

**Question: Consent**

Peter and Mary are unhappily married. Peter has discovered that Mary is having an affair. Peter decides to leave Mary, but wishes to teach her a nasty lesson first. He arranges for his best friend Jake to rape Mary, for which Peter will pay Jake R5000-00. Peter gives Jake a key to their matrimonial home and advises Jake of the best time of the day to attack Mary. Jake puts the plan into action.

Jake impersonates Peter. Late one night while Mary is sleeping, Jake puts on Peter's cologne and climbs into bed with Mary. Jake wakes Mary who mistakes him for Peter and she consents to intercourse. Critically discuss whether Jake and Peter are guilty on a charge of rape.

(10 marks)

Taken from the November 2010 Exam Paper.

**Answer**

Please note: This is not a formal or official memo.

This is simply how I would go about answering the question.

Please do not interpret this as a model answer: It is merely my answer to the question.

**The text in purple is extra notes, thoughts and theory. Only the text in black would actually have been included in my answer.**

**1) Define the Issue:**

Remember guys – it is good to define the issue as narrowly as possible. So, it's not simply whether Peter and Jake are liable for rape. **You have to get to the point as quickly as possible.**

**Note:** The question asks us to discuss liability in respect of both Peter and Jake. **It is, of course, crucial that you READ THE QUESTION.** We will, however, be focussing on Jake's liability.

**1) The issue** is whether Jake can rely on Mary's consent to negate his liability. The issue in turn therefore, is whether Mary gave valid consent in respect of intercourse with Jake.

**2) Define Rape –** We are dealing with a specific crime, therefore it is important that we define the crime in question. This can also be done, before you define the issue, whichever you prefer.

**1)** Any person who unlawfully and intentionally commits an act of sexual penetration with another without the latter's consent, is guilty of the crime of rape.

**2) Sexual Penetration:** Sexual penetration includes any act which causes penetration to extent whatsoever by –

- i. Genital organs into genital organs;
- ii. Any other part of the body of a person, any object, including any part of an animal, into genitals or anus; or
- iii. Genital organs of animal into the mouth of a person.

**3) Principles and Application:**

**1) Start with the most basic principle and then work my way into the specifics.**

**Consent is governed by the Latin maxim 'volenti non fit iniuria'**, which means no harm will come to him who consents. Hence, where valid consent exists, the person administering the harm cannot be held liable in law, since the victim has assumed the risk of the harm.

**2) Consent is a ground of justification**, therefore all the elements of valid consent need to exist objectively. Therefore, the accused's mere belief that valid consent existed is insufficient.

3) **In order for consent to be valid** it must be **legally recognised, real** and the person giving consent must have **capacity** (must be capable of consenting). The consent must be also be given **before the fact**.

i. Legally recognised consent – Whether or not consent is recognised depends on the dictates of the legal convictions of the community. There is however, no *numerus clausus* in respect of legally recognised consent. [*Clarke v Hurst*]

1. We can categorise conduct in the following way with regards to consent:

a. Conduct where consent will **never** legally recognised.

i. ***R v Peeverett:***

**The law does not allow consent to being killed.**

**The law does not allow consent to assisted suicide.**

**Protection of society as a whole:** It is difficult to establish whether there is valid consent as the consenting party is dead. The capacity of the consent could be tainted.

ii. **Distinguish - The living will:**

Where one is in a situation where there is no prospect of recovery/ survival, consent that you should not be kept alive artificially.

**Note:** This is not consenting to murder, merely to letting nature be allowed to take its course.

iii. **Crimes against the state** – One can never consent to crimes against the state, such as treason, or perjury.

b. Conduct where consent will **always** legally recognised.

i. **Rape**

ii. **Theft**

iii. **Malicious damage to property**

c. Conduct where consent will **sometimes** legally recognised.

i. Lawful sports

**Distinguish** – Lawful v Unlawful sports: The court will only allow consent in terms of lawful sport.

**Extent of harm** – This consent only extends to what is reasonably expected in that sport.

ii. Medical treatment

**Note:** Again the law only allows consent in terms of lawful medical treatment. [*Stoffberg v Elliot*]

iii. Religious/ Initiation Ceremonies

**S v Njikelana**

**Held:** It is possible to consent to minor physical aggression, including aggression for religious, customary or superstitious purposes.

**S v Sikunyana**

**Held:** Assaults/ bodily aggressions of a very serious nature/ permanent nature cannot be consented to.

iv. **Consent in terms of employment contracts is not legally recognised.**

-This is due to the **unequal bargaining power** which is usually prevalent in employment contracts.

- **The State has an obligation to/ interest in society as a whole.**

The court will not allow consent where an individual might be forced

to consent, purely for the purposes of securing a job. Promotes degrading treatment of disadvantaged employees – undermines human dignity, equality and the right to be free from violence.

2. The conduct in question is rape. Consent is always recognised in respect of rape and therefore this requirement is met.

## ii. Real Consent

1. **Expressed or implied:** The consent may be expressed or implied (inferred from conduct).
2. **Voluntary and without coercion:**  
The consent must be given voluntarily by the consenting party and he/ she must have been induced/ forced/ coerced to give the consent in any way.
3. **Knowledge of material facts:**  
The consenting party must have knowledge of all the material facts regarding the act/ conduct to which he/ she consents.
4. **Mistake**  
Where there is no real consent, it is often true that the consenting party made a mistake.  
There are **2 kinds** of mistake that may negate consent:
  - a. **Error in negotio:**  
Mistake as to the nature of the conduct to which they are consenting.  
[Williams]
  - b. **Error in persona:**  
Mistake as to the identity of the person they are consenting to.  
**Example:** A mistake as to the identity of a sexual partner. [C]  
**Mistake regarding characteristics:** If the party makes a mistake regarding the characteristics/ the qualities of the person real consent is not negated, as it is not material.
5. In this case, Mary, the consenting party made an *error in persona* – she made a mistake as to the identity of the party she was consenting to, since she mistook Jake for Peter.
6. **Therefore, Mary's consent is not real, since this requirement is negated by the error of identity.**  
Jake cannot rely on consent to negate his liability and he is guilty of rape.

- iii. **Capacity** – I would go further and make the argument that Mary's capacity to consent may have been affected, since she just woke up and was still in a state of near sleep when she consented.