Crossing the Rubicon: implications of s.75A of the Serious Crime Act 2015 for consent and reasonable belief in consent in Sexual Offences Act 2003 offences

HH Judge Emma Nott
John Simmons

Journal Article

Criminal Law Review

Crim. L.R. 2023, 8, 512-529

Subject
Criminal law

Keywords
Consent; Juries; Mens rea; Reasonable belief; Sexual offences; Strangulation or suffocation

Legislation cited
Serious Crime Act 2015 (c.9) s.75A

***Crim. L.R. 512** In this article we examine some of the evidential and legal complexities the courts must address when trying offences charged under the new "strangulation or suffocation" s.75A of the Serious Crime Act 2015 , inserted by s.70 of the Domestic Abuse Act 2021 . We suggest that to import a common law mens rea of belief in consent may be inapt. Finally, we explore the implications for consent and reasonable belief in consent in sexual offences in light of Parliament's approach to consent in the new strangulation offence.*

Introduction

As discussed in previous editions of this Review, [1] the passage of the 2019 Domestic Abuse Bill through Parliament coincided with the heightened visibility given to the issue through COVID-19 containment measures; this may have led to a delay in the passing of the 2021 Act, but it also contributed to its strengthening. One important amendment arising from parliamentary debate through 2020 and 2021 was the insertion by s.70 of the Domestic Abuse Act 2021 of a new s.75A into the Serious Crime Act (SCA) 2015 as follows:

"Strangulation or suffocation

75A Strangulation or suffocation

(1) A person ('A') commits an offence if—

(a) A intentionally strangles another person ('B'), or ***Crim. L.R. 513***

(b) A does any other act to B that—

(i) affects B's ability to breathe, and

(ii) constitutes battery of B.

(2) It is a defence to an offence under this section for A to show that B consented to the strangulation or other act.

(3) But subsection (2) does not apply if—

(a) B suffers serious harm as a result of the strangulation or other act, and

(b) A either—

(i) intended to cause B serious harm, or

(ii) was reckless as to whether B would suffer serious harm.

(4) A is to be taken to have shown the fact mentioned in subsection (2) if—

(a) sufficient evidence of the fact is adduced to raise an issue with respect to it, and

(b) the contrary is not proved beyond reasonable doubt.

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction—

(i) to imprisonment for a term not exceeding 12 months (or 6 months, if the offence was committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020), or

(ii) to a fine,

or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or both.

(6) In this section 'serious harm' means—

(a) grievous bodily harm, within the meaning of section 18 of the Offences Against the Person Act 1861,

(b) wounding, within the meaning of that section, or

(c) actual bodily harm, within the meaning of section 47 of that Act."

In this article we begin by considering the purpose of s.75A, before examining some of the legal and evidential challenges it brings to the criminal courts. We review the concept of "informed" consent and how this might operate in the context of an acknowledged lack of public understanding of the high risk of serious harm associated with asphyxiation. We assess the potential for expert neurological or neuropsychological evidence in relevant cases to explain symptoms of the strangled brain in order to meet potentially unjustified attacks on a complainant's credibility. We explore whether, by requiring a defendant to give evidence of consent before he can rely on it in defence to a charge of strangulation, Parliament has effectively precluded him from relying on any belief in consent that is not allied with actual consent. Finally, we consider the implications for consent and belief in consent as elements of sexual offences and suggest that victims' groups may point to s.75A ***Crim. L.R. 514*** as precedent for amending the Sexual Offences Act (SOA) 2003 to require defendants to provide evidence of consent and to circumscribe the defence of reasonable belief in consent where there is in fact no consent.

Strangulation and suffocation: legislative purpose

The history, necessity and purpose of standalone strangulation and suffocation offences are comprehensively examined by Rory Kelly and David Ormerod in their *2021 Review* article "Non-fatal strangulation and suffocation."[2] Introduced as part of the Government's Violence Against Women and Girls Strategy 2021, the new offences are triable on indictment with a maximum sentence of five years' imprisonment, in line with the maxima for causing actual bodily harm and for inflicting grievous bodily harm. According to research by the Centre for Women's Justice, prior to the introduction of s.75A of the SCA 2015 most strangulations were charged as batteries, triable only summarily.[3] Since the passage of the 2021 Act, and pursuant to the

guidance given in the recent case of *Cook* [4] most—if not all—strangulation offences should be sent for trial to the Crown Court. The Court of Appeal held that the starting point for an offence of strangulation after trial is 18 months' imprisonment, which should be immediate, save in exceptional circumstances. The Court further held that when sentencing intentional strangulation offences, it is wrong in principle to determine the starting point by reference to physical or psychological harm; it stated that there is real harm inherent in the strangulation "which inevitably creates real and justified fear of death". [5]

Parliament's willingness to criminalise a specific battery that is otherwise caught by more general assault offences, and the Court of Appeal's swift issuing of guidance in *Cook* , each reflect a new understanding of the unique harms, high risks and red flags associated with cutting off an individual's oxygen supply. During the Lords' debate in March 2021, Baroness Wilcox gave this précis of the medical and academic evidence surrounding strangulation in the context of domestic abuse:

"Strangulation is a very particular form of assault for three reasons: it is likely to cause serious injury or death, it is perceived by the victim as a direct threat to their life, and it is highly predictive of future homicide." [6]

Baroness Newlove spoke about the little-known risks associated with voluntary strangulation as part of sexual activity:

"Many young people consent to violent acts because they feel pressured or coerced by partners and because of the normalisation of this violence through pornography. They may not be aware of the serious harm that this causes; even death can be caused in a matter of seconds. In a BBC survey of over 2,000 participants, 38% of women under 40 had experienced strangulation during sex; for women aged 18-24, this rises to 54% … [There is a need] to get across the message that strangulation can be very dangerous, and that ***Crim. L.R. 515*** using it is reckless as there is always a risk of harm because you are depriving the brain of oxygen. Restricting oxygen to the brain, even for a short time, can have long-term consequences such as neurological damage." [7]

Current research suggests that strangulation may be the second most common cause of stroke in women under 42. [8] From our perspectives within the criminal and family courts, we see the prevalence of strangulation as a weapon of choice for the coercive controller: face to face with his victim, the strangler exerts total control in a menacing yet singularly intimate form of domestic terrorism.

Legal and evidential issues

Informed consent

Consent under the Sexual Offences Act must be freely given. Common law consent to assault must also be informed. As Baroness Newlove recognised, public understanding of the risks associated with strangulation is low; the issue of informed consent may therefore require informed consideration. Police, prosecutors and judges should be comprehensively trained in current medical understanding of the likely physiological and neuropsychological effects of strangulation, whether voluntary or involuntary.

Nuanced differences between consent to sex and consent to risk of harm were examined in *Dica* [9] where the defendant withheld his HIV+ status from two sexual partners who consequently became infected; he was convicted of causing grievous bodily harm contrary to s.20 of the Offences Against the Person Act (OAPA) 1861. On appeal the Court of Appeal held:

"These victims consented to sexual intercourse. Accordingly, the appellant was not guilty of rape. Given the long-term nature of the relationships, if the appellant concealed the truth about his condition from them, and therefore kept them in ignorance of it, there was no reason for them to think that they were running any risk of infection, and they were not consenting to it. On this basis, there would be no consent sufficient in law to provide the appellant with a defence to the charge under s.20." [10]

To what extent under s.75A might there be an onus on a party to ensure informed consent to asphyxiation/strangulation? *Dica* and ensuing case law established that withholding important information about an obvious risk to health means that there can be no informed consent to the taking of that risk: lack of disclosure by a party carrying a sexually transmitted disease is not enough to vitiate consent to sex, but it is enough to vitiate any defence that the injured party consented to the risk and actuality of the causation of serious harm through that consensual sexual intercourse. In this situation the defendant has both knowledge that he has a harmful disease and comprehension that sexual intercourse will likely cause the same in ***Crim. L.R. 516*** his partner. However, what if neither the defendant nor the injured party fully understand the risks of serious harm attached to

voluntary strangulation? This is a narrow issue that may not trouble the courts where the strangulation/asphyxiation is for sexual gratification: where there is no physical harm, there is unlikely to be complaint leading to prosecution; where actual bodily harm in fact occurs, the court will not be concerned with whether the complainant's consent was informed or not, since any consent defence falls away, and the mens rea battleground will be recklessness versus no contemplation of harm (see *Meachen* [11]). It is difficult to see how a defendant might argue that he did not contemplate the risk of any harm as a result of strangulation or asphyxiation, as acknowledged by the Court of Appeal in *Emmet* . [12] However, the courts may have to grapple with the issue of what constitutes "informed" consent in the sporting context. While Parliament stated during debate that s.75A maintains the sporting exceptions per *Brown*, [13] contact sports organisers, coaches and participants may find themselves in difficulties when prosecuted for a s.75A offence if they cannot establish that an injured participant's consent was informed. A defendant who compromises the breathing of and seriously injures an opponent through a poorly executed neck hold (martial arts) or tackle (rugby, etc) may need to give evidence not just of the fact of consent to the risk of harm, but that the consent was sufficiently informed as to the extent and nature of that risk.

Capacity to consent

The very act of interfering with the oxygen supply to the brain may undermine capacity to withdraw consent. In controversial "Red Wing" experiments during the 1940s, 137 young male subjects were fitted with a mechanical strangulation cuff in laboratory conditions to observe the effects of cutting off blood flow and air supply to the brain. Each was given control of the strangulation mechanism, which they could release by moving their finger. It took between five and ten seconds for the subject to lose consciousness. Almost all subjects failed to release the mechanism; when asked why not, most were unaware that they had not released the button, some reported that they had tried to do so but were incapable of movement, others reported that they could not in the moment "be bothered". [14] In a 2021 paper describing this experiment, Helen Bichard et al explained:

"The potential onset of dyspraxia, amnesia, and unconsciousness itself (in as little as four seconds) are disabling: the very organ that is needed to withdraw consent is compromised by the activity to which that consent applies." [15]

The speed of the effect of oxygen deprivation on the brain and the consequent rapid impairment to the ability to withdraw consent highlights the necessity of informed, specific and explicit consent before the act of asphyxiation or strangulation begins.
Crim. L.R. 517

Cognitive dissonance, memory and expert evidence

On the issue of cognitive dissonance caused by restricted airflow and the need properly to demonstrate the same, Bichard et al described from a medical perspective a 2011 trial at Teesside Crown Court where the defendant was charged with raping and causing grievous bodily harm with intent to a prostitute who he had strangled:

"With her losing consciousness, he had panicked, believed her to be dead, and was in the process of abandoning her body by the roadside when she regained consciousness. The victim then went to her attacker's house, where they drank wine together. Her behaviour after the event was used to undermine the severity of the attack, he was found guilty of the lesser charge of grievous bodily harm, and sentenced to two years. Based on the literature we have reviewed, her behaviour could have been due to existential fear, and therefore displaying compliance in order to survive. Having lost consciousness she would almost certainly be amnesic for that portion of the attack, but she could also have wider retrograde memory loss. It could be the result of damage to brain areas involved in executive function—she could not problem-solve or plan an escape—and general hypoxic confusion. But if none of this is systematically evidenced, then victims' behaviour will not be seen as the product of a strangled brain." [16]

The criminal and family courts must be alive to these issues so as not to mischaracterise or draw wrong inferences from seemingly inconsistent or irrational behaviours. It is likely that assumptions directions, such as those given to the jury in sex cases, will be resisted by advocates and judges until the complexities and medical mechanisms surrounding strangulation are more widely and better understood. The CPS should assess early in proceedings the potential need for expert medical evidence from a neurologist and/or a neuropsychologist in relevant trials to give medical context to unusual behaviours and thus meet unjustified attacks on a disorientated complainant's credibility.

The effect of strangulation on memory may also require expert or independent evidence. The part of the brain involved with memory is particularly sensitive to lack of oxygen; decreased oxygen leads to decreased memory, such that someone subject

to loss of consciousness through strangulation may not recall losing consciousness. [17] Some of the subjects of the Red Wing experiments described above insisted when revived that they had not lost consciousness at all. [18] In a recent case at Reading Crown Court, [19] police attended a block of flats after a caller reported that her neighbour was strangling his girlfriend. The responding police officer's body worn camera footage showed a woman unconscious on the stairs in a communal area of the flats. The defendant was in the background bare-chested ***Crim. L.R. 518*** and aggressive. It took police several minutes to rouse the complainant, who twice thereafter relapsed into unconsciousness and who, when roused a second time, was sick. She had visible abrasions to her neck. In the ambulance she gave a history that her partner had thrown her around their apartment, punched her to the stomach and tried to kill her by strangulation. She said that her neck was sore and that she was struggling to swallow, but she did not mention losing consciousness. A CAT scan at the hospital revealed no fractures and, apparently, no internal injury. Within two days the complainant had withdrawn support for the prosecution, stating that the incident had been exaggerated by the neighbour, that she had not been strangled, and that the marks on her neck were love bites. Eventually she confided in the officer that the defendant was the father of their 12-week-old child and that she needed to do everything she could to show him that she "wasn't the one supporting this allegation". Two months later she attended the Crown Court in support of her partner's bail application; she saw the footage played in court, at which point she realised the extent of the violence perpetrated upon her. She remained unsupportive of the prosecution. She stood by her earlier statement, and maintained that the bruising was caused by love bites. She stated that after her neighbour had called the police she had stumbled and hit the back of her head so she left the flat for some fresh air; then she felt dizzy and tired so she lay down for a sleep—which was how the police found her. She stated that she likely caused the abrasive injuries to her neck herself by grabbing at it when the police roused her. She produced her GP records in which her GP had, after examination three days later, accepted her explanation and commented that the injury visible at that time did not appear consistent with strangulation, rather was "more a bruise from suction like a hickey".

The CPS relied on the body worn camera footage, applied to rely on the comments in the ambulance as res gestae, instructed a forensic pathologist to opine on the bruising and abrasions to the neck and instructed a forensic radiologist to review the CAT scans. The pathologist excluded the possibility that the marks were "hickeys" and said they were consistent with manual strangulation. The radiologist opined that the CAT scans showed bruising to the deeper soft tissues of the neck, and bruising and swelling to the laryngeal cartilaginous skeleton (voice box) indicative of a possible fracture. He too said that these injuries were consistent with manual strangulation, and ruled out love bites. Dr White, Director of the Institute for Addressing Strangulation, was instructed to review the medical evidence as a whole. She opined that the evidence was consistent with deliberate infliction of injury via strangulation and was inconsistent with love bites or self-infliction of injury. The defendant then pleaded guilty and was sentenced to a total of 21 months' imprisonment. This case highlights the evidential importance of first responders' accounts, the clinical and forensic value of expert medical assessment, and the need for attending police officers and paramedics to consider the possibility of loss of consciousness even where the injured party does not give a history of it. It also demonstrates the utility of body worn footage both for its evidential value and potentially to inform and safeguard the victim—and her children. ***Crim. L.R. 519***

Belief in consent: a guilty mind?

While specifically incorporating consent as a defence to the offence, the new law is silent on the perpetrator's state of mind regarding that consent. In their 2021 analysis, Kelly and Ormerod considered the issue of a defendant's belief in consent in the context of s.75A offences, suggesting a presumption that this is part of the mens rea, consistent with the basic position at common law per *Beckford* . [20] While consent will operate as a defence to strangulation in relevant sports, the issue is likely more often to come before the courts in the context of strangulation for sexual gratification. Yet the common law approach to a defendant's belief in consent is that it must be genuine; under the SOA 2003 the belief must also be reasonable. While noting the difference between the common law and the statutory belief—the subjective "genuine" vs the objective "reasonable"—Kelly and Ormerod query whether this difference is significant. They cite the Privy Council in *Beckford* (where the issue was considered in the context of self-defence):

"Whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held." [21]

Notwithstanding the Privy Council's observations, if it is correct to presume a common law mens rea such that the Crown must disprove a belief in consent, the difference in the quality of the belief—reasonable for rape, genuine for strangulation—is problematic for two reasons. First, as Kelly and Ormerod point out, the necessarily different directions for each offence may

confuse the jury and are certainly unhelpful. For example, a complainant may assert a pattern of coercive control throughout a relationship including specific allegations of rape and of strangulation. The indictment may be framed to reflect her account, alleging an over-arching count of controlling or coercive behaviour with substantive counts of rape and strangulation. The defendant may deny the rape allegations on the basis of consent, or at least his reasonable belief in consent; he may accept the incidents of strangulation but say that they were always part of consensual sexual activity for the complainant's gratification and that they were not part of any pattern of coercive control. If it is right that the common law mens rea applies to s.75A as postulated by Kelly and Ormerod, one can envisage jury directions along the following lines (simplified as far as possible for the benefit of a lay jury):

"Rape

1. In order to prove rape the prosecution must make you sure of the following three things:

   (i) D deliberately—i.e. knowingly—penetrated C in the manner alleged;

   (ii) When he did so C was not consenting;

   (iii) He did not reasonably believe that C was consenting. ***Crim. L.R. 520***

If you are sure of all three elements, then your verdict on the count you are considering will be guilty. If you are not sure of any one of them, your verdict on that count will be not guilty.

2. [direction on penetration]

3. In law a person consents to something if she agrees, by choice, to do it. To agree she must have the freedom and capacity to make a choice. Submission—through fear, shock or intoxication—is not consent.

4. If the prosecution has proved to you that D penetrated C without her consent, they must also prove that he did not reasonably believe that she consented. You judge this by the standards of the reasonable person; you must have regard to all of the circumstances including the nature of the particular sexual activity as you find it to be, the history and nature of the relationship, any vulnerabilities or fragilities you find that C had at the material time, and D's knowledge of those vulnerabilities and fragilities.

Strangulation

1. In order to prove strangulation the prosecution must make you sure that D intentionally—ie deliberately—strangled C.

2. If the prosecution has made you sure of this then you must go on to consider the defence raised. D accepts that he intentionally strangled C but said in his evidence to you that he did so during consensual sexual activity and that C consented in the strangulation—indeed he says that she expressly invited him to do so for sexual gratification.

3. Because of the high risk of harm inherent in the act of strangulation, consent to it must be informed as well as free. If you think that C may have freely consented to strangulation, you will also need to consider the extent to which she understood the risk of harm involved.

4. If having considered the evidence adduced by the defence, you think that C may have consented to D strangling her, you will need to consider the issue of harm. If the prosecution has made you sure that:

   (i) C suffered actual bodily harm as a result of the strangulation; and

   (ii) D realised that he might cause her such harm

then your verdict will be guilty. If you are not sure about either one of those two matters, then your verdict will be not guilty.

5. If the prosecution has made you sure that C did not consent to being strangled, you will need then to consider D's state of mind—might he genuinely, albeit mistakenly, have believed that C was consenting? A genuine belief does not have to be a reasonable belief, it simply has to be honestly held and so you must consider D's mindset when deciding whether or not he held such a belief. You do so in the context of the history and nature of their relationship as you find it to be, and you should have regard to the presence or absence of reasonable grounds for believing in consent when

considering if D's **Crim. L.R. 521* belief was genuinely held. If you are sure that D did not genuinely believe C was consenting then your verdict is guilty; if you think he may genuinely have believed she was consenting, then again you will need to consider the issue of harm as set out at step 4 above."

The complexity of the strangulation direction—with the evidential burden shifting as the jury follows the logical route to verdict—is likely to give rise to jury confusion. While the need for informed consent in strangulation is explicable due to the risk of harm involved, the jury may find it less easy to understand the logic or reasoning behind the different approaches to belief in consent in the two offences. There is the potential for verdicts on rape and strangulation that differ solely due to a jury's determination that the defendant held an unreasonable but genuine belief in consent.

There is a further ambiguity: where a defendant gives evidence of consent, the Act specifically excludes the same as a defence when serious harm is caused, and the defendant was at least reckless in its causation. It does not do so where there is in fact no consent but where the defendant gives evidence that he believed there was. Presumably, both the genuine belief defence and its prohibition when serious harm occurs should be read into the Act. However, in s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 Parliament drew a distinction between actual and perceived consent, imposing strict prohibitions on adducing the previous sexual history of a complainant in trials of sexual offending where the issue is consent, but determining that those prohibitions should apply less rigidly when the issue is belief in consent. [22] Consent and belief in consent are separate elements within SOA 2003 offences, with separate and different approaches to the admissibility of evidence attaching to each element. It is therefore arguable that a similar separation should be implied into s.75A of the SCA 2015, where consent is a defence to be evidenced before the Crown is required to disprove it, and where the statute itself is silent as to belief in consent; the serious harm prohibition at s.75A(3) attaches to consent, but must it therefore attach to belief in consent where consent has been disproved?

The second problem with importing genuine belief in consent into s.75A is that in sex cases the difference in the quality of belief attaching to rape versus strangulation is not only internally tortuous for a judge to direct and for a jury to resolve, but it is externally illogical: the behaviour with objectively the highest risk of fatality requires the disproof of a subjective, and therefore possibly unreasonable, mens rea rather than an objective one.

This illogicality leads us to question whether there should be imported into s.75A(1) any mens rea on the part of the defendant over and above an intention to strangle, and into s.75A(2) any mens rea over and above recklessness to the causation of serious harm as per s.75A(3). Given the unique harms and high-risk factors [23] that concerned Parliament sufficiently to make strangulation a standalone **Crim. L.R. 522* offence, it is unlikely to have intended a lesser mens rea than for rape or other sexual offences.

Development of statutory concept of consent and belief in consent

Other statutes into which the common law mens rea of genuine belief in consent has been incorporated—e.g. the Offences Against the Person Act 1861 —are silent on the issue of consent. Lack of consent and lack of belief in consent were first imported into the statutory definition of rape at s.1 of the SOA 1956 by s.1(1) of the Sexual Offences (Amendment) Act 1976. This amending Act also required a jury considering belief in consent to have regard to "the presence or absence of reasonable grounds for such a belief" [24] —providing a statutory precedent for the Privy Council's observations applicable to a defendant's belief when considering self-defence in *Beckford* .

The SOA 2003 was the first statute to define consent, [25] and Parliament chose to replace the subjective mens rea with an objective one, with lack of consent and lack of reasonable belief in consent each now discrete elements of the offence. Section 70 of the Domestic Abuse Act 2021 on the other hand, creates a statutory offence, [26] which, in incorporating a statutory defence at s.75A(2) of the SCA 2015, we submit de facto circumscribes that defence to that which is described within the statute. Lack of consent is not an element of the offence to be proved; rather consent is a defence to be raised and sufficiently supported to require the prosecution to disprove it. Once this evidence is given, it then brings into play a new element of the offence to be proved by the Crown, i.e. serious harm (subs.(3)(a)), with a reckless mens rea attached at subs.(3)(b). In this context, it might reasonably be assumed that if Parliament had intended that a defendant's belief in consent should avail him of a defence, it would have said so.

Parliamentary understanding of consent v reasonable belief in consent

Did Parliament simply fail to consider a defendant's belief in consent distinctly from a complainant's actual consent? In June 2020 when the Domestic Abuse Bill was debated in the Commons, the issue of non-fatal strangulation was initially considered in the context of the "rough sex defence", which now comprises s.71 of the Domestic Abuse Act 2021. *Hansard* records the following exchange:

Christine Jardine MP: "It is a world of difference, but talking about this sort of consent, I find my mind is thrown back 20 or 30 years to the original arguments about rape and consent. Does the hon. Lady share my disappointment that we have not moved on?"

Jess Phillips MP: "I absolutely share the hon. Lady's frustrations. The truth of the matter is that we are talking about specific cases where this defence could easily be leaned on, and we are trying to shut those loopholes. There are only really three defences in a rape case. One is mistaken identity: it was ***Crim. L.R. 523*** not the accused, but someone completely different. Another is that it just did not happen, full stop—luckily, science has moved quicker than social science. The final one is that she or he consented. That is usually the one that is leaned on, because, unfortunately, it is much more difficult to prove [lack of consent] than it is to rape." [27]

Jess Phillips MP was one of the Domestic Abuse Act 's stronger and better-informed proponents. She was seemingly unaware of the fourth, and often decisive, defence to rape: the defendant's reasonable belief in consent. Nobody enlightened her, and in the Commons and Lords debates thereafter nobody revisited the issue.

In January 2021 the Lords discussed Baroness Newlove's proposed amendment that strangulation/asphyxiation should be a standalone offence. Lord Anderson was the first to question whether the proposed section should incorporate a statutory defence of consent. [28] When Baroness Newlove moved the amendment first in Committee in February 2021 and then in the Lords' debate in March 2021, the Committee and then the House discussed the issue of consent, but not the issue of belief in consent. [29] During the Lords' debate, Lord Wolfson explained Parliament's thinking that the rationale for addressing consent

"is that the law needs to strike a balance. On the one hand, it must not interfere with an individual's Article 8 ECHR rights to respect for their private life; we also do not want to criminalise low-risk consensual activity. But, on the other hand, we must ensure that any activity which causes serious harm is punished. We have sought to strike that balance in a manner which reflects the current law of the land. That was established by your Lordships' House in its previous judicial function, which some of us still remember, in its decision in 1993 in the case of *R v Brown*." [30]

While Lord Wolfson specifically underlined that the common law exceptions under *Brown* in relation to sports and other activities where public policy applies would remain notwithstanding ss.70 and 71 of the Domestic Abuse Act, he did not similarly state that the common law mens rea of genuine belief in consent would attach to the statutory defence which is set out at s.75(2) and circumscribed by a statutory mens rea at s.75(3)(b) of the SCA 2015.

There was opposition in some quarters to consent being a defence at all, given the "growing pressure on young women to consent to violent, dangerous and demeaning acts," [31] and during Commons consideration of the Lords' amendments Victoria Atkins MP recognised the concerns that had been expressed about allowing consent to operate as a defence to strangulation:

"A valid defence of consent is available under the new offence only where the offence does not involve causing serious harm or where the perpetrator can show that they had not intended to cause serious harm or had not been ***Crim. L.R. 524*** reckless as to the serious harm caused. This provision reflects the current law as set out in *R v Brown* and, indeed, in the rough sex clause that was passed earlier in the Bill's progress. We have had to be, and tried to be, consistent with both of those provisions." [32]

Analysis

We submit that where Parliament has considered and set out the parameters of a consent-based statutory defence to strangulation, it is not for the courts to import into those parameters a further defence based on a common law mens rea. If it were otherwise, then per s.75A either:

(i) the defendant would have a burden to evidence consent sufficiently to require its disproof, but once raised the Crown would have to disprove a mistaken but genuine belief in consent as an essential element of the mens rea attached to the offence; or

(ii) there would have to be implied into s.75A(2) after "It is a defence to an offence under this section for A to show that B consented to the strangulation or other act" the words "or for A to show that A genuinely believed that B consented to the strangulation or other act".

Not only would the additional element of the offence (or implied additional defence) require a complex set of legal directions for the jury as exemplified above, it is antithetic to the wording of the statute to infer a mens rea concerning A's belief in B's consent that is anything other than concomitant with B's actual consent. If it is enough for A to show that he genuinely believed B consented, even though she did not in fact consent, then how can A "show that B consented" as required by subs.(2)?

As discussed earlier, the test for mens rea in consent has evolved from the common law subjective in 1956, through the statutory subjective (with objective elements) in 1976, to the statutory objective in 2003. Had Parliament in 2021 intended that any belief in consent should avail a defendant of a defence to the statutory offence of strangulation, then we submit it would have been an objective belief, consistent with 21st-century statute, which it would have explicitly set out within s.75A(2) of the SCA 2015. However, we suggest that the absence of a statutory mens rea attaching to consent is more likely to represent the apogee of its evolution from subjective, through subjective with objective elements, to objective, and now finally to a belief in consent that is indivisible from the fact of consent.

Absent any belief in consent defence, the jury direction on strangulation in our hypothetical indictment would still differ from the rape direction regarding the defendant's state of mind on the issue of consent, but would be slightly less complex, cutting out the fifth step.

There is tangential common law support for our position. *Konzani* [33] concerned an appeal against convictions for inflicting grievous bodily harm contrary to s.20 ***Crim. L.R. 525*** of the OAPA 1861. The facts were similar to those in *Dica* . The appellant had had unprotected consensual sexual intercourse with three women without having disclosed that he was HIV+. The women had contracted the HIV virus. As per *Dica* , the judge had directed the jury that if the consent of the women were to provide the appellant with a defence, it had to be an informed and willing consent to the risk of contracting the HIV virus. The appellant submitted that the judge had wrongly declined to leave to the jury the issue whether he may have had an honest, even if unreasonable, belief that because each of the complainants had consented to unprotected sex, it might be inferred that they had also consented to all possible consequent risks, including the risk of contracting HIV. He submitted that the judge had deprived him of the jury's consideration of whether he had a guilty mind. The Court of Appeal dismissed the appeal, emphasising that there was a critical distinction between taking a risk as to the various potentially adverse and possibly problematic consequences of unprotected consensual sexual intercourse, and the giving of informed consent to the risk of infection with a fatal disease. Where consent provided a defence to an offence against the person, it was generally the case that an honest belief in consent would also provide a defence. However, in the circumstances, the appellant's honest belief had to be concomitant with the consent that provided a defence. Unless the consent would provide a defence, an honest belief in it would not assist a defendant.

We submit that there is a similar critical distinction between consensual sexual intercourse and the giving of informed consent to the risk of serious—possibly fatal—harm through strangulation, which distinction justifies the refusal to leave to a jury consideration of whether the defendant has a "guilty mind". This approach would be consistent with the evidential burden placed on the defendant by subs.(2) "to show that B consented". It would also be consistent with Parliament's stated intention to protect the public—young women and girls in particular—from coercion into risk-laden sexual activity. As we set out earlier in this article, once the act of oxygen-deprivation begins, the window for the subject maintaining capacity to withdraw consent may be as little as four seconds. As a matter of public protection, the importance of obtaining informed, unambiguous and freely given consent prior to the act of strangulation should override the protection traditionally afforded to a defendant who erroneously believes his partner has consented.

Given the ambiguities in s.75A of the SCA 2015 it seems likely that the Appellate Courts will once again be called upon to divine Parliament's intention and to give definitive authority on the defendant's mens rea surrounding consent in strangulation. However, as Lady Hale observed in *J* [34] when dismantling the Sexual Offences Act 1956, "although we do have to try to make sense of the words Parliament has used, we do not have to supply Parliament with the thinking that it never did and words that

it never used". [35] Throughout 2020 and 2021 Parliament gave a lot of thought to the creation of a new offence of strangulation within the Domestic Abuse Act; not once did it use the words "belief in consent". ***Crim. L.R. 526***

Implications for sexual offences

If our interpretation of s.75A of the SCA 2015 is correct—that belief in consent to strangulation is indivisible from the fact of consent—then the Rubicon has been crossed: the burden of evidencing consent in strangulation falls on the defendant, and he must ensure that consent is clear and unambiguous since he can no longer rely on a genuine but mistaken belief in consent. Putting the onus on the strangler to obtain consent and to take care that no serious harm occurs may reflect a sea change in the application of criminal law principles. However, this seems timely rather than unreasonable given the unique harms and high risk of instant or future fatality or morbidity associated with non-fatal strangulation offences, as well as the general disparity in physical strength between the sexes. Like rape, strangulation is a gendered crime, with current research indicating that around 96% of victims are female, and 98% of perpetrators are male. [36]

In debating whether or not consent should be a defence to strangulation, Parliament was concerned with the modern pressures that today's children and teenagers must navigate to reach adulthood, including the "widespread availability and use of extreme pornography". [37] However, anti-VAWG associations and victims' rights groups may well point to the implications of those same pressures surrounding sexual activity as well as the serious trauma-based harm caused to victims of rape. If s.75A of the SCA 2015 recognises that the potential serious consequences of strangulation for sexual gratification require a high level of care to be taken by the perpetrator such that the onus is placed on him to obtain and ensure consent, then why in principle can that recognition not be extended to rape and assault by penetration cases? Rape is no less a gendered crime than strangulation. As in 1999 when it debated s.41 of the YJCEA 1999, when debating the Domestic Abuse Bill 20 years later Parliament was scrupulous to consider the need to balance the rights of defendants to a fair trial (and mitigate the risk of wrongful convictions) against the need to protect vulnerable young women and girls. The consent defence was absent altogether from the original draft s.75A, and was only added after Members were persuaded it was necessary to mitigate the potential interference with an individual's right to private life. Parliament deliberately limited the defence, not just to achieve consistency with s.71 of the Domestic Abuse Act 2021, but in recognition of both the very high risk of harm and the prevalence of strangulation during sex amongst the 18–24-year age group, with research indicating that in over half of cases the female partner felt coerced or pressured to consent to it. [38] As Baroness Newlove observed,

"there is no evidence that strangulation improves the sexual experience for women, but there is evidence that men routinely use strangulation as a method of assault, and it is dangerous. When people speak of strangulation for sexual gratification, they really mean sexual gratification of men at the expense of women's safety. ***Crim. L.R. 527*** "

The Baroness' observation could apply equally to rape. Public concern at the way in which rape allegations are investigated and tried is heightened, widely expressed and needs little further description here. From Parliamentary debate, through quotidian press articles, to Jodie Comer's performance in Suzie Miller's *Prima Facie*, the public expresses its misgivings surrounding the balance between fairness to a defendant and fairness to a complainant in the prosecution of serious sexual offences. The Editorial in this February's Review referred to "the repeated claim that rape has effectively been decriminalised as conviction rates are so low". [39]

Earlier this year France abolished juries for all crimes with maximum sentences between 15–20 years—in the three-year pilot 90% of these cases involved rape. [40] The Republic of Ireland is currently debating a Bill that will replace the subjective belief in consent to sex with an objective one, bringing the Republic into line with the UK. [41] Each jurisdiction in the UK is looking closely at how victims might be better served and these offences might be better investigated and presented while still ensuring a fair trial for the defendant. [42] On 23 May the Law Commission of England and Wales launched a 730-page consultation paper on Evidence in Sexual Offences Prosecutions, discussing various reforms including limitations on disclosure of complainants' personal records, stricter controls on their cross-examination and offering them independent legal representation. [43] Trial by judge rather than jury is proposed in Scotland through the Victims, Witnesses and Justice Reform (Scotland) Bill introduced to Scots Parliament on 26 April 2023. The proposed pilot is proving controversial, with leading Scots lawyers threatening a boycott. [44] It is our experience that in the jurisdiction of England and Wales, with its binary verdicts, jurors are well able to discuss and dissect the issues; they are generally assiduous in following directions and in the application of the burden and standard of proof. They remain the barometer and the guarantor of democracy. Our anecdotal observations are supported by Professor Cheryl Thomas KC's most recent research published in March's Review. Her empirical analysis of rape trials from

2007–2022 indicates that in the last five years—during which period written directions including on rape myths and stereotypes have routinely been given to juries—the conviction rates after trial by jury for rape have increased from between 50–55% in 2007–17 to between 65 and 78% in 2018–21.[45] It may be that the lack of justice afforded to victims of sexual crime complained of by victims' rights groups is rooted in the way the jury has historically been directed to perform its task rather than in want of juror diligence or fairness. Nonetheless, currently a jury ***Crim. L.R. 528*** must be directed that they must acquit a defendant of rape if they are sure that the complainant did not consent but think that the defendant may not have realised that.

Conclusion

It is our thesis that s.75A represents new precedent by placing a burden on a defendant to provide evidence of consent and by denying him the separate defence that he might mistakenly but honestly have believed in consent. If that thesis is correct, then it does not seem illogical or unfair to amend the Sexual Offences Act to follow suit. If the defendant says that the complainant consented, then why should he not have to demonstrate the fact of that consent when tried for rape, as he does when tried for strangulation for sexual gratification? If he accepts with hindsight that the complainant was not in fact consenting, then why should his possible contemporaneous belief that she was entitle him to be acquitted of rape but not of strangulation?

Almost two decades ago Lady Hale was the single dissenting voice in the House of Lords decision in *J*.[46] In a blistering judgment she observed that the Sexual Offences Act 1956, "was a mess when it was enacted and became an ever greater mess with later amendments".[47] *J* is authority for the rule that prosecutors cannot subvert the statutory bar on prosecuting unlawful sexual intercourse[48] under the 1956 Act by charging indecent assault (which does not require proof of lack of consent and which is not time-limited). Criticising her colleagues' majority decision, she said,

"the integrity of the criminal justice system requires that it make sense to victims and the general public as well as to the accused. How can it possibly be explained to the victim in this case that her abuser can be prosecuted for the oral sexual intercourse but not for the vaginal? Women vary in whether they see oral or vaginal intercourse as more serious and in their degrees of reluctance to comply with either. How can it be explained that he can be prosecuted for any peripheral and preparatory sexual acts but not for those which were part and parcel of committing or attempting to commit the act of vaginal intercourse? … This sort of irrational and incoherent distinction is exactly what brings the legal system into disrepute."[49]

So spoke our pre-eminent female judge at the beginning of the 21st century. Victims' groups have been vocal in agreement with these sentiments ever since; in the last few years they have gathered and submitted copious research-based evidence to legislators. The passage of the Domestic Abuse Act 2021 reflects a Parliament perhaps more in tune with Lady Hale's judgment than that of her brother Law Lords. However, despite Parliament's best efforts it did not achieve consistency with s.75A; there is now a statutory difference in how consent operates in rape and in strangulation allegations, even where strangulation is part of the alleged rape. Quite apart from the necessarily complex directions that we submit ***Crim. L.R. 529*** even the most diligent jury may struggle to grasp, victims' groups may well aver that this is a distinction that is "irrational and incoherent".

While the Court of Appeal is likely soon to be called upon to determine whether and to what extent belief in consent is relevant in strangulation, it will be for Parliament alone to determine whether and to what extent the evidential burden in establishing consent in rape should shift, and whether there is in the modern age any longer any justification for the reasonable belief in consent defence at all.

HH Judge Emma Nott

Reading Crown and Family Courts

John Simmons

The 36 Group

Footnotes

1 V. Bettinson, "Adding to the Domestic Abuse Criminal Law Framework: The Domestic Abuse Act 2021" [2022] Crim. L.R. 88; R. Kelly and D. Ormerod, "Non-fatal Strangulation and Suffocation" [2021] Crim. L.R. 532; E. Nott, "Addressing Domestic Abuse Before, During and After the COVID-19 Pandemic: a Perspective From Within the Criminal Justice System of England and Wales" [2022] Crim L.R. 525.

2 Kelly and Ormerod, "Non-fatal Strangulation and Suffocation" [2021] Crim. L.R. 532.

3 Kelly and Ormerod, "Non-fatal Strangulation and Suffocation" [2021] Crim. L.R. 536.

4 *Cook [2023] EWCA Crim 452*.

5 *Cook [2023] EWCA Crim 452* at [4].

6 *Baroness Wilcox, Hansard, HL Deb, Vol.810, Col.1658 (10 March 2021)*.

7 *Baroness Newlove, Hansard, HL Deb, Vol.810, cols 1653–1654 (10 March 2021)*.

8 H. Bichard et al, "The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review" (2022) 32(6) Neuropsychol Rehabil. 1164. doi:10.1080/09602011.2020.1868537. Epub 12 January 2021. PMID: 33432860.

9 *Dica [2004] EWCA Crim 1103; [2004] 2 Cr. App. R. 28*.

10 *Dica [2004] EWCA Crim 1103 at [39]; [2004] 2 Cr. App. R. 28*.

11 *Meachen [2006] EWCA Crim 2414*.

12 *Emmet [1999] EWCA Crim 1710*.

13 *Brown [1994] A.C. 212*; *Lord Wolfson, Hansard, HL Deb, cols 1660–1661 (10 March 2021)*.

14 R. Rossen et al, "Acute arrest of cerebral circulation in man" [1943] Archive of Neurology and Psychiatry 515.

15 Bichard et al, "The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review" (2022) 32(6) Neuropsychol Rehabil. 1164. doi:10.1080/09602011.2020.1868537. Epub 12 January 2021. PMID: 33432860.

16 Bichard et al, "The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review" (2022) 32(6) Neuropsychol Rehabil. 1164. doi:10.1080/09602011.2020.1868537. Epub 12 January 2021. PMID: 33432860.

17 C. White et al, "'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period" (2021) 79 J. Forensic Leg. Med. 102.

18 B. Smith et al, "Experimental arrest of cerebral blood flow in human subjects: the Red Wing studies revisited" (2011) Perspect Biol Med. Spring 2011 54(2). doi. 10.1353/pbm.2011.0018.

19 *P, unreported, 30 March 2023 (Reading Crown Court)*, URN: 43SW0571622.

20 *Beckford [1988] A.C. 130; [1988] Crim. L.R. 116*.

21 *Beckford [1988] A.C. 130; [1988] Crim. L.R. 116*; Kelly and Ormerod, "Non-fatal strangulation and suffocation" [2021] Crim. L.R. 549.

22 *Hansard, Deb, cols 19, 23–24, 29 (8 March 1999)*.

23 For detailed descriptions of these harms and risk factors see: Kelly and Ormerod, "Non-fatal Strangulation and Suffocation" [2021] Crim. L.R. 532; White et al, "'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period" (2021) 79 J. Forensic Leg. Med. 102; S. Edwards, "The strangulation of female partners" [2015] Crim. L.R. 949; Bichard et al, "The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review" [2021] Neuropsychological Rehabilitation 4, 18–20.

24 Sexual Offences (Amendment) Act 1976 s.1(2).

25 Sexual Offences Act 2003 s.74.

26 Section 75A(1) of the SCA 2015.

27 *Hansard, Domestic Abuse Bill Debate (Ninth Sitting), col.317 (16 June 2020)*.

28 *Hansard, HL Deb, col.92 (5 January 2021)*.

29 *Hansard, HL Committee Deb, Vol.809, cols 2259, 2271 (3 February 2021)*; *Hansard, HL Deb, cols 1653–1654 (10 March 2021)*.

30 *Hansard, HL Deb, col.1660 (10 March 2021)*.

31 *Laura Farris MP, Hansard Commons Consideration of Lords Amendments to Domestic Abuse Bill, col.548, (15 April 2021)*.

32 *Hansard, Commons Consideration of Lords Amendments to Domestic Abuse Bill, col.567 (15 April 2021)*.
33 *Konzani [2005] EWCA Crim 706*.
34 *J [2004] UKHL 42 at [89]; [2005] 1 Cr. App. R. 19*.
35 *J [2004] UKHL 42 at [89]; [2005] 1 Cr. App. R. 19*.
36 White et al, "'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period" (2021) 79 J. Forensic Leg. Med. 102.
37 *Laura Farris MP, Hansard Commons Consideration of Lords Amendments to Domestic Abuse Bill, col.548 (15 April 2021)*.
38 *Baroness Newlove, Hansard, HL Deb, Vol.810, col.1653 (15 April 2021)*.
39 H. Quirk, "(Perceptions of) fairness" [2023] Crim. L.R. 101.
40 *"France: Juries abolished for most rape trials as lawyers decry attack on legacy of 1789" (4 Jan 2023), Irish Legal News*, https://www.irishlegal.com/articles/france-juries-abolished-for-most-rape-trials-as-lawyers-decry-attack-on-legacy-of-1789.
41 *Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022; "Rape accused will have to show consent belief was 'objectively reasonable' under new reforms" (27 July 2022), Irish Times*, https://www.irishtimes.com/crime-law/courts/2022/07/27/rape-accused-will-have-to-show-consent-belief-was-objectively-reasonable-under-new-reforms/.
42 *Ministry of Justice, "End to End Rape Review, England and Wales 2021" (20 August 2021), gov.uk*, https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions; *"Gillen Review Report into the law and procedures in serious sexual offences in NI 2019" (9 May 2019), gov.uk*, https://www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni;
43 *Law Commission, Evidence in Sexual Offences Prosecutions (London: The Stationery Office, 2023), CP No.259*.
44 *C. O'Neill, "Leading lawyers 'won't take part' in judge-only rape trials without juries" (27 April 2023), STV News*, https://news.stv.tv/scotland/scottish-law-firms-criticise-rape-trial-pilot-scheme-without-juries-as-not-in-the-interests-of-justice.
45 C. Thomas, "Juries, Rape and Sexual offences in the Crown Court 2007/21" [2023] Crim. L.R. 200.
46 *J [2004] UKHL 42 at [67]–[91]; [2005] 1 Cr. App. R. 19*.
47 *J [2004] UKHL 42 at [89]; [2005] 1 Cr. App. R. 19*.
48 Section 6 of the Sexual Offences Act 1956.
49 *J [2004] UKHL 42 at [79]; [2005] 1 Cr. App. R. 19*.

