

Legislation

352 Sexual assaults

- (1) Any person who—
 - (a) unlawfully and indecently assaults another person;
 - ...is guilty of a crime.

1 Definitions

assault—

- (a) generally – see section 245, or
- (b) for chapter 32 – see section 347.

347 Definitions for ch 32

In this chapter—

assault has the meaning given by section 245 as if a reference in section 245 to consent were a reference to consent within the meaning given by section 348.

consent see section 348.

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 threat 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- (4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.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 the other 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 any other substance.

Commentary

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: sections 1 and 347;
- expanding the meaning of consent by adding section 348(3) and (4);
- inserting section 348A relating to mistake of fact in relation to consent.

The transitional provision in section 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.

For directions about mistake of fact in relation to consent, see chapter 80 of the Bench Book.

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 section 348 was held to apply to the offence of sexual assault in section 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 section 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) 5 QR 261; [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.

In *R v Winchester* [2014] 1 Qd R 44; [\[2011\] QCA 374](#) the Court of Appeal made a detailed examination of the subject of consent including whether consent is freely and voluntarily given where there is a promise of a gift.

For a case involving therapeutic treatment, see *R v BAS* [\[2005\] QCA 97](#). In *R v Jones* [\[2011\] QCA 19](#) the Court of Appeal held that in a case involving an ambulance officer found guilty of indecent assault while performing an ECG the trial judge erred in directing the jury that the appellant's motive was not relevant to whether the act was indecent. White JA said at [32] "The quality of 'indecent' is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision." See also *R v Rae* [\[2009\] 2 Qd R 463](#), where it was held that a direction that the acts had to be accompanied by an intention to gain sexual gratification was not required in that particular case. In *R v McCallum* [\[2013\] QCA 254](#) it was held that the decision in *Jones* did not require that a direction on the motive of the accused be given in every case where indecency is an element of the offence (at [31] - [40]). In *R v McGrady* [\[2020\] QCA 188](#), Fraser JA explained, at [47], that it is not an element of the offence that a defendant was motivated by sexual interest. Such a direction was necessary in *Jones* only because the issue at trial was whether the defendant paramedic's conduct, in touching the breasts of the complainant whilst attaching electrodes to her for the purposes of an ECG was indecent because it was motivated by sexual gratification, or whether it was instead not indecent because it occurred in the course of a legitimate medical examination.

Circumstance of aggravation

The circumstances of aggravation for an offence of sexual assault are:

- (a) if the indecent assault includes bringing into contact any part of the genitalia or anus of a person with any part of the mouth of a person: section 352(2);
- (b) if immediately before, during, or immediately after, the offence, the defendant is, or pretends to be, armed with a dangerous or offensive weapon: section 352(3)(a);
- (c) if the defendant is in company with another person: section 352(3)(a) (see Benchbook direction no 124);
- (d) if the indecent assault includes the person who is assaulted penetrating the defendant's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis: section 352(3)(b);
- (e) the offence of sexual assault is a "prescribed offence" in schedule 1C *Penalties and Sentences Act 1992* and therefore the "serious organised crime circumstance of aggravation" in section 161Q may be applicable.

Suggested Direction

The prosecution must prove that the defendant:

1. assaulted the complainant

A person who strikes, touches or moves or otherwise applies force of any kind to the person of another either directly or indirectly without their consent is said to assault that other person and the act is called an assault.

"Consent" means consent freely and voluntarily given by a person with the ability to know and understand what s/he is doing in giving consent.

2. the assault was unlawful

An assault is unlawful unless it is authorised, justified or excused by law.

3. the assault was indecent

The word "indecent" bears its ordinary everyday meaning. It is what the community regards as indecent. It is what offends against

currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.

Circumstance of aggravation

If a circumstance of aggravation has been alleged, direct accordingly.

Absence of consent

See section 348 and the notes in the commentary.

Mistake of fact

An issue of mistake of fact may arise: see notes in the commentary and Benchbook direction no. 80.