**Sexual Offences**

What type of rape is it ?

* + If not consenting – type 1 [38(2)(a)]
  + If consenting then change mind, then type 2 [38(2)(b)]
  + If not consenting but required by force then Type 3 [s38(3)]

|  |  |  |
| --- | --- | --- |
| S38(2)(a) | S38(2)(b) | S38(3) |
| Sexual Penetration | Continual of Sexual Penetration | Compelling by force or otherwise |
| ------------------------------------------- | ------------------------------------------- | Victim to SP, D or TP - s 35 |
| Without Consent | After notification of consent | Without Victims Consent |
| S36 – Free agreement | S36 🡪 Free agreement | S36 🡪 Free agreement |
| S36(a)🡪(g) | S36(a)🡪(g) – query relevance | S36(a)🡪(g) – query relevance |
| S37 – mandatory jury direction | S37 – mandatory jury direction | S37 – mandatory jury direction |
| S37AAA –  (a)  (b) Deeming provisions under s36 | S37AAA –  (a)  (b) | S37AAA –   1. Or (b) |

*Jury Direction – Mens Rea (apply equally across all)*

* The jury directions are provided if the trial judge IS NOT SATISFIED that the prosecution evidentiary burden has been satisfied i.e. the trial judge believe some exists that the accused honestly believed the complainant had consented. The judge will direct the jury to convict the accused on the basis that they are convinced beyond a reasonable doubt that the complainant had not consented.
  + *The jury will be directed that the prosecution must prove beyond a reasonable doubt the following three things:*
    - *That the accused intentionally sexually penetrated the complainant*
    - *That the complainant did not consent; and*
    - *That the accused did not honestly believe that the complainant consented.*
* 37AA
* 37AAA–

**A Basic Definition**

In order for the accused to be found guilty in Victoria of the crime of rape, the prosecution must prove beyond reasonable doubt that:

* The accused sexually penetrated the victim; and
* The victim did not consent to the sexual penetration; and
* Either:
  + The accused knew that the victim was not consenting; or
  + The accused knew that the victim might not be consenting.

***s 38(2):***

A person commits rape if –

1. he or she **intentionally sexually penetrates** another person without that person’s consent while being aware that the person is not consenting or might not be consenting; or
2. after sexual penetration **he or she does not withdraw from a person who is not consenting** on becoming aware that the person is not consenting or might not be consenting.

(3) A person (the offender) also commits rape if he or she compels a person-

1. to **sexually penetrate the offender or another person**, irrespective of whether the person being sexually penetrated consents to the act; or
2. who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.

(4) For the purposes of subsection (3), **a person compels another person (the victim)** to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act-

1. without the **victim's consent**; and
2. while-
   1. being aware that the victim is not consenting or might not be consenting; or
   2. not giving any thought to whether the victim is not consenting or might not be consenting.

**Penalty: 25 years maximum.**

Section 38(2) defines and prohibits the crime of rape. It draws upon collateral definitions in ss 35 (defining sexual penetration), 36 (defining consent) and 37 (jury directions). The practical operation of these sections is also determined by a the various evidentiary rules regulating the relevance and admissibility of evidence in sexual assault trials.

Thus, the legal meanings of s 38’s definitional and evidential rules are determined by cultural and structural practices quite apart from the legislative scheme itself.

**Actus Reus**

* “sexually penetrates another person”
* “without that person’s consent”

**Mens Rea**

* “intentionally”
* “while being aware that the person is not consenting or might not be consenting”

***Actus Reus***

***‘Sexually Penetrates Another Person’***

Sexual penetration extends beyond vaginal penetration by a penis, and does not require the emission of semen:

***s 35(1):***

‘sexual penetration’ means –

1. the introduction (to any extent) by a person of his penis into the vagina, anus, or mouth of another person, whether or not there is emission of semen; or
2. the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes;

The definition of ‘vagina’ is similarly inclusive:

***s 35(1):***

‘vagina’ means –

1. the external genitalia; and
2. (b) a surgically constructed vagina.

***Ibbs v R* –**

* On the facts, the sentence was ‘manifestly excessive’ because here the factual scenario was not of the most heinous kind
* Failing to withdraw when asked is less serious than if no consent was given from the outset

***‘Without That Person’s Consent’***

In relation to the victim’s mental state, the question is asked: **‘as a matter of her actual conduct, did the victim consent or not consent to the sexual penetration?’** If she did not, then at the second stage, the question arises: ‘did the accused know that the victim was not or might not have been consenting?’

* Consent must be given verbally or by conduct, and must amount to the granting of free and conscious permission (*R v Wilkes & Briant*).

Section 36 sets out the statutory definition of consent. It may be contrasted with the previous common law definition, ‘against her will’. Today, consent is defined negatively:

***s 36:***

For the purposes of Subdivisions (8A) to (8D) "consent" means *free agreement.*

Circumstances in which a person does not freely agree to an act **include** the following –

1. the person submits because of **force or the fear of force** to that person or someone else;
2. the person submits because of the **fear of harm of any type** to that person or someone else;
3. the person submits because she or he is **unlawfully detained**;
4. the person is asleep, unconscious, or so affected by alcohol or another drug as to be **incapable of freely agreeing**;
5. the person is incapable of **understanding the sexual nature** of the act;
6. the person is **mistaken about the sexual nature** of the act or the **identity of the person**; and
7. the person mistakenly believes that the act is for **medical or hygienic purposes**.

* ***R v Papadimitropoulos***
  + *“Such a consent 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. But once the consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape.”*

*Comparative analysis with Canada*

* “consent” means *the voluntary agreement of the complainant* to engage in the sexual activity in question
* (2) No consent is obtained… where
  + the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.’

1. ***Force and harm (actual and threatened) by the accused* (s 36 (a), (b), (c), s 37 (1)(b))s**

Here, it is the violence of circumstances surrounding the act of penetration that is said to negate the free agreement of the victim:

***s 36:***

Circumstances in which a person does not freely agree to an act include the following –

1. the person submits because of force or the fear of force to that person or someone else;
2. the person submits because of the fear of harm of any type to that person or someone else;
3. the person submits because she or he is unlawfully detained;

***R v Olugboja* (1981) UK CA –**

* This is a task for the jury to determine, ‘applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case’ (*R v Olugboja*).
* **Was there Submission?**
* *R v Olugboja* (1981) UK CA –
  + ‘There is a difference between consent and submission; every consent involves submission, but it by no means follows that mere submission involves consent.’
* *Question of Law (No 1 of 1993)* SA CCA
  + Submission is not consent: “… consent must be freely given, and acquiescence to intercourse by reason of any threat or duress may properly be regarded as negativing consent for the purposes of the law of rape.”

1. ***Incapacity of the victim* (s 36 (d), (e))**

The victim must possess the capacity to consent. If a victim is incapable of consenting, *the question* whether she did actually did consent must be answered in the negative.

***s 36:***

Circumstances in which a person does not freely agree to an act include the following –

1. the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
2. the person is incapable of understanding the sexual nature of the act;

* **Was the Victim incapacited?**
  + Causes of incapacity specified in s 36 are sleep, unconsciousness, and intoxication (see, eg, *Galliene*). However, these sections do not prevent defence counsel attempting to use intoxication to demonstrate the presence of consent (see, eg, *Saragozza*).
  + *O’Connor* suggests that s 36(d) will be interpreted narrowly: the victim really needs to be completely incapable of consenting, as where, for example, they are unable to speak, move, or interact with the accused in any way

1. ***Mistaken belief of the victim* (s 36 (f), (g))**

In order to negate their consent, the victim’s mental state must be characterised by a mistaken belief as to either the sexual nature of the act or to the identity of the person performing it.

A mistaken belief as to the identity of a person (eg, where the victim mistook the accused for her husband, and the resulting sex for marital sex) will not necessarily vitiate consent; there must be a mistake as to the nature of the act itself or the identity of the person with whom it is done (*Papadimitropoulos*). The outcome will often depend on the extent to which the judiciary is willing to logically separate ‘consent to fornication’ from ‘consent to marital intercourse’.

***s 36:***

Circumstances in which a person does not freely agree to an act include the following –

1. the person is mistaken about the sexual nature of the act or the identity of the person; and
2. the person mistakenly believes that the act is for medical or hygienic purposes.

**Cases**

* *Saunders v Williams* (1835), no rape occurred because the consent of the victim was held not to be vitiated, despite mistakenly thinking the man with whom she was having sex was actually her husband.
* *Mistake as to Idenity - Gallienne Case*
* *Medical Case – Mobilio*
* *R v Osolin (Canada Case)*
  + *‘A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them … a person who commits a sexual assault without some support in the circumstances for inferring the consent of complainant has, at very least, been willfully blind as to consent’*

1. ***Consent and its withdrawal***

The fact that consent was withdrawn only after the initial penetration is still indicative of there being a lack of consent (s 38(2)).

* Question of consent – must refer to Jury Directions in accordance with s37 which refers to s37AAA

*R v Ibbs* (1987) HCA:

* Refusal to withdraw following initial consent is still rape, but the heinousness and resulting sentence will depend on the facts

*Kaitemaki* (1980):

* Refusal to withdraw following initial consent is still rape
* Common law restatement of s 38(2)

1. ***Directions to the Jury***

**s37AAA – Jury directions on consent**

* + - Meaning on consent in s36
    - s37AAA(b)
    - s37AAA(c) – If beyond reasonable doubt, s36 is true, victim not consenting
    - s37AAA(d) – Free agreement direction for JURY
    - s37AAA(e) – Just because they didn’t resist or know about it doesn’t mean its not rape in respect of a JURY

**S37AAA -** For the purposes of section 37, the matters relating to consent on which the judge must direct the jury are-

1. the **meaning of consent set out in section 36**;
2. that the law deems a circumstance specified in section 36 to be a **circumstance in which the complainant did not consent**;
3. that if the **jury is satisfied beyond reasonable doubt** that a circumstance specified in section 36 exists in relation to the complainant, the **jury must find that the complainant was not consenting**;
4. that the fact that a person **did not say or do anything to indicate free agreement** to a sexual act at the time at which the act took place is enough to show that the act took place **without that person's free agreement**;
5. the **jury is not to regard a person as having freely agreed** to a sexual act just because-
   1. she or he did not protest or physically resist; or
   2. she or he did not sustain physical injury; or
   3. on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, nor a sexual act with another.
6. ***Sexual history and consent***

Evidence of the sexual history of the victim was traditionally construed by defence counsel as being relevant to two issues:

* The *credibility* of the victim when she testified (the rather questionable presumption was urged upon the court that the greater the victim’s promiscuity, the greater her propensity to lie); and
* The *legal issue* of whether or not the victim consented (more promiscuous victims are presumed to consent more readily to acts of intercourse).

***Mens Rea***

The mens rea of rape has two components. The prosecution must prove beyond reasonable doubt that the accused possessed both mental states:

* An attitude towards the act of sexual penetration (legally defined as an intention to sexually penetrate); and
* An attitude towards the victim’s (lack of) consent (legally defined in terms of knowledge or awareness)

**The mens rea is set out by s 38(2):**

The intention to sexually penetrate is rarely capable of dispute, since it is unlikely that it is possible to perform such an act accidentally or inadvertently.

***s 38:***

(2) The accused –

1. Intentionally sexually penetrated another person;
2. While being aware that the person:
   1. Was not consenting; or
   2. Might not be consenting.

The intention to sexually penetrate is rarely capable of dispute, since it is unlikely that it is possible to perform such an act accidentally or inadvertently

1. ***‘Knowledge That the Victim Was Not or Might Not Be Consenting’***

What must be proved, in addition to the intent to sexually penetrate, is either:

1. Knowledge that the victim *was not* consenting; or
2. Knowledge that the victim *might not be* consenting

This standard of knowledge or awareness is a *fully subjective* standard. Component (a) imports a standard of knowledge and (b) a standard of recklessness.

1. *The standard of recklessness*

**Rule:** does ‘might not’ be consenting invoke knowledge of a possibility or does it invoke the higher standard of knowledge of a probability?

The language of lawyers suggests that the standard being *used* is the lesser standard of possibility. It is generally agreed that the standard ‘might not be consenting’ is a lower standard of recklessness than is the standard in relation to murder. For rape, advertence by the Accused to the mere *possibility* of non-consent is sufficient for the mens rea to be satisfied (rather than advertence to the *probability* of death or grievous bodily harm in the case of reckless murder).

Lord Hailsham phrased the standard of recklessness in respect of consent in *Morgan* as intending to have sex ‘willy nilly’

1. *The degree of knowledge*

**Rule:** must the accused’s belief in the victim’s consent be reasonable?

The test for criminally negligent homicide was set out by the Full Victorian Supreme Court in *Nydam*:

* The rule is that, for the argument of defence counsel to be successful, the mistaken belief of the accused need only be honest; it need not be ‘honest and reasonable’
* In addition, when deciding whether the accused honestly believed that the victim was consenting, the jury must consider the reasonableness or unreasonableness of the belief

Cases:

* Pemble, DPP v Morgan

1. *Reasonableness and Honest Belief*

**Rule:** Did the accused actually hold that belief at the time?’, in that the more unreasonable the alleged belief, the less likely it is that the accused held it at the time of the intercourse.

* Section 37(c) does *not* require the claimed belief of the accused to be both honest and reasonable for it to be accepted by the jury. The section simply requires that, where a mistaken belief in consent argument is run by the accused, the judge must direct the jury to consider the evidence of reasonableness and unreasonableness of the belief when they are deciding the question of whether or not the accused did in fact honestly believe that the victim was consenting.
* In the Second Reading Speech to the Crimes (Rape) Bill 1991, the then Attorney-General explained the proposed section 37(c) as follows:
  + *It must be emphasized that just because an accused says he believed the other person was consenting does not mean a jury has to believe him. If the claim is unreasonable, it may well not believe him. The Bill ensures that, in considering whether or not an alleged belief that the complainant was consenting was genuinely held, the jury will take into account whether the alleged belief was reasonable. The Bill requires the judge to direct the jury to this effect.*

1. *Inadvertence and willful blindness*

**Rule:** What if the accused gives *no thought* to the question of consent?

To form the mens rea of rape in Victoria, the Accused must have given *conscious* thought to the question of the Victim’s consent; mere inadvertence will not suffice.

The Accused must have been ‘*aware* that the woman was not consenting, or else *realised* that she might not be and determined to have intercourse with her whether she was consenting or not’ (*R v Flannery and Prendergast* [1969] VR 31). Such an awareness is mandated by the entirely *subjective* mens rea of rape.

* *Flannery*: need conscious awareness of non-consent or the possibility of non-consent
* *R v Paul Ev Costa*: there is no such thing as culpable inadvertence; the accused *must* be aware that the victim was not or might not be consenting.

The correct way to define recklessness in the mens rea of rape is as follows: ‘knowing she [the victim] might not be consenting’ (*Ev Costa*).

Cases:

* *R v Paul Ev Costa*
  + In NSW, ‘recklessness’ also includes ‘indifference’ as to whether or not V consented, rather than requiring actual advertence to this possibility. The argument for such a broad conception of recklessness was that to criminalise conscious advertence but ignore the inadvertence of consent would be unacceptable (see *Kitchener*). Instead, reckless mens rea is said to include culpable inadvertence.
    - See, for example:
      * *R v Kitchener* (1993) NSW C of CA (WW 123)
      * *R v Tolmie* (1995) NSW C of CA (following *Kitchener*).

1. ***Intoxication – REFER SEXUAL AMENDMENT ACT NOTES***

**Crimes Act 1958 - SECT 37AA**

**s37. Jury directions**

1. If relevant to the facts in issue in a proceeding the judge must direct the jury on the matters set out in sections 37AAA and 37AA.
2. A judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding.
3. A judge must relate any direction given to the jury of a kind referred to in section 37AAA or 37AA to-
   1. the facts in issue in the proceeding; and
   2. the elements of the offence being tried in respect of which the direction is given-

so as to aid the jury's comprehension of the direction.

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**37AA. Jury directions on the accused's awareness**

For the purposes of section 37, if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act, the judge must direct the jury that in considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider-

* 1. any evidence of that belief; and
  2. whether that belief was reasonable in all the relevant circumstances having regard to-
  3. in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
  4. whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
  5. any other relevant matters.