

Mistake of Fact in Sexual Offences

Legislation

24 Mistake of fact

- (1) 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.

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.

Section 348A was inserted by the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021*, No 7 of 2021 which commenced on 7 April 2021. The transitional provision is s 754:

754 Offences charged before or after the commencement

- (1) Despite the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021*, the former provisions continue to apply in relation to a person charged with an offence before the commencement.
- (2) The new provisions apply in relation to a person charged with an offence after the commencement, whether the charge is for an offence committed before or after the commencement.
- (3) In this section—

"former provisions" means the provisions of this Code as in force from time to time before the commencement.

"new provisions" means the provisions of this Code as in force from the commencement.

Commentary

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

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. Inevitably, that will require some evidence of acts (or, in particular circumstances, an omission to act) by a complainant that led the defendant to believe that the complainant had a particular state of mind consisting of a willingness to engage in the act and believed also that that state of mind had been communicated to the defendant, that is, that consent had been “given”.

[55] Where s 24 arises for a jury’s consideration the onus of proof lies upon the prosecution to exclude mistake as an excuse ... The excuse afforded by that provision may have to be excluded by the prosecution even if the accused does not invoke the section ... [Section 24 arises if] there [are] facts in the case that justify consideration of the issue by the jury ... [T]he only question is whether there is evidence which raises the issue of mistaken belief for the jury’s consideration so that the prosecution must exclude the excuse afforded by s 24.

...

[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.

...

[61] In a case like this one, in which the primary answer to the charge is one of consent, it is likely that the very facts relied upon to show consent, being objective facts, will also be relied upon to raise an inference that the accused held a reasonable but mistaken belief about that issue ...

...

[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, at 376 – 377 [97]. *R v Ewanchuk* was also cited with approval by McMurdo P in *R v Cutts* [2005] QCA 306 at [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 at [53]-[56]; *R v Dunrobin* [2013] QCA 175 at [119].

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: *R v O'Loughlin* [2011] QCA 123 at [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: *R v Julian* (1998) 100 A Crim R 430 at 434; *R v Mrzljak* [2005] 1 Qd R 308 at 321, 326; *R v Wilson* [2009] 1 Qd R 476 at [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 at 321, 329-330.

Williams JA said:

[53] The critical fact for a defence based on s 24 is the offender's belief. For the defence to arise the belief held by the offender must be both honest and reasonable. Whilst that means that the belief must be based on reasonable grounds it is nevertheless the belief of the offender which is critical. That must mean, in my view, that the 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] The circumstances of the present case point up the inevitability of reference to the characteristics of an accused in considering the reasonableness of mistake. It would be absurd here to introduce a fiction that the appellant had a full command of the language into the process of considering whether he laboured under a reasonable but mistaken apprehension as to the existence of consent. But 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.

Sample Direction

If you are satisfied beyond reasonable doubt that the complainant did not 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 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? (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.

An honest belief is one which is genuinely held by the defendant.¹

A defendant's belief is reasonable, when it is one held by the defendant, on reasonable grounds.² [Consider whether it is necessary to direct the jury on any particular circumstances relevant to the defendant and outline these relevant particular characteristics: see commentary on matters relevant to a defendant's belief].

The complainant says that he/she did not consent [and made that clear to the defendant].

Remember the onus of proof. It is not for 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 wasn't in fact consenting, you must ask yourself "can I be satisfied beyond reasonable doubt that the defendant did not have an honest and reasonable belief that she was consenting?"

If the prosecution have satisfied you beyond reasonable doubt that the defendant did not have such a belief you must find the accused guilty.

If you are not so satisfied, even though the complainant was not consenting, you must find the defendant not guilty.

¹ See commentary above on relevance of defendant's intoxication.

² See commentary above on whether a defendant's belief was reasonably held.