

79. Mistake of Fact

79.1 Legislation

[Last reviewed: September 2024]

Criminal Code

[Section 24](#) - Mistake of fact

79.2 Commentary

[Last reviewed: September 2024]

Where s 24 is raised in respect of sexual offences located in Chapter 32 of the *Criminal Code*, a specific provision applies which is not applicable to other offences. In those cases, see **Chapter 80 – Mistake of Fact in Sexual Offences**.

As to the relevant considerations in determining if the evidence raises a mistake of fact 'defence' see *R v Makary* [\[2019\] 2 Qd R 528](#) per Sofronoff P (Bond J agreeing) at [54]-[59]. Philip McMurdo JA proposed a different test at [90]. Although the observations in *Makary* were concerned with a charge of rape, the principles are applicable generally. (See also *R v FAV* [\[2019\] QCA 299](#), [5]-[6] (Fraser JA), [45]-[48] (Mullins JA), [108]-[111] (Henry J dissenting) and *R v Kellett* [\[2020\] QCA 199](#), [18]-[23] (Morrison JA), [128]-[129] (Mullins JA)).

The directions to the jury should identify the particular matters for consideration in deciding whether the Crown has negated the defence: *R v Rope* [\[2010\] QCA 194](#), [53]-[56].

Matters relevant to a defendant's belief

Section 24(1) requires a subjectively honest belief. The defendant's intoxication may be relevant to whether the defendant's mistaken belief was honest: *R v O'Loughlin* [\[2011\] QCA 123](#), [34].

Section 24(1) also requires consideration of whether a defendant's belief, based on the circumstances as he or she perceived these to be was held on reasonable grounds (as opposed to whether a reasonable person would have held it): *R v Julian* [\[1998\] QCA 119](#); [\(1998\) 100 A Crim R 430](#), 434; *R v Mrzljak* [\[2005\] 1 Qd R 308](#), 321, 326; *R v Wilson* [\[2009\] 1 Qd R 476](#), [20]; see also extensive discussion of the authorities in *R v Rope* [\[2010\] QCA 194](#). Since the focus is on the defendant's belief rather than that of a theoretical reasonable person, the information available to the defendant and the defendant's circumstances (such as an intellectual impairment or language difficulty) are of relevance in considering whether a belief was reasonably held: *R v Mrzljak* [\[2005\] 1 Qd R 308](#), 321, 329-330.

79.3 Suggested Direction

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Our law provides that a person who does [or omits to do] an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act [or omission] to any greater extent than if the real state of things had been such as the person believed to exist.

Whether you need to consider this issue will depend on what evidence you accept. There is a view of the evidence open that suggests that the defendant believed [outline the mistaken belief]. [(Where appropriate) explain how that mistaken belief is raised on the evidence]. Whether you consider that the defendant did hold such a belief or not is a matter for you to decide.

If the defendant [did/failed] to [refer to the act or omission alleged] under an honest and reasonable, but mistaken, belief that [details of state of things mistakenly believed to exist] the defendant is not criminally responsible to any greater extent than if the real state of things had been such as [he/she] believed to exist.

If you conclude that the real state of things was [outline the nature of the real state of things], but that the prosecution have failed to disprove that the defendant honestly and reasonably believed that [outline the nature of the mistaken belief], [he/she] will not be criminally responsible to any greater extent than if [the nature of the mistaken belief] did in fact exist. That would mean that the defendant should be found not guilty of [refer to the appropriate charge].

A mere mistake is not enough, the mistaken belief must have been both honest and reasonable.

An honest belief is one which is genuinely held by the defendant.

(Where appropriate, the following text on intoxication may be added) In deciding whether the defendant honestly held the belief, you are entitled to take into account the intoxication of the defendant, if any, as you find it to be. That is, in light of the defendant's intoxication, did [he/she] honestly hold the stated belief?

To be reasonable, the belief must be one held by the defendant, in [his/her] particular circumstances, on reasonable grounds. Whether the belief is reasonable requires an objective assessment by you.

(Where appropriate, the following text on intoxication may be added) Any intoxication, as you may find there to be on the part of the defendant, is not relevant to an assessment of whether the belief was held on reasonable grounds. Self-induced intoxication cannot turn what would otherwise be an unreasonable belief into a reasonable one.

(Where appropriate, the following text on circumstances peculiar to the defendant may be added) **You have heard evidence that the defendant** [outline the nature of the circumstances peculiar to the defendant, such as intellectual impairment or language difficulties]. [That/these] **circumstance/s are relevant to your assessment of whether the mistaken belief was held on reasonable grounds. That is, were there reasonable grounds to hold the mistaken belief given the defendant experienced these circumstances?**

Remember, there is no burden on the defendant to prove that [he/she] made an honest and reasonable mistake of fact. The prosecution must satisfy you beyond reasonable doubt that the defendant did not do so.

If the prosecution has failed to satisfy you that the defendant did not act under an honest and reasonable mistake of fact, you should find the defendant not guilty of [refer to the appropriate charge]. On the other hand, if the Crown proves beyond reasonable doubt either that:

- 1. The defendant did not honestly hold the relevant mistaken belief about [the facts].**
or
- 2. That the belief was not reasonable in the defendant's circumstances, then you would find that the defence of mistake of fact did not apply.**