

# Critical Reflections on *R v Lawrance*

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# Starting Assumptions

- ▶ Deception and mistake can affect the validity of consent under s74. Section 76 does not “cover the ground” in this area.
- ▶ Not all deceptions or mistakes will be capable of vitiating consent under s74

# Principles

A free choice?

- Section 74: “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”

[38] In terms of section 74 of the 2003 Act, the complainant was not deprived by the appellant's lie of the freedom to choose whether to have the sexual intercourse which occurred.

# *Predictability*

The inexplicability of *McNally*:

[36] In our opinion, a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so and different from engaging in sexual activity having misrepresented one's gender.

# Predictability

Conflict between *McNally* and *Lawrence*

[23] **Mr Wainwright argues** that deception as to gender cannot vitiate consent; in the same way deception as to age, marital status, wealth or, following *EB*, HIV status being **deceptions as to qualities or attributes cannot vitiate consent**. Thus, he submits that **Assange and R(F) can be distinguished as the deceptions in those cases were not deceptions as to qualities or attributes but as to the features of the act itself**.

[24] **We reject this analysis**. First and foremost, *EB* was not saying that HIV status could not vitiate consent if, for example, the complainant had been positively assured that the defendant was not HIV positive: it left the issue open. ... **[T]he argument that in Assange and R(F) the deceptions were as to the features of the act is not sustainable..... In the last two cases, it was alleged that the victim had consented on the basis of a premise that, at the time of the consent, was false** (namely, in one case, that her partner would wear a condom and, in the second, that he would ejaculate outside her body).

# *Predictability*

An explanation for *McNally*?

[36] In her decision, the CPS lawyer... identified cases... where [the deceptions]... strike at the heart of the complainant's sexuality, which she characterised as a deception "as to the fundamental identity of the perpetrator." **In the CPS lawyer's view, McNally could be analysed as an identity or impersonation case, given the centrality of an individual's sexuality to her or his identity, and we would agree.**

# *A better compromise?*

Deceptions relating to physical features of the act or deceptions which result in a risk to the health of the complainant

*Lawrance* at [42]:

There is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003.