

Rape s 349 (Offences occurring after 27 October 2000)

Legislation

349 Rape

- (1) Any person who rapes another person is guilty of a crime. Maximum penalty— life imprisonment.
- (2) A person rapes another person if—
 - (a) the person engages in penile intercourse with the other person without the other person's consent; or
 - (b) the person 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 without the other person's consent; or
 - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (3) For this section, a child under the age of 12 years is incapable of giving consent.
- (4) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.
- (5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

348 Meaning of consent

- (1) In this chapter, **consent** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
- (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained –
 - (a) by force; or
 - (b) by threats or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.
- (3) A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.
- (4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.

348A Mistake of fact in relation to consent

- (1) This section applies for deciding whether, for section 24, a person charged with an offence under this chapter did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.

- (2) In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.
- (3) In deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.

Commentary

As the offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992*, a serious organised crime circumstance of aggravation is applicable.

For offences occurring prior to 27 October 2000, see 133 Rape s 347 (now repealed).

The s 6 definition of “penile intercourse”, inserted in substitution of “carnal knowledge” by s 9 *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* with effect from 1 August 2023, includes penile penetration of the anus, as did the former definition of “carnal knowledge”, which was amended to include anal intercourse (initially referred to as sodomy) with effect from 3 December 2004 by the Schedule to *Justice and Other Legislation Amendment Act 2004*. **Because the physical acts contemplated by either label remain the same and because trial judges’ directions should direct what the relevant act is, the below suggested direction adopts the more recent label of “penile intercourse” without reminding judges that the theoretically correct label for pre-1 August 2023 offending is “carnal knowledge”.**

The *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* No 7 of 2021 which commenced on 7 April 2021 amended the Code by:

- inserting a definition of assault: ss 1 and 347;
- expanding the meaning of consent by adding s 348(3) and (4);
- inserting s 348A relating to mistake of fact in relation to consent.

The transitional provision in s 754 states that the former provisions continue to apply where the person is charged before the commencement date. The new provisions apply where the person is charged after the commencement date, whether the charge is for an offence committed before or after the commencement.

The position prior to the amendments was explained in *R v Sunderland* ([2020](#)) 5 QR 261; [2020] QCA 156 at [38]-[42]. The definition of “consent” in s 348 was held to apply to the offence of sexual assault in s 352.

In *R v Makary* [2019] 2 Qd R 528; [\[2018\] QCA 258](#), Sofronoff P (with whom Bond J agreed) said of the definition of “consent” in s 348, which was inserted by the *Criminal Law Amendment Act 2000* that it required two elements:

[49] ...First, there must in fact be “consent” as a state of mind ... Second, consent must also be “given” in the terms required by the section.

[50] The giving of consent is the making of a representation by some means about one’s actual mental state when that mental state consists

of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour.

In *R v Sunderland* [2020] QCA 156 at [43], Sofronoff P said: “As it is now defined, ‘consent’ requires that consent be ‘given’. This aspect of the definition of consent must not be overlooked”. His Honour said at [45], footnote 8, that:

“In a case in which a complainant did not, as a matter of fact, intend to do anything to ‘give’ consent but in which the complainant’s actions, or failures to act, reasonably imply a giving of consent, the jury will have to be instructed about s 24 of the *Code* [mistake of fact]”.

At [55], his Honour set out directions that may have been adequate in that case, while emphasising that “[e]ach summing up must be tailor-made to fit the requirements of the case at hand”.

In *R v Mrzljak* [2005] 1 Qd R 308; [2004] QCA 420, 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; [2011] QCA 374, for a detailed examination of the subject of consent including whether consent is freely and voluntarily given where there is a promise of a gift.

An issue of mistake of fact may arise – see notes on mistake of fact in ch 80.

Note that a person charged with rape may be alternatively convicted of the offence, if established by the evidence of other forms of sex offences listed in s 578(1).

Suggested direction

A variety of sexually penetrative acts engaged in with another person without the person’s consent constitute the offence of rape.

Relevantly to this case a person rapes another person if:

- **the person engages in penile intercourse with the other person without the other person’s consent; or**

- the person 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 without the other person's consent; or
- the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[Omit reference to acts irrelevant to the present case.]

There are therefore two elements or ingredients which the prosecution must prove beyond a reasonable doubt to prove the offence of rape:

1. that there was an act of physical penetration; and
2. that the act of penetration occurred without the complainant's consent.

First, as to element 1, the act of physical penetration, the prosecution must prove that the defendant:

- engaged in penile intercourse with the complainant. Penile intercourse is the penetration, to any extent, of the vagina/vulva/anus [as the case may be] of a person by the penis of another person. A person engages in penile intercourse with another person if:
 - the person penetrates to any extent, the vagina/vulva/anus [as the case may be] of another person with the person's penis.
 - the person's vagina/vulva/anus [as the case may be] is penetrated, to any extent, by the penis of another person.

[Omit reference to acts irrelevant to the present case.]

- penetrated the vulva/vagina/anus [as the case may be] of the complainant, to any extent, with a thing/part of the defendant's body that is not a penis [as the case may be].
- penetrated the mouth of the complainant, to any extent, with the defendant's penis.

[Omit reference to acts irrelevant to the present case.]

[Identify the factual issues to be resolved by the jury in determining whether the act of physical penetration occurred. If the case has been litigated on the basis an inherent alternative verdict is open per s 578 in the event the jury conclude the sexual act fell short of penetration. Direct re the alternative.]

Secondly, as to element 2, the prosecution must prove the act of penetration occurred without the complainant's consent. Consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent. Consent to an act will not have been freely and voluntarily given if it is obtained by force/threats or intimidation/fear of bodily harm/exercise of authority/false and fraudulent representations about the nature or purpose of the act/a mistaken belief induced by the accused person that the accused person was the person's sexual partner [as the case may be].

[Where relevant:

- **A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.]**

[Where relevant:

If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.]

[Identify the factual issues to be resolved by the jury in determining the element of consent.]

[If a defence of mistake of fact re consent arises for consideration see ch 80.]