

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 *Thoburn* principle of interpretation (of which I have written elsewhere).*

*The *Thoburn* principle of interpretation (of which I have written elsewhere) is consistent with this proposition, and having previously been rejected in*

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

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

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

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

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, Tnse i.934 0 T0[(no)-3 wTc 0 Tw ()Tj14.393Tc -.0.

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 p

