

80. Mistake of Fact in Sexual Offences – offending on or before 23 September 2024

80.1 Legislation

[Last reviewed: January 2025]

Criminal Code

[Section 24](#) - Mistake of fact.

[Section 348A](#) - Mistake of fact in relation to consent.

[Section 761](#) – Application of ch 32 to proceedings

Evidence Act 1977 (Qld)

[Section 103ZX](#) - Direction on mistake of fact in relation to consent.

[Section 161](#) - Application of part 6B, divisions 1–3 to criminal proceedings.

80.2 Commentary

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This part of the Criminal Code, Chapter 32, was substantially amended on proclamation of the relevant part of *Criminal Code by Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* on 23 September 2024. The transitional provision, s 761 of the *Criminal Code* provides in effect that the amended provisions apply only where the offence is alleged to have been wholly committed after the commencement date by proclamation of the amendments. This Benchbook Chapter therefore applies to offences committed wholly, or in part, prior to 23 September 2024.

The amending Act also introduced s 103ZX into the *Evidence Act*. It too took effect on proclamation on 23 September 2024. The transitional provision (s 161 of the *Evidence Act*) in effect means that it applies to all directions given on or after 23 September 2024. Section 103ZX refers back to s 348AA of the *Criminal Code*, which also commenced on the same date, but which has a different transitional provision; it applies only to proceedings for offences committed wholly after 23 September 2024. The effect of these different transitional provisions means that s 103ZX cannot apply to proceedings for offending that is alleged to have occurred wholly or in part on or before 23 September 2024.

The circumstances in which a trial judge ought to direct the jury on the excuse of mistake of fact in the case of non-consensual sexual offences were considered in detail in *R v Makary* [\[2019\] 2 Qd R 528](#); [\[2018\] QCA 258](#) (*'Makary'*) (see also *R v FAV*

[\[2019\] QCA 299](#), [5]-[6] (Fraser JA), [45]-[48] (Mullins JA), [108]-[111] (Henry J, dissenting); *R v Kellett* [\[2020\] QCA 199](#), [18]-[23] (Morrison JA), [128]-[129] (Mullins JA)).

In *Makary*, the trial judge's refusal to direct the jury on mistake of fact was held to be correct. Sofronoff P (with whom Bond J agreed) said:

[54] It follows that before s 24 can arise for a jury's consideration in connection with the issue of consent there must be some evidence that raises a factual issue about whether the accused believed that the complainant had a particular state of mind and also believed that the complainant had freely and voluntarily given consent in some way. ...

...

[59] In cases like this one, in which the appellant alleges that the complainant consented but did not give evidence, the raising of s 24 is problematical because the element of the accused's belief can arise only by way of inference. As always, inference must not be confused with speculation.

...

[71] The appellant's submission that anything that the complainant said, did, or did not say or do could reasonably have been understood as her giving consent to having sexual intercourse with him so as to generate an inference that he believed that she had given her consent was utterly unreal and ...Richards DCJ was right not to direct the jury in the way invited.

(The President's reference to the unreality of the Appellant's submission drew upon a quote from the reasons of L'Heureux-Dube J in *R v Ewanchuk* [\[1999\] 1 SCR 330](#), 376–377, [97]. *R v Ewanchuk* was also cited with approval by McMurdo P in *R v Cutts* [\[2005\] QCA 306](#), [14], with her Honour quoting: '... there is, on the record, no evidence that would give an air of reality to an honest belief in consent for any of the sexual activity which took place in this case').

McMurdo JA (in *Makary*) said:

[90] To raise the operation of s 24, there must be some evidence of a mistaken belief by the defendant ... I would not describe the requirement as going as far as a need for evidence on which there could be a finding that the mistaken belief was held. I prefer the formulation by McPherson JA in *R v Millar* [\[2000\] 1 Qd R 437](#), 439 [7], which is that there must be evidence on which the jury could legitimately entertain a reasonable doubt about whether the defendant honestly and reasonably believed the complainant had consented.

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

The Defendant's intoxication may be relevant to whether the Defendant had an honest belief that the Complainant was consenting (see *R v O'Loughlin* [2011] QCA 123, [34]). A Defendant's voluntary intoxication caused by alcohol, a drug or another substance is not relevant in deciding whether the Defendant's belief was reasonable: s 348A(3).

Section 24(1) requires consideration of whether a Defendant's belief, based on the circumstances as he or she perceived them to be, was held on reasonable grounds (as opposed to whether a reasonable person would have held it (see *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])).

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).

In *R v Mrzljak* [2005] 1 Qd R 308, Williams JA said:

[53] The critical fact for a defence based on s 24 is the offender's belief. ...[T]he critical focus is on the offender rather than a theoretical reasonable person. It is the information available to the offender which must determine whether the belief was honest and also was reasonable. That must mean that factors such as intellectual impairment, psychiatric problems and language difficulties are relevant considerations though none would be necessarily decisive.

Holmes J (as her Honour then was) said:

[89] ... [If] one accepts, as (counsel for the Crown) seemed to, that a language handicap is a feature of the accused relevant to assessment of the reasonableness of his belief, it becomes difficult to assert that an intellectual handicap is not similarly such a feature.

[90] It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.

80.3 Suggested Direction

[Last reviewed: January 2025]

If you are satisfied beyond reasonable doubt that the Complainant did not give consent there is another matter you must consider.

Our law provides that a person who does 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 to any greater extent than if the real state of things had been such as the person believed to exist.

In the context of this case that means that, even though you are satisfied that the Complainant was not in fact consenting, you must consider whether the Defendant, in the circumstances, honestly and reasonably believed that the Complainant was consenting, and that [he/she] held that belief at the time [he/she] [did the charged act].

(It may help to describe those circumstances at this stage of the directions).

In deciding whether the Defendant's belief was honest and reasonable, you may have regard to anything the Defendant said or did to ascertain whether the other person gave consent to the act.

A mere mistake by the Defendant is not enough. The mistaken belief in consent must have been both honest and reasonable, and if the prosecution disproves either or both of those things beyond reasonable doubt, it will have proven that this defence does not apply.

An honest belief is one which is genuinely held by the Defendant. (Use the following text on intoxication as appropriate): 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 [his/her] intoxication, did [he/she] honestly hold the stated belief?

A Defendant's belief is reasonable when it is one held by the Defendant, in [his/her] particular circumstances, on reasonable grounds. Whether the belief is reasonable requires an objective assessment by you. (Use the following text on intoxication as appropriate): 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 in consent was held on reasonable grounds. That is, were there reasonable grounds to hold the mistaken belief given the defendant experienced these circumstances?

The Complainant says that [he/she] did not consent [and made that clear to the Defendant]. If you accept the Complainant's evidence that [he/she] [quote the evidence], that may inform your consideration of whether the Defendant honestly and reasonably believed the Complainant was consenting.

Remember, however, that the onus of proof is not on the Defendant to prove that [he/she] honestly and reasonably believed the Complainant was consenting but for the prosecution to prove beyond reasonable doubt that the Defendant did not honestly and reasonably believe that the Complainant was consenting.

Accordingly, if you find that the Complainant in fact was not consenting, you must ask yourself if you are satisfied beyond reasonable doubt that the Defendant did not have an honest and reasonable belief that the Complainant was consenting at the time [he/she] did the [charged act].

If you are not so satisfied, even though the Complainant was not consenting, you must find the defendant not guilty. If the prosecution have satisfied you beyond reasonable doubt that the Defendant either did not honestly have such a belief or that [he/she] held that belief but that it was not reasonably held in all of the circumstances, you must find the Defendant guilty.