

## **Rape s 347 (now repealed)** **(For offences occurring prior to 27 October 2000)<sup>1</sup>**

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**The prosecution must prove the defendant:**

- 1. Had carnal knowledge<sup>2</sup> of (the complainant).**

**The prosecution must prove that the defendant penetrated the genitalia of the complainant with his penis. Any degree of penetration is sufficient. It is not necessary for the prosecution to prove that the defendant ejaculated.**

- 2. Without her consent.<sup>3</sup> Consent is a common word in every day use. When it is used in the context of sexual activity it means consciously permitting the act of sexual intercourse to occur. Consent may be defined as the agreement to, or the acquiescence in, the act of sexual intercourse by the complainant.**

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<sup>1</sup> For offences occurring on and after 27 October 2000 the above direction will have to be modified. The definition of “rape” has been substantially widened by the *Criminal Law Amendment Act 2000* operational on and after 27 October 2000. A person rapes another if without that other person’s consent he -

- has carnal knowledge (including sodomy and penetration to any extent: see definitions s 1 and 6) of or with the person or;
- penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis or;
- penetrates the mouth of the other person to any extent with the person’s penis.

Section 348 sets out a definition of “consent”. “Consent” is defined in sub-section (1) as “consent freely and voluntarily given by a person with cognitive capacity to give the consent”. “Cognitive” means “to know; perceive (Macquarie Dictionary). Section 348(2) sets out that a person’s consent is not freely and voluntarily given if obtained by force, etc.

<sup>2</sup> See definition s 1 and s 6.

<sup>3</sup> Where the prosecution case is that the complainant consented, but by force, or by means of threat or intimidation of any kind, or by fear of bodily harm, it is only in an exceptional case in which it would be necessary for the trial judge to direct the jury as to the distinction between “without consent” and “consent obtained by force etc”: *I.A. Shaw* [1996] 1 Qd R 641, 645; cf *P.S. Shaw* [1995] 2 Qd R 97.

In a case in which there is an issue as to consent, or if it is alleged that consent was obtained by force, it may be useful for the trial judge to adapt the words at p 636 of *I.A. Shaw*:

“Under 347 consent refers to a subjective state of mind on the part of the complainant at the time when penetration took place. It is not in law necessary that the complainant should manifest her dissent, or strictly even that she should say in evidence at the trial that she did not consent to sexual intercourse.”

In most cases, it will not be necessary for the judge to use these words in directing the jury. It may arise, for example, in a case in which the evidence establishes that the complainant said or did nothing prior to and during intercourse.

In *R v Mrzljak* [2005] 1 Qd R 308 it was held that a complainant’s intellectual impairment will be a relevant matter for the jury to consider when determining whether or not the complainant had the necessary cognitive capacity. Intellectual impairment itself does not deprive the complainant of the cognitive capacity to give or withhold consent.

See *R v Winchester* [2014] 1 Qd R 44 for a detailed examination of the subject of consent in the context of s. 348 (applicable to offences from 27 October 2000), including whether consent is freely and voluntarily given where there is a promise of a gift.

**The defendant does not have to prove she consented, the prosecution must prove that she did not.<sup>4</sup>**

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<sup>4</sup> An issue of honest and reasonable mistake of fact may arise – see notes on Mistake of Fact.