

## R v Lawrence [2020] EWCA Crim 971

### Issues considered

The main issue in this case was whether a lie about fertility can vitiate consent to sex. According to section 74 of the Sexual Offences Act 2003, “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. Section 76 explains that if the defendant:

- (a) intentionally deceived the complainant as to the nature or purpose of the act; or
- (b) intentionally induced the complainant’s consent by impersonating someone known personally by the complainant,

then it is to be conclusively presumed that the complainant did not consent, and the defendant did not believe that the complainant consented.

On the facts of the case, the appellant, Lawrence, made a false representation to the complainant that he had had a vasectomy. This caused her to agree to have unprotected sex with him, when otherwise she would have insisted that he wore a condom. The complainant later found out that she was pregnant and underwent a termination. The complainant argued that her consent to sex was vitiated by Lawrence’s deception.

### Court decision

The Court of Appeal, overturning the Crown Court decision, held that Lawrence’s deception about having a vasectomy was not enough to vitiate consent for two reasons: (a) it was not closely connected to the nature or purpose of the sexual act [35-37]; and (b) it did not deprive the complainant of the freedom to choose whether or not to have sex [38]. Thus, Lawrence’s rape conviction was quashed.

With regard to (a) above, the Court distinguished this case from *Assange v Swedish Prosecution Authority* where the defendant lied about wearing a condom during sex,<sup>1</sup> and *R(F) v DPP* where the defendant lied about intending to withdraw before ejaculation.<sup>2</sup> In both *Assange* and *R(F)*, it was held that the deception was sufficient to vitiate consent. By contrast, in this case the complainant agreed to have sex with Lawrence without imposing any physical restrictions. That is, she agreed both to the penetration of her vagina and ejaculation without a condom. Thus, the Court of Appeal took the view that the deception was not related to the physical act, but rather the consequences of it (risk of pregnancy) [37]. It was therefore not sufficient to vitiate consent under s76.

With regard to (b) above, the Court drew an analogy with *R v B* where the defendant failed to disclose to the complainant that he was HIV positive.<sup>3</sup> In both cases, the deception related to an issue that “was not part of the performance of the sexual act but a consequence of it” (transmission of disease/pregnancy) [39]. Thus, it was not enough to deprive the complainant of the choice of whether to have sex, under s74. It is also worth noting that the Court said it made no difference whether it was an express deception, as in this case, or a failure to disclose, as in *R v B* [41].

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<sup>1</sup> [2011] EWHC 2849 (Admin).

<sup>2</sup> [2014] QB 581, [2013] EWHC 945 (Admin).

<sup>3</sup> [2007] 1 WLR 1567, [2006] EWCA Crim 2945.

## Comment

It is submitted that to draw a distinction between agreeing to have sex with someone who:

- (a) wears a condom or intends to withdraw before ejaculation; and
- (b) has had a vasectomy,

is, as the Crown Court argued, artificial. In all three cases, it is the risk of pregnancy, and not the presence of the ejaculate, that determines whether the complainant agrees to have sex. To draw a distinction based on whether or not ejaculate enters the vagina is to engage in an excessively formalistic interpretation of the words “nature or purpose of the relevant act” in s76. When considered in a broad sense, it is evident that if the deception in *Assange* and *R(F)* was enough to vitiate consent, then it should have been enough to vitiate consent in this case as well.

This reveals how important it is for Parliament to go beyond the limited categories of deception listed in s76. As the Court of Appeal notes, in drafting that section “Parliament did not take the opportunity to go further” than “the two well-established common law bases upon which deceit or fraud will vitiate consent” [27]. This has led to absurd results where the defendants in *Assange* and *R(F)* were found guilty, but the defendant in this case was not, even though in substance their deception related to the same issue of whether the complainant could get pregnant.

It is therefore necessary for Parliament to clearly define what categories of deceit are capable of vitiating consent to sex. While they cannot give an exhaustive list, they can clarify issues that have come up in past cases, including deceit as to HIV (or other STI) status, deceit as to ideological belief, deceit as to intention to pay a sex worker, deceit as to fertility, deceit as to whether or not a condom will be worn, and deceit as to whether or not there is an intention to withdraw before ejaculation. It would also be desirable for Parliament to clarify whether an express deception will be treated differently from a failure to disclose. This will still leave room for flexibility because where unprecedented categories of deception arise that affect the complainant’s freedom to agree, the Court can still find that consent was vitiated under s74. It is hoped that Parliament will consider clarifying the law on this issue, given the severity of the offences of rape and sexual assault.

**By Rukevwe Otive-Igbuzor**