Fraudulent Impersonation and Consent in Rape

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Introduction

One problem relating to consent in rape which has given rise to considerable confusion and numerous conflicting judgements[1] is that regarding fraud. Where "consent" to the particular act has in fact been given by the woman concerned, is the charge of rape thereby ousted, or does the fraud vitiate the consent, thus validating a charge that the man has had carnal knowledge of the woman without her consent?

Confusion as to vitiation or validity of consent has arisen where the nature and character of the act has been misrepresented by the actor;[2] where fraud as to inducement to consent has been mooted;[3] and where fraud as to the identity of the person doing the act has arisen.[4] In the latter case, decisions have been made in such a way as to appear fundamentally wrong in law,[5] and have been "rectified" by the passage of legislation.[6] Rather than rectifying the situation, however, such statutes have simply compounded the error by limiting unnecessarily the fraud as to identity which vitiates consent.[7] Both commonsense and good law require a revision of mistaken legislation which has itself been based on a mistaken interpretation of law.

Case Law Background

In *R.* v. *Jackson* (1822) Russ. & Ry. 487 the defendant was convicted of burglary with intent to commit rape, the complainant being a married woman into whose bed he had introduced himself whilst she was sleeping. The question of whether a man could be convicted of rape where the woman did not immediately resist him, in the belief that he was her husband, was considered. Four of the judges concluded that such fraud would vitiate consent, and thus that the charge of rape should in such a case be sustained. The eight remaining judges held that such could not be rape. However, several of these intimated that if such a case should occur, the jury ought to be advised to bring in a special verdict.[8]

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1. See, for example: *Jackson* (1822) R. & R. 487: *Saunders* (1838) 9 C. & P. 265: *Williams* (1838) C. & P. 286: *Clarke* (1854) Dears 397: *Barrow* (1868) L.R. 1 C.C.R. 156: *Dee* (1884) 15 Cox 579: *Harms* (1944) 2 D.L.R. 61: *Papidimitropolous* (1957) 98 C.L.R. 249.
2. *Cawe* (1850) 1 Den. 580: *Flattery* (1877) 2 Q.B. 410: *Williams* (1923) 1 K.B. 340.
3. *Papidimitropolous* (1957) op.cit.
4. *Dee* (1884) op.cit.: *Papadimitropolous* (1957) op.cit.: *Galliene* (1964) N.S.W.R. 919.
5. The basis of this submission will be discussed post.
6. E.G. Criminal Law Amendment Act 1885 (U.K.): where personation of a husband leads to "consent" on the part of a wife to sexual intercourse renders that act rape on the part of the personator. (See also: s.1(2) Sexual Offences Act 1956 (U.K.) based on Criminal Law Amendment Act.)
7. It is submitted that the limitation of personation to the husband in the legislation has come about as the result of fundamentally unsound decisions in law: that the statutes thus limiting cases of personations are unnecessary if the correct reading of the common law is applied: and that the correct reading of the law would result in a wider area of personation rendering an act of intercourse procured by such means to be rape.
8. Dallas, C.J. is stated in the report to have '... pointed out forcibly the difference between compelling a woman against her will, when abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation.' Presumably it was by making this distinction that he wished to justify the decision that in the fraudulent situation the man

The problem was against considered in 1838: *R.* v. *Saunders* (1838) 8 Car. & P. 266 and *R.* v. *Williams* (1838) 8 Car. & P. 286. In both, it was held that the accused would be guilty not of rape, but of assault. In the former, Gurney, B. considered that the crime was not against the will of the woman, as she consented in the belief that the man was her husband. The jury was directed to bring in a verdict of assault: there need not be resistance: 'If resistance is prevented by the fraud of the man who pretends to be the husband, then that is sufficient.'

The rationale underlying both decisions is, however, questionable. As May, C.J. concluded in *R.* v. *Dee* (1884) 15 Cox C.C. 579: 'If there is a consent which prevented the crime being rape, it would seem that that consent would also prevent the crime from being an assault which consent excludes.'[9] Thus there would be no crime at all.[10] In that same case, Pallas, C.B. stated:

> 'It seems to me that logically it is inevitable ... that the consent which must be absent to constitute rape is the same consent the absence of which involves the minor offence of assault and that if there were, as there unquestionably was in *Saunders'* and *Williams'* cases, acts involving assault, the crime committed in each case must be rape.'[11]

Dee's case reviewed those decisions relating to the gaining of 'consent' to an act of sexual intercourse by way of fraudulent impersonation. The prosecutrix in the particular case was awake at the commencement of the act, and spoke, in the darkness, to the man whom she assumed was her husband. He failed to answer, and it was only after the act had commenced that she realised that he was not her husband. It was held that the man would be guilty of rape, it being irrelevant that the woman was awake and in full control of her faculties during the act. The point in issue, and that rendering the act rape, was that at the time the woman submitted she was under a misapprehension—namely, that she was giving consent to another party.[12] In a case of personation, it was considered, there was no *consensus quoad hanc personam*: the act was thus rape.[13] Any decision previously made in which impersonation was not considered to destroy the apparent consent and render the act of intercourse rape were discounted by all judges as being incorrectly decided and not in accordance with the principles of English common-law.

May, C.J. based his decision on the moral nature of the act:[14] 'Did she consent to the act of adultery? Are not the acts themselves wholly different in their moral nature? The act she permitted cannot properly be regarded as the real act which took place.'[15] Grove, J. recognised that a 'dissenting will' would not be necessary, the question being between positive and negative agreement: '... and I think mere negation of assent is sufficient.'

would not be guilty of rape. However, surely this ignores the nature of the crime of rape. If the important factor were the 'calling into the mind of abhorrence', when it would mean that any unconscious woman who was raped would never have the protection of the criminal law in relation to the act of penetration, but would have protection only in respect of 'an assault'. It is penetration (in addition to the acts leading up to this) that the law relating to rape is presumably designed to deal with.

9. *Dee* (1884) op.cit., at p.585.
10. See also: *Clarence* (1888) op.cit., per Willes, J.
11. *Dee* (1884) op.cit., at p.590.
12. Criticising the decision in *Barrow* (1868) op.cit. where a distinction was made between submission where a woman was sleeping and the situation of a woman awake—the woman being held in the latter case to have consented, although she was in bed with her husband at the time and thought it was he who was effecting penetration.
13. Per May, C.J. in *Dee* (1884) op.cit., at p.587.
14. The moral nature ofthe act of intercourse was also dealt with in relation to consent, where the *act* (rather than identity of the perpetrator) was under discussion as a matter relating to fraud in: *Harms* (1944) op.cit.
15. *Dee* (1884) op.cit., at p. 587.

In his judgement Grove, J. specifically referred to the identity of the man concerned in the act of intercourse, determining that identity is an intrinsic part of the consent to the act. Such a principle he considered to be in concert with the overall rationale of the common-law.

> 'That (the identity of the man is an intrinsic part of the act, and of consent thereto) is but an instance of the application, which in the criminal law appears under the maxim 'Actus non facit reum nisi mens, sit rea', which determines the nature of the act of execution of all legal instruments, of which it is of the essence that it be accompanied by the intellect, and which applies in the innumerable cases in which intention governs. *An act done under the belief that it is another act different in its essence is not in law the act of the party. The person by whom the act was to be performed was part of its essence* ...'[16]

Similarly, Lawson, J. determined that the reality of consent is governed by two issues: consent to the actor, and consent to the act of intercourse: if either element is missing, then the consent is not real, not 'the free exercise of the will of a conscious agent.'[17]

That the identity of the parties may be a factor intrinsic to the performance is, as Grove, J. pointed out, well recognised in other areas of common-law—most notably that of commercial contracts. If, in order to achieve a desired state of sartorial elegance, 'A' contracts with 'B', a renowned tailor, to design and cut his new suit, 'C' cannot take over 'B's duties under the contract: it must be 'B' or no one who makes the suit required under that particular contract. Similarly, if 'X' is hired to perform at an entertainment, the contract being specifically directed at the appearance of X, no one other than 'X' can undertake to appear in fulfilment of that contract. The particular character or personality is of the essence of the contract, a term which cannot be altered without destroying the agreement. 'B' and 'X' are agreed to: there is no agreement within those particular contracts which will legalise the performance of others who claim to be acting under the said agreements.

So with sexual intercourse—where a party agrees to sexual intercourse with 'M' then the agreement extends only to sexual intercourse with 'M': 'R' has no rights under that agreement, and cannot claim the consent given to 'M' as consent given to him.

In *Dee* (1884) Murphey, J. drew an analogy between the signing of an agreement and the agreement to undertake intercourse: where a man agrees to the content of a particular document, and undertakes to sign that agreement, then if he turns away and in that instant a substitute document is placed before him, so that he unknowingly signs the latter, it cannot be said that he agreed to the terms of the latter document, nor to sign it—although his signature appears thereon.[18] Similarly with sexual intercourse—if a party agrees to the act with 'X', then in the dark 'Y' takes 'X's place—it cannot be said that the consent given to 'X' extends to 'Y'.

O'Brien, J. drew an analogy with an act of intercourse perpetrated upon a blind woman: if she consents to 'P', but due to her lack of sight 'M' impersonates 'P' and she submits, it cannot be said that she has consented to 'M'—despite the fact that she does not reject 'M's advances.[19] In criminal law, O'Brien observed, if a man were to agree to give another a sum of money, handing the money over in the dark, a third party silently intervening and accepting the money would be guilty of theft—despite the 'giving' of the money to him. If it were the object of the law to provide protection in cases of violence or inability through uncon-

16. *Dee* (1884) op.cit., at pp. 593, 594.
17. Ibid, at p. 595.
18. Ibid, at p. 598.
19. Ibid, at pp. 597, 598.

sciousness and so on to consent to the act of intercourse, and these cases only, leaving women to preserve their own virtue, O'Brien could not reconcile this 'object' of the criminal law with the fact that persons are not left to preserve their property, by their own efforts, against agressive acts committed by means identical to those used in the fraudulent intercourse situation. There must, he concluded, be '... the same defence for female virtue against a thief in the dark as against the open methods of a highwayman.'[20]

Fraud and Protection of Property

The question of fraud in relation to the act of sexual intercourse where identity is in issue is substantially that which relates to fraudulent entry under the Theft Act 1968 (U.K.).[21] Under that Act, if Plummer gained entry to 'x's home by holding himself out to be Plummer, a well-known firm of drainage experts, and thus acquired permission to re-lay pipes in the home, and then in fact made off with goods belonging to the owner (as had been his intention all along) Plummer would be guilty of burglary.[22,23] Similarly if 'A' gained entry to the house by fraudulently representing himself to the woman inside as her husband who had lost his key, whereas in fact his aim was to enter and commit rape, he would be guilty of burglary.[24,25] The consent in both cases would not be 'real consent', the fraud being such as to render the transaction void, so that in each case the entry would be a trespass.[26]

Thus O'Brien's disapproval as expressed in *Dee* (1884) of the view which would hold that fraudulent impersonation in gaining 'consent' to the sexual act would not be such as to vitiate consent would appear to be bourne out by statute: clearly, if such fraud renders the 'consent' void in the case of entry for the purposes of The Theft Act it is inconceivable that like fraud should not similarly render 'consent' to the sex-act void.[27,28] There is no ground on which a legal distinction between such fraud in relation to the entry and fraud in relation to sexual activity can be drawn, and similarly in concert with O'Brien's view,

20. Ibid, at p. 598.
21. See s.9(1) A person is guilty of burglary if—(a) he enters any building or part of a building as a trespasser and with intent to commit any such offences as is mentioned in subsection (2) below ... (2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building ... of inflicting on any person therein any grievous bodily harm or raping any woman therein, ...
22. Cf. *Cundy* v. *Lindsey* (1878) 2 A.C. 459.
23. See: fn. 21 ante.
24. That is, accepting that if he honestly believed the women to be admitting him as himself, not as her husband, he would not be guilty of trespass—but the fraudulent story belies this construction: see: *Collins* (1972) 2 All E.R. 1105.
25. See: fn. 21 ante.
26. See also: Smith (1968) 'Burglary Under the Theft Act' Crim. L.R. 295, at pp. 299, 300.
27. See: Dee (1884) op.cit., at pp. 597, 598:
28. There might be a contention that there is a distinction between a case where a person actively holds himself out to be someone he is not in order to gain entry—e.g. as in the example of the husband impersonation in gaining entry to the home—and that of the man who simply climbs into the woman's bed without seeking to convince her by words that he is her husband. However it is submitted that there is in reality no distinction. By the very act of climbing into the bed the man holds himself out to be a person whom the woman holds in considerable intimacy: such action surely would be sufficient to constitute the necessary fraud. A second point raised might be that where the woman responds to his overtures it might be that he honestly believes that she is consenting to him as himself, not as the person whom she intimately knows—however it is submitted that no jury would—or should—believe that a man who enters a woman's bed, unannounced, could possibly hold an honest belief that she was consenting to his sexual overtures in his own person (where he is unacquainted with the woman in a sexual way previous to his unannounced entry)—unless his mind was totally befuddled! (on this point, however, see: *Collins* (1972) 2 All E.R. 1105.)

there hardly seems to be support for a policy grounding which would extend greater protection in terms of crimes against property than in terms of crimes against the person.

Fraud as to Identity Versus Fraud as to Adultery

A contention which has been made in relation to fraud vitiating consent to sexual intercourse on grounds of identity is, however, that it is only impersonation of a husband which will render the 'consent' void. Clearly, despite the seeming confirmation of this contention by the containment in the Sexual Offences Act 1956 (U.K.) of a section providing that husband impersonation will render a sexual act rape, such a contention cannot on legal or logical grounds be supported. The relevant factor is that of impersonation of a party to whom the woman would give a valid consent: the character of the party to whom the woman would give a valid consent is irrelevant.

Gaining entry by fraudulent means under the terms of the Theft Act 1968 is not so limited to special relationships between parties. That is, in the above cited example of the woman who 'consents' to the entry of the intruder in the belief that it is her husband who has mislaid his key, it is not the fact that she thinks the man requesting to come in is her *husband* that is relevant: it is that she thinks that she is opening the door to 'X', a particular identity, where as in fact she is opening the door to 'Y'—a quite different identity. The intruder could be a boy claiming to be her son, a woman claiming to be her mother, and thus gaining entry. Clearly the voiding factor in the trespass case must be of the same dimensions in the rape case: the woman consents to 'X', whereas it is 'Y' who presents himself.[29]

This confusion may have arisen from the fact that the majority of cases which have dealt with the question of impersonation have involved husband-wife situations.[30] Further in relation to this, where husband personation is concerned, the wife would, had the act been taken in law to have been consented to, have been guilty of adultery, upon which ground her husband could have obtained a decree of divorce.[31]

In *R.* v. *Dee* (1884) the problem of adultery was specifically referred to: 'Did she consent to the act of adultery? Are not the acts themselves wholly different in their moral nature? The act she permitted cannot properly be regarded as the real act which took place.'[32] However the use of the term 'adultery' tends to cloud the issue. It is not that to render consent void there must be no consent to an adulterous act alone: rather, it is that to render consent void there must be no consent to the particular person. Obviously, where a woman is married and gives

29. That is if the woman were unmarried, the correct interpretation of the law would mean that a man to whom she gives her 'consent' in the belief that it is a particular friend/lover would be guilty of rape: a wife who gives her consent in the belief that the man is her husband—or an adulterous lover—would be subjected to rape: further it would seem clear that a woman who admitted one whom she believed to be another man to her bed would equally be within the terms of the law in the sense that when she realised her mistake as to sex, the man could not say she consented to initial entry to the bed.
30. All cases previously cited as relating to the issue of consent involved fraud where the woman was a married person and imagined the interloper to be her husband. However the case of *R.* v. *Merembu Bongab* (1971-1972) P. & N.G.L.R. 433 involved a woman who suffered a fraudulent deception when she imagined the intruder to be her defacto husband. (See discussion post.)
31. In order to be guilty of adultery, a person must have had sexual intercourse voluntarily: *Clarkson* v. *Clarkson* (1930) 170 L.T. 101 where it was held that on evidence of rape, although there had been introduced into the matrimonial home an illegitimate child (the husband having been away from home at the date of conception). The wife had not committed adultery—that is, had not willingly yielded herself to another man—and the marriage could not be ended on such grounds.
32. Per May, C.J. in *Dee* (1884) op.cit., at p.587.

consent on the basis of the man being her husband, it will be a natural concomitant of the fact that she is raped that she will not be guilty of adultery. Coincidentally with the failure to give consent to the particular body runs the failure to give consent to the act of adultery. However this cannot mean that simply because an unmarried woman is in no position to give or withhold consent to an act of adultery in the sense of her being an offending married party, she cannot give or withhold consent to a particular body.

That it is identity rather than the fact of marriage which is important is clear from the judgments in *Dee* (1884) itself: Consent must be to the man himself. 'That this is so is but an instance of application of the principle of widespread application ... *Actus non facit reum nisi mens, sit rea* ...[33] Similarly, in Clarence (1888) 2 Q.B. 23 Stephen, J. declared: '... the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to fact into rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.'[34] And in *Papidimitropolous* (1957) 98 C.L.R. 249 the High Court of Australia declared: '... consent (to sexual intercourse) demands a perception as to what is about to take place, *as to the identity of the man*, and the character of what he is doing.'[35]

Current Legislation

Nevertheless the Sexual Offences Act 1956 (U.K.) provides that it is a felony for a man to rape a woman, and where a man induces a married woman to have sexual intercourse with him by impersonating her husband, he will be guilty of the act of rape.[36]. Relating directly to the issue of fraud as to the identity of the man perpetrating the act of intercourse, this section can be viewed as unnecessarily limiting the common-law. 'Consent' cannot be taken to be real where the woman consents to a body other than that which perpetrates the act. Therefore it appears to be irrelevant to the problem of identity whether the relationship with the man consented to is one subsisting outside wedlock.

The paradoxical nature of the formulation of such legislation is evident in the recently decided New Guinean case of *R.* v. *Merembu Bongab* (1972) P. & N.G.L.R. 433. In New Guinea the Queensland Criminal Code is in force, under which it is provided that 'Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by ... means of false and fraudulent representations as to the nature of the act, *or in the case of a married woman, by impersonating her husband*, is guilty of a crime which is called rape.'[37] Here, the accused was found to have had sexual intercourse with the prosecutrix in such circumstances as she was aware that he had made some partial penetration, but *she believed he was her de facto husband* and so 'consented'. The court considered that on proper construction of the relevant section of the Code, the crime of rape was not committed. The facts of the case fell outside the terms of the section—the belief was not that the man was her husband, but that he was her defacto husband: she was not a married woman—and thus the charge could not stand. The effect of the relevant section of the Code was to limit the crime of rape to the circumstances set out therein.[38]

In terms of the common-law, however, the woman had not consented to the act with the man who effected intercourse with her. He was not her de facto hus-

33. Per Grove, J. in *Dee* (1884) op.cit., at p. 593.
34. *Clarence* (1888) op.cit., per Stephen, J. at pp. 43, 44.
35. *Papidimitropolous* (1957) op.cit., at p. 261.
36. Sexual Offences Act (U.K.) 1956 s.1, ss.1,2.
37. S. 347 Criminal Code Queensland (adopted): cf. Western Australian Criminal Code.
38. *R.* v. *Merembu Bongab* (1971-1972) op.cit.

band, although she thought him to be.[39] Thus, within the terms of *Dee* (1884), *Clarence* (1888) and *Papidimitropolous* (1957), in addition to the numerous aspects of contract law which might be cited in favour of this approach to the common law, rape was committed.

The relevant New Guinea section was based upon the provision in the Criminal Law Amendment Act 1885, upon which the Sexual Offences Act 1956 was itself based. As a perusal of the cases leading up to the enactment of the 1885 provision reveals, however, it was the confusion of judgments on the issue of identity which resulted in enactment: it was the desire to clarify the position as to rape in cases which had, up to that time, involved deception as to husband only, rather than a desire to limit the common-law scope of rape which led to the 'husband-type' formulation. On this basis it might be said that the law of rape at common-law was not limited: that the issue of identity, despite the *Merembu Bongab* judgment, remains a real one. Indeed this was the view of Stephen who in referring to the Criminal Law Amendment Act in his Digest of the Criminal Law stated:

> '... a declaration of the law was made by statute, section 4 of the Criminal Law Amendment Act 1885 (Imp.) after reciting that doubts had been entertained as to whether a man who induces a married woman to submit to having connection with her by personating her husband is or is not guilty of rape, enacted and declared that every such offender should be deemed guilty of rape ...'[40]

He appeared thus to accept the enactment as a clarification of the law rather than as a limitation upon the 'consent to the body' requirement of *Dee* (1884).

Nevertheless, it also seems clear that the idea of limitation may find favour in some interpretations of the existing law. This can only lead to the conclusion that s.1(2) of the Sexual Offences Act ought be repealed, as being either superfluous in relation to the common-law[41] or being unnecessarily limiting and thus leading to a discriminatory application of the protection of the criminal law.[42]

Conclusion

If the formulation of s.1(2) of the Sexual Offences Act 1956 (U.K.) based on the Criminal Amendment Act 1898 is taken as laying down a limitation on what is the common law relating to the circumstances in which a charge of rape may be sustained—a limitation which in fact takes away common-law protection for unmarried women who are defrauded into 'consenting' to sexual intercourse, and protection for married women who are defrauded into 'consenting' to sexual intercourse where they have been led to believe that the interloper was some party other than the husband, but a particular party to whom consent would be extended, then it can only be said that redrafting—or repeal and recognition of the common-law position is essential.

39. In terms of the common law principle of identity as an essential element of agreement, it is clear that the woman need not have been under the illusion that the man was her de facto husband, either—the principle ought to be that she was under an illusion that she was giving consent to a person to whom she would in the normal course of things have given consent.
40. Stephen's *Digest of the Criminal Law* (3rd Edition) at p. 185.
41. That is, if identity is an intrinsic issue to the question of consent to sexual intercourse, then the relationship of husband, defacto husband, etc. is irrelevant: there is no necessity for the section in terms of common law interpretation of consent in rape.
42. Note also that it could be said that such an interpretation of the law would lead to discrimination in terms of those punished. One could validly ask why it should be that a man who impersonates a married woman's husband ought to be punished by conviction for rape, when a man who personates a man not being a husband should be punished not at all. Fundamentally the acts are the same—should not the same punishment attach?