that has ever nurtured a nascent relationship.