

Should There Be a Requirement of Mens Rea in The Definition of Rape

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The Oxford English Dictionary defines Mens rea as ‘The intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused’. In sexual offences, mens rea, implying intention here, becomes a given. Without intention, one cannot perform a sexual act and if the act is non-consensual, it automatically becomes rape. A variation to this situation is often seen in cases where the accused believed that consent existed but, it did not exist. In several cases in foreign as well as Indian jurisdictions, mens rea is seen to exist as consent is seen as subjective and not objective. Subjectivism vs Objectivism in consent has been an important topic of discussion since the R v. Morgan (1976) case in England.

In the R v. Morgan case, William Anthony Morgan, an Officer of the Royal Air Force, brought his three friends' home and asked them to have sexual intercourse with his wife. He told them that she was ‘kinky’ and enjoyed being forced and that the resistance that she would show would be a part of the act and just pretence and they didn’t need to pay any heed to that. All three men went to his house and one by one had sex with Daphne Morgan by holding her down. The woman filed a case of rape. The House of Lords with a majority of 3 to 2 held that the defendants had ‘honest belief’ that the woman had consented, thus, the mens rea element of the crime was negated. The House of Lords held, mens rea can be said to be present in rape only when an individual has sexual intercourse with the intention of having it without the consent of the woman. If the accused is reckless or indifferent if the woman consents or not, that too would amount to rape because there is a possibility of absence of consent which has not been discovered. An issue in this case was if the honest belief also ought to be a reasonable belief. The defendants’ counsel contended that an honest belief need not be a reasonable one. Reasonableness of belief could be seen as evidence but not an essential requirement in defence was their argument. The House of Lords declared that if presence of consent was honestly believed by the accused, the accused would go scot-free even if the belief was held on no solid reasonable grounds.¹ Such an interpretation is an extremely subjective view of consent enabling abuse of law by rapists. The conviction was, however, upheld due to other reasons. Most critics of this judgement argue that honest belief in consent should not be the only test of mens rea. Reasonableness of the belief, according to them, is also an excruciating factor to be considered. In R v. Morgan the belief in consent even if it was honest could not have been founded on reasonable grounds.

In the Indian context, Section 375 of the Indian Penal Code defines rape. The circumstances of rape mentioned in the Section relevant to the following case are sexual acts mentioned in Section 375 if done: Firstly- against her will, Secondly, without her consent. The case in question is that of Mahmood Farooqui

¹ Sankaran, M. (1978). MENS REA IN RAPE: AN ANALYSIS OF "REG. V. MORGAN" AND SECTIONS 375 AND 79 OF THE INDIAN PENAL CODE. *Journal of the Indian Law Institute*, 20(3), 438-462. Retrieved November 18th, 2020, from <http://jguelibrary.informaticsglobal.com:2074/stable/43950610>

v. NCT of Delhi.² In this case accused had allegedly raped an American woman whom he had befriended professionally. They previously shared a few kisses and probably a relationship. On the day of assault, the accused was drunk, the victim said no, tried to pull her underwear up but the accused did not stop. The victim, fearing for her life as she had heard one of Delhi Gang Rape victim's rapists say that he would have spared her life if she had cooperated, did not resist thereafter and faked an orgasm in the hope that he would stop. The court held each and every act of the victim during and after the assault against her. The court basically dismissed her feeble 'no' as a 'yes' and talked about gender roles and their importance in sexual activity. Since the victim was an academically proficient woman, she was expected to say a vehement 'no' to the advances, the court observed as they dictated how a victim is expected to behave. The pulling up of underwear, the emails exchanged between the victim and the accused in which the accused apologised for the assault and thus, which proved the case beyond doubt, were not considered. The court devised the concept of 'implied consent' which meant that even if the victim had not consented in reality but had somehow communicated consent, then the accused can be said to hold honest belief of the consent and could not be charged with rape. This interpretation of rape goes against the very definition of rape in the IPC according to which sexual activity in the absence of consent is rape.

After reading the R v. Morgan judgement, the flaw in mens rea interpretation seems to be that reasonableness of honest belief in consent was not considered, but after reading Farooqui, the question of honest belief itself comes into question. In Farooqui, despite there being no consent, the court holds him not guilty because there was communication of consent which is highly subjective. People from different cultural, religious, social and economic backgrounds have different sensibilities due to different exposures in life. A smile, a pat on the shoulder, wearing western clothing, etc can all be seen as signs of consent by somebody or the other and these are common notions especially in Indian society. The precedent of Farooqui would imply that all these, because they were honestly believed to be signs of consent by the accused, could be treated as communications of consent even when no real consent exists. This interpretation of law throws open women to all kinds of abuse. Any act by her can be treated as communication if this logic governs judgements.

Mens rea is implicit in the definition of rape under IPC and need not be explicitly included. The need of the hour is to interpret it in the interests of the victim too which is absent in so many of such cases. Since Mens rea in rape is the intention to have sexual intercourse forcibly or without consent, the only way to correctly interpret it is to see if a 'no' was uttered by the victim or if any resistance or sign of no consent was demonstrated at the time of the act, the past or present relationship of the parties being immaterial. Thus, an objective enquiry into the circumstances of the event. If any individual goes ahead with sexual intercourse even after a clear 'no' or uncomfortable gestures, intention should be assumed and defence of honest belief in the consent not awarded. Subjective interpretations of consent can be wide enough to negate mens rea in a plethora of rape cases, leaving the victims with no redressal. Thus, 'no' should always be treated as a no and not a maybe. As Lord Simon, the dissenting judge in R v. Morgan stated, 'A respectable woman who has been ravished would hardly feel that she was vindicated by being told that

² Mahmood Farooqui vs. State (Govt of NCT Of Delhi) (2017), CRL.A. 944/2016

her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him'.³

³ Sankaran, M. (1978). MENS REA IN RAPE : AN ANALYSIS OF "REG. V. MORGAN" AND SECTIONS 375 AND 79 OF THE INDIAN PENAL CODE. Journal of the Indian Law Institute, 20(3), 438-462. Retrieved November 30, 2020, from <http://jguelibrary.informaticsglobal.com:2074/stable/43950610>