DECEPTION, CONSENT TO SEX, AND *R V LAWRANCE* [PART 1]

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In Part 1 of this post, I describe and analyse the recent judgment of the Court of Appeal (Criminal Division) ("CACD") in R v Lawrance [2020] EWCA Crim 971, which addressed the effect of deception on consent to sexual activity. I argue that in its judgment, the CACD took certain observations made in a previous case called R (Monica) v DPP out of context, and relied heavily on them. The CACD's ruling is therefore flawed, and to be regretted.

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. In *Lawrance*, the CACD was required to rule on whether the appellant (Lawrance) raped the complainant (hereinafter "C") by lying about having a vasectomy to convince her to have unprotected sex with him. Lawrance lied to C about the vasectomy in writing on an online chat sometime before they met, and again on the evening that they met, when C again specifically asked him if he was fertile. The next morning, Lawrance texted C to say "I have a confession. I'm still fertile. Sorry". Although this isn't strictly relevant to the sexual offence charged, C did, as a matter of fact, get pregnant, and needed to undergo a termination. Lawrance was charged with, and convicted of, rape by the trial court, but appealed his conviction.

2. The legal issue here is the effect of the falseness of the premise (i.e. that Lawrance had had a vasectomy) on which C agreed to have sex with Lawrance, on the legal validity of that agreement. A generic complainant ("V") can come to believe in a false premise in the following ways:

    a. D (a generic defendant) might deceive her into believing it (this happened in *Lawrance*);

    b. Someone other than D might deceive V into believing it; or

    c. V may unilaterally form the belief.

3. The CACD ruled that although V's seeming consent is invalidated when it is based on her erroneous belief in the truth of premises closely connected to the nature and purpose of the sexual intercourse (like whether D is wearing a condom, or intends to withdraw before ejaculation, or is of the biological sex that V thinks D is), it is not invalidated by the falseness of premises about the broad circumstances surrounding it. It ruled that whether Lawrance had undergone a vasectomy was a premise of the latter type, and therefore held that C's consent to unprotected sexual intercourse with Lawrance remained legally valid. As a result, it set aside Lawrance's conviction.

I. The ruling in *Lawrance*

1. The CACD in *Lawrance* briefly traced the development of the law on consent to sexual activity obtained by deception, starting with *R v Flattery* [1877] 2 QBD 410 and *R v Dee* [1884] 14 LR Ir 468. In *Flattery,* V (who had learning difficulties) submitted to sexual intercourse with D after D convinced her that he was in fact performing a surgical operation on her. This deception vitiated V's apparent consent to intercourse, and D was convicted of rape. In *Dee*, D impersonated V's husband to get her to submit to intercourse. Again, V's ostensible consent was held to have been vitiated because she thought she was consenting to intercourse with her husband, and not with D. The CACD in *Lawrance* [para 24] cited with approval Stephen J's

finding in *Dee* [para 44] that "... consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not consent to a sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery." It also noted that the court in *Dee* had considered the appropriateness of a wide principle of deceit vitiating consent to sexual intercourse, but had opted not to go beyond accepting that impersonating a husband, or pretending that sexual intercourse is a medical procedure, would vitiate consent.

2. The CACD next noted that this continued to be the law even after the passing of the Sexual Offences Act 1956, and in fact, s.1(2) even gave statutory force to the rule in *Dee*. Subsequent cases decided during the currency of the SOA 1956 extended the rule in *Dee* to impersonations of persons other than husbands as well. Notable amongst these was *R v Linekar* [1995] QB 250, in which the Court of Appeal (CA) also reiterated that deception would vitiate consent only in the two well-established categories, namely, deceit as to identity, and deceit involving passing intercourse off as something else entirely (such as a medical procedure). In *Linekar*, a prostitute (V) and D had agreed a price for intercourse, which occurred. However, D did not pay and apparently had never intended to pay. It was held that since V knew that she was agreeing to intercourse, and did have intercourse with the person she expected, her consent remained valid.

3. Finally, the CACD came to the Sexual Offences Act 2003 which replaced the SOA 1956. The CACD noted that while s.76(2) of the 2003 Act puts the two well-established common law bases upon which deceit or fraud will vitiate consent on a statutory footing, it does not go beyond those [para 27].

4. However, in *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), the High Court ruled that even where s.76 did not apply, apparent consent can, in some circumstances, be vitiated if it was premised on a false belief. The accepted facts for the purposes of the ruling were that V made it clear to D that she would consent to intercourse only if he used a condom, but D surreptitiously removed or tore it, and penetrated V. The HC concluded that while deception as to the use of a condom did not fall under s.76, it could vitiate consent under the general definition of consent under s.74 of the SOA 2003, which says: "... a person consents if he agrees by choice, and has the freedom and capacity to make that choice".

5. Interestingly, instead of explaining the effect of *Assange* on the law of consent by quoting from *Assange* itself, the CACD in *Lawrance* relied on an encapsulation thereof taken from a later High Court's judgment in a case called *R (Monica) v DPP* [2018] EWHC 3508 (Admin). This is likely explained by the fact that the judgment in *Lawrance* was written by the Lord Chief Justice of England & Wales, who had also co-authored the judgment in *Monica*. The said encapsulation of the effect of *Assange*, taken from *Monica* [para 72] is as follows:

> "What may be derived from *Assange* is that deception which is closely connected with "the nature or purpose of the act", because it relates to sexual intercourse itself rather than the broad circumstances surrounding it is capable of negating a complainant's free exercise of choice for the purposes of section 74 of the 2003 Act."

6. On this basis, the CACD in *Lawrance* took *Assange* to be an example of a case in which the deception (as to condom use) was closely connected to the nature and purpose of the act (i.e. in this context, the sexual penetration) because it related to the sexual intercourse itself, rather than to the broad circumstances surrounding it.

7. The CACD next considered the cases of *R (F) v DPP* [2013] EWHC 945 (Admin) and *R v McNally* [2014] QB 593. In *R (F)*, D was convicted of rape after V consented to intercourse on the understanding that D would not ejaculate in her, but despite this, D deliberately ejaculated in V. In *McNally*, D was convicted of assault by penetration (which is governed by the same rules on consent) after D was taken to have deceived V as to D's biological sex in order to procure V's consent to penetrative sexual activity.

8. The CACD explained that the outcomes in these cases were in line with its understanding of the principle underlying the ruling in *Assange*, which was essentially that since "[t]here is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003" [para 42], any addition to the list of deceptions that converted apparently consensual intercourse into rape must be "closely connected with" the existing deceptions that had this effect. In its view, a deception as to the intention to ejaculate was also closely connected to the nature and purpose of the sexual penetration, since it related to the performance of the sexual act itself rather than the broad circumstances surrounding it. Correspondingly, a deception as to biological sex was closely connected to a deception as to identity. Such deceptions would therefore vitiate consent by negating V's free exercise of choice for the purposes of s.74 of the SOA 2003. Interestingly, this was exactly the reading of these cases that had been adopted in the judgment of the HC in *Monica*, [para 74-76] which recall, was authored by the same judge.

9. For the CACD, other deceptions, such as lying about not being HIV positive [para 39 read with para 41], not being previously married [para 34], or being an environmental activist rather than an undercover policeman [para 34 read with para 23] do not relate closely enough to the nature and purpose of the sexual act, since they do not relate to the performance of the sexual act, but rather to the broad circumstances surrounding it. They do not, therefore, vitiate consent. Along the same lines, the CACD concluded that lies about fertility do not relate to the performance of the sexual act; instead, they relate to the broad circumstances surrounding it. It therefore quashed Lawrance's conviction for rape.

II. Analysis

1. A key basis of the CACD's ruling is its understanding that the law of consent has not changed radically with the passing of the 2003 Act. For that reason, it held that any additions to the list of deceptions that vitiate consent must be closely connected with the deceptions already accepted to have this effect. But there are good reasons to doubt that proposition:

(A) *The failure in 2003 to separately criminalise procuring sex by deception*

a. Both, the SOA 1956 [in s.3], and before it, the Criminal Law Amendment Act 1885 [in s.3(2)] criminalised procuring sexual intercourse by deception expressly, and separately from rape. There is no separate offence of procuring sex by deception in the 2003 Act, but equally, there is nothing to indicate that Parliament intended to decriminalise deceiving someone into having sex. Indeed, the belief alluded to by the CA in a case called *R v Dica* [2004] EWCA Crim 1103, that the s.4 SOA 2003 offence covers instances of procuring sex by deception, might explain why no separate offence of procuring sex by deception was enacted despite the recommendations of the Home Office's *Setting the Boundaries: Reforming the law on sex offences* report [2000]. Unfortunately, it is clear that this reading of the scope of s.4 SOA 2003 is simply wrong.

b. Now one way to prevent the inadvertent decriminalisation of the obviously seriously wrongful behaviour of lying to obtain sex is to expand the set of deceptions that vitiate consent. Perhaps this expansion was not what Parliament intended, but arguably, neither was the complete decriminalisation of deceptively procuring sex. The Home Office's *Setting the Boundaries: Reforming the law on sex offences* report [2000], which led to the passing of the 2003 Act made it clear that the protection of sexual autonomy should be central to the new law of sexual offences. This added emphasis on sexual autonomy was also noted by the House of Lords in R v C [2009] 1 WLR 1786 [pg 1790]. Given the 2003 Act's special emphasis on the protection of sexual autonomy, expanding the list of deceptions that vitiate consent for the purposes of the rape offence may well be the better course of action.

c. Admittedly, this is hardly a conclusive argument to show that the 2003 Act changed the law on consent, but it does give us reason to think that irrespective of whether Parliament intended to change the law on consent in 2003, it may well have changed. And then, there's the second reason to think that that passing of the 2003 Act had this effect.

(B) ***Changes in the object of consent*****:**

a. Prior to the 2003 Act, D raped V if he had intercourse with V, either knowing that V did not consent to the intercourse, or being reckless as to whether V was consenting to the intercourse. This was the common law understanding of rape which was given statutory form in s.1 of the Sexual Offences (Amendment) Act 1976, and slightly updated by a further amendment in 1994. Under s.1 of the 2003 Act though, what matters was not V's consent 'to the intercourse' generally, but rather, to the specific act of 'penetration'.

b. The significance of this change emerges when we think back to the only two deceptions that vitiated consent for the purposes of rape that prior to the 2003 Act: impersonating someone the complainant was willing to consent to sex with, and making the complainant believe that what was happening was a fundamentally different type of act, such as a medical procedure. The prevalent explanation of *why* these deceptions vitiated apparent consent for the purposes of rape was set out in *Dee* [para 44]. Essentially, V had consented to one thing (a medical procedure, or to intercourse with a chosen partner), and what had actually happened was something else (sexual intercourse, or intercourse with an unchosen partner respectively). Hence V had not consented to what actually happened. An understanding of the nature of sexual intercourse and the identity of the person with whom it was being had was thus treated as being integral to an adequate description of the sexual intercourse. Call this the RICH ACT DESCRIPTION thesis.

c. The trial judge in *Linekar* had instructed the jury by reference to an alternative explanation. He said that if V's consent was premised on some proposition being true (in that case, that D was intending to pay), then if that proposition was not true, V's consent never arose [pg 253-54]. V could, in principle, make any premise so important to her decision to consent that its falseness vitiates consent, since her ability to choose whether to engage in intercourse must also include the ability to choose the conditions under which she will engage in intercourse. Call this the FALSE PREMISE

thesis. This analysis was rejected by the CA, which instead reaffirmed the RICH ACT DESCRIPTION thesis.

d. But the RICH ACT DESCRIPTION thesis sits awkwardly with the wording of the 2003 Act. Consider the offence of rape under s.1 of the 2003 Act. The focus in that offence is on consent specifically to the *penetration* (of V's vagina, anus, or mouth, with D's penis). It is not on consent to the more loaded descriptor, 'sexual intercourse'. (Similarly, the offences under ss. 2, 3, and 4 of the SOA 2003 also focus on consent to a narrow, technically specified conduct-token rather than to some other richer descriptor that can carry more meaning.) Whether V thought that what was happening was a medical procedure rather than sex, or that she was having intercourse with her husband or lover, rather than D, V can still recognise and consent to the penetration, and according to s.1(1)(b) SOA 2003, that's all that seems to matter.

e. To be clear, even on the RICH ACT DESCRIPTION understanding of how deception undermines consent, most medical procedure and impersonation cases would still be rape, thanks to the deeming presumption in s.76. But on this reading, s.76 would be extending s.1 beyond its natural scope rather than merely creating presumptions relating to the proof of matters falling substantively within its natural scope. In other words, s.76 would deem something that is not rape in terms of s.1, to be rape. And this deeming provision would apply *only if D* deceived V. But if D realised that a third party had deceived V into thinking that D would be performing a medical procedure on V instead of having sex with V, or if V had reached that false conclusion unilaterally, D could take advantage of V's misconception and commit no sexual offence whatsoever, since s.76 would not apply, and V would be consenting to the penetration.

f. The FALSE PREMISE thesis on the other hand, would easily assimilate medical procedure and impersonation cases within the scope of s.1, such that even without s.76, those cases would be rape. The apparent consent to the penetration in these cases would be premised on the false proposition that the penetration is a medical procedure, or that D was somebody else. Since the premise is false, V's apparent consent would not be real consent. The same logic would apply in third party deception and unilateral mistake cases, except that in those cases D might find it easier to deny mens rea if he were unaware of V's misapprehension.

g. Arguably therefore, the changes in statutory wording brought about by the SOA 2003 make the FALSE PREMISE thesis, favoured by the trial judge in *Linekar*, the more appealing explanation of how deception now undermines consent. But this analysis can apply to any premise that V makes important to her consent, not just to premises that are so closely linked to the intercourse as to be an integral part of an adequately rich description of the intercourse. In this sense, the FALSE PREMISE thesis does more to protect sexual autonomy than the RICH ACT DESCRIPTION thesis, and for that reason too would be a better fit with a statute aimed at increasing the protection of sexual autonomy. This is an additional reason to think that the passing of the SOA 2003 has changed the law, such that a wider range of deceptions may now vitiate consent to intercourse.

h. In fact, the judgment in *Assange*, shows a definite move towards the FALSE PREMISE analysis, where the concerned premise is that D would wear a condom:

> "The question of consent in the present case… [could] be determined by reference to s.74….if [V] had made clear that she would only consent to sexual intercourse if [D] used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act 2003, whatever the position may have been prior to that Act." [para 86]

2. So why then was the CACD in *Lawrance* so convinced that the changes to the law of consent brought about by the 2003 Act were minimal? In large part, because it relied heavily on certain findings in the judgment in *Monica* (which recall, was written by a member of the bench in *Lawrance*) out of context.

3. Although *Monica* was decided in 2018, it was a historic case, relating to facts that occurred in 1997. D was an undercover policeman who infiltrated an environmental movement using an assumed name, and pretending to share the beliefs of the group. While undercover, D and V developed a mutual attraction which turned into a sexual relationship. The relationship ended and many years later, in 2011, V discovered D's true identity from newspaper reports. She pressed for D to be prosecuted for rape on the basis that her belief that D shared her core beliefs was central to her decision to enter into a relationship with him, and that under no circumstances would she have entered into any relationship with D had she known the truth. The DPP declined to prosecute and V applied to the High Court for judicial review of that decision.

4. Since the relevant instances of intercourse occurred in 1997, the SOA 1956 applied to the case. Strictly, any discussion of the SOA 2003 was obiter dicta (i.e. not essential to the ruling and so, not binding authority). That the provisions of the 2003 Act were discussed at all was down to the CPS lawyer's approach when deciding whether to prosecute, which had been "to consider the position under the Sexual Offences Act 1956 and at common law before addressing whether the case law under the Sexual Offences Act 2003 might assist the claimant's case in… a wider or indirect way." [para 48] The HC therefore decided to do the same. It did so even while recognising that this approach "arguably, may have been unduly favourable to the claimant." It further expressly noted that "[t]here is no decided case which holds in terms that the 2003 Act has made no difference to the notion of 'consent'. There is a possible indication in *Assange* that the 2003 Act has made a difference, and there must at least be room for the argument that the abolition of the offence of procurement may have widened the scope of the offence of rape." [para 48].

5. In other words, the entire discussion relating to the 2003 Act in *Monica* was premised on the CPS lawyer's possibly over-generous assumption in favour of the applicant, "that the 2003 Act did no more than restate and clarify the meaning of 'consent' rather than alter or advance it." [para 48] For the analysis that followed, the HC adopted this assumption for the sake of argument, but it certainly did not endorse it or find that it was correct as a matter of law. The HC's interpretation of the ruling in *Assange* was therefore premised on an assumption – it was not a categorical finding about the effect of *Assange* on the law of consent under the 2003

Act. The same was also true of the HC's interpretation of *R(F)* and *McNally*, and in fact in para 74 when discussing these cases, the HC in *Monica* had again expressly recognised that its reading was premised on the legally questionable assumption that the provisions of the 2003 Act had not brought about a change in the law on consent.

6. Surprisingly, all of this context was entirely jettisoned by the CACD in *Lawrance* when it adopted the obiter dicta findings of the HC in *Monica* as to the proper interpretations of *Assange*, *R(F)*, and *McNally*. With respect, the CACD fell into serious error in its analysis. Its finding that only a deception about or failure to disclose a matter "sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it" [para 41] can vitiate consent is based on a suggestion in *Monica* about what might be the proper way to read the jurisprudence relating to consent and deception under the 2003 Act *if we assume that the 2003 Act has not changed the pre-2003 law*. Recall that the HC in *Monica* itself repeatedly expressed doubts about the correctness of this assumption. Yet, apart from a single unsupported assertion that "[t]here is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003", there is no argument addressing whether the law of consent had in fact changed, whether as intended by Parliament, or otherwise. The CACD's ultimate conclusion therefore falls well short of being convincing.

7. What then is the best way to read the law? Is there any way to adequately protect sexual autonomy that is compatible with the words of the 2003 Act as well as with the findings of (at least the vast majority of) the cases that have applied the Act?

8. I will make one tentative suggestion in the second part of this blogpost.