

Rape: When Does Fraud Vitiolate Consent?



G SYROTA[†]

A prostitute is tricked into having sexual intercourse with a man by a false promise of payment. Is the man guilty of raping the prostitute? A recent English case says 'no'. This article asks whether the answer would be different in Western Australia.

'An essential ingredient of the offence of rape is the proof that the woman did not consent to the actual act of sexual intercourse with the particular man who penetrated her'. The English Court of Appeal so held in *R v Linekar*,¹ a landmark case which may well prove to be decisive of the meaning of 'consent' not only under the English sexual offences legislation but also under the corresponding provisions of the Western Australian Criminal Code.

Linekar's case was an atypical one in that it did not involve the man overpowering the woman by violence, or threats, in order to have sexual intercourse with her. Rather it involved the man gaining the woman's consent to intercourse through the use of false pretences. The case therefore gave the court an opportunity to review the effect of fraud on consent in the context of the crime of rape and sexual offences generally.

By comparison with violent rape, cases of 'rape by fraud' rarely come before the courts. Nevertheless the law reports show that such cases do arise from time to time. For example, in one case a man had sexual intercourse with a woman by impersonating her husband.² In another, a man seduced a woman by falsely claiming that he was married to her.³ And in yet another case the defendant concealed from his partner the fact

[†] I am grateful to Mr Simon Bladen and to Ms Fiona Gauntlett for their helpful comments on an earlier draft of this article. The responsibility for any errors which remain is mine alone.

1. [1995] 3 All ER 69, 73.

2. *R v Dee* (1884) 15 Cox CC 579. The facts are set out at p 338 *infra*.

3. *R v Papadimitropoulos* (1957) 98 CLR 249. See n 15 *infra*, where the facts are set out.

that he was infected with gonorrhea because he feared that such disclosure would cause the partner to refuse consent to intercourse.⁴

Such cases cause multifarious problems in practice because the courts have long held that, whilst *some* types of fraud may negative a woman's consent (with the result that D can be convicted of raping her), other types of fraud do not negative consent (so that rape is not an available charge).⁵ This raises the question, which types of fraud negative consent and which do not? On this point the law in both England and Australia has, until recently, been relatively clear: it is only in the most exceptional cases that fraud will vitiate consent. However, recent legislative developments in both countries,⁶ coupled with decisions in the highest appellate courts,⁷ have tended to broaden the law of rape, thereby making it easier to secure convictions. This raises the possibility that the category of cases known as 'rape by fraud' or 'rape by false pretences' may also have been broadened, thus bringing within the net conduct which would previously have been regarded as non-criminal.

In *Linekar*, the trial judge evidently took the view that the crime of 'rape by fraud' either had been or should be considerably widened; but his view was firmly rejected by the Court of Appeal which redefined this category of rape along traditional, and very restrictive, lines.

The aims of this Note are threefold: first, to suggest that the Court of Appeal was right to confine 'rape by fraud' to a narrow category of cases; secondly, to suggest that, despite significant differences in the wording of the English and Western Australian sexual offences legislation, the result in *Linekar* would have been the same had the case been tried in this jurisdiction; and, thirdly, to suggest that although *Linekar* could not have been convicted of rape under the W.A. Criminal Code, he could nevertheless have been charged with and convicted of various lesser offences.

THE FACTS

At the time of the alleged offence, the defendant, Gareth Linekar, was a 17 year old unemployed youth. His victim (the complainant) was a 30 year old woman who occasionally worked as a prostitute to supplement her state pension.

4. *R v Clarence* (1888) 22 QBD 23: see p 337 below.

5. See E J Edwards, R W Harding & I G Campbell *The Criminal Codes: Cases and Commentary* 4th edn (Sydney: Law Book Co, 1992) 542 et seq; B Fisse *Howard's Criminal Law* 5th edn (Sydney: Law Book Co, 1990) 180-183

6. See eg Criminal Code (WA) ch XXXI ('sexual offences'), introduced in 1992; Sexual Offences (Amendment) Act 1976 (UK).

7. Eg *R v R* (1992) 94 Cr App Rep 216; *R v L* (1992) 174 CLR 379. (These cases hold that D may be convicted of raping his wife whereas previous authorities had held to the contrary.)

On 21 March 1993, shortly after midnight, Linekar approached the complainant who was working that night as a prostitute outside the Odeon cinema in Streatham, South London. A fee of £25 was negotiated for sexual intercourse, but L had no money on him and no means of paying — a fact which he deliberately concealed from the prostitute.

Sexual intercourse took place shortly after this initial meeting on the balcony of a nearby block of flats, after which L ran off without paying. The woman then knocked on the door of one of the adjacent flats. She was nearly naked, clearly very distressed and complained that she had been raped. The police were called and they subsequently arrested L and charged him with rape, contrary to section 1 of the Sexual Offences Act 1956 (UK).

In England, rape is defined as follows:

A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.⁸

At the trial, the judge directed the jury that if L had intended, from the outset,⁹ not to pay for sexual intercourse with the woman, in breach of their agreement, then the woman's consent was negated and he should be convicted of rape. The jury found L guilty by a majority of 11:1.¹⁰

The question for the Court of Appeal was whether the trial judge's direction (namely, that the deception by L regarding his intention to pay for sex destroyed the woman's consent) was correct. In reaching its conclusion that the direction was not correct, and that L's conviction should be quashed, the court reviewed a wide range of English and Commonwealth authorities dealing with the question of whether fraud can vitiate consent in rape and other cases of sexual assault.

POLICY AND PRECEDENT

In quashing L's conviction the Court of Appeal was clearly influenced both by policy and precedent. As for policy, the court was keen not to broaden the crime of rape by fraud to such an extent that men would be put at risk of being charged with this offence in seemingly trivial cases. A man who promises a woman a fur coat in return for sexual intercourse, with no

8. See Sexual Offences (Amendment) Act 1976 (UK) s 1, which defines rape for the purposes of s 1 of the Sexual Offences Act 1956 (UK).

9. It was accepted that if L initially intended to pay the prostitute and only changed his mind after sexual intercourse was complete, then he could not be guilty of rape. The false pretence must precede the intercourse: see *Linekar* supra n 1, 72.

10. *Linekar* supra n 1, 70-72. The sentence of 2 years' probation and 100 hours' community service was said to reflect 'the unusual facts of the case': id, 70.

intention of fulfilling his promise, should not be guilty of rape, the court held.¹¹ Likewise, a bigamist who 'marries' and subsequently has sexual intercourse with his second 'wife', whilst concealing from her that he is still married to another woman, should be charged with bigamy; but he should not be guilty of rape.¹²

As for precedent, the Court of Appeal based its decision principally on two earlier rulings: (i) the key decision of the High Court of Australia in *Papadimitropoulos*¹³ and (ii) the celebrated judgment of the Court for Crown Cases Reserved in *Clarence*.¹⁴ In *Papadimitropoulos*, the High Court quashed the conviction for rape of a man who had induced a woman to sleep with him by pretending that they were lawfully married. The court reasoned that the woman had consented to have intercourse and that the fraud as to their marital status was a collateral matter which did not affect that consent. The court said:

Rape is carnal knowledge of a woman without her consent; carnal knowledge is the physical fact of penetration, it is the consent to that which is in question; 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.¹⁵

The other case relied upon by the Court of Appeal was *Clarence*. This held that a man could not be convicted of rape (or of inflicting grievous bodily harm) if he infected a woman with gonorrhea during sexual intercourse.¹⁶ The fact that the man knew that he was suffering from gonorrhea, and deliberately concealed this from the woman, did not mean that her consent to have intercourse with him was destroyed. In the course of giving his judgment in this case Wills J said:

That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives

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11. *Linekar* supra n 1, 72-73. This example was taken from the Criminal Law Revision Committee *Sexual Offences* Rep No 15 (London, HMSO, 1983) ¶ 2.25.
 12. Cf *Papadimitropoulos* supra n 3, 261, where the High Court of Australia said: 'In the history of bigamy [t]he most heartless bigamist has not been considered guilty of rape'. The Court of Appeal agreed: *Linekar* supra n 1, 78.
 13. *Supra* n 3.
 14. *Supra* n 4.
 15. *Papadimitropoulos* supra n 3, 261. In this case, P fraudulently misrepresented to a Greek migrant girl who spoke no English that papers which she and he had jointly signed at the Melbourne Registry Office amounted to a marriage certificate. In fact, the papers were merely a notice of intended marriage — a fact which P deliberately concealed from the girl. After signing the papers the couple lived together for several days during which intercourse took place. P then abandoned the girl.
 16. The Criminal Code (WA) s 1(4) makes the deliberate (or possibly reckless) transmission of disease and/or serious disease an offence.

her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.¹⁷

By analogy with this dictum, the Court of Appeal in *Linekar* reasoned that, although L had obtained the complainant's consent to intercourse by fraud, 'it would be childish to say that she did not consent'. It followed that L's conviction of rape had to be quashed.

WHEN DOES FRAUD NEGATIVE CONSENT?

Having reviewed the authorities the Court of Appeal concluded that the mere fact that a man succeeds in seducing a woman by means of deception is not in itself sufficient to render him guilty of rape. The crucial question is not whether the man duped the woman in some way, but whether the woman did or did not consent to have intercourse with him. The court said:

In our judgment...[it] is the absence of consent and not the existence of fraud which makes it rape.¹⁸

Based on this premise, the court went on to affirm the traditional view that fraud negatives consent in only two cases: (i) where it is directed to the *identity* of the man (as in the so-called 'impersonation cases'); and (ii) where it is directed to the *nature* of the act (as in the 'medical cases').¹⁹

An example of (i) (the impersonation cases) is *Dee*,²⁰ a decision of the Court of the Crown Cases Reserved for Ireland. The facts of this case are set out in the judgment of May CJ:

Judith Gorman, the wife of one J Gorman, who was absent, having gone out to fish, lay down upon a bed in her sleeping room in the evening when it was dark;...the prisoner came into the room, personating her husband, lay down upon her and had connection with her;...she did not at first resist, believing the man to be her husband, but...on discovering that he was not her husband, which was after the commencement, but before the termination of the proceeding, her consent or acquiescence terminated, and she ran downstairs.

17. *Clarence* supra n 4, 27. Cf Stephen J's judgment: '[The] proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification....Many seductions might [otherwise] be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled': id, 43 (emphasis added).

18. *Linekar* supra n 1, 75; cf *Papadimitropoulos* supra n3, 260-261.

19. *Linekar* supra n 1, 76-77.

20. Supra n 2. Cf Sexual Offences Act 1956 (UK) s 1(2), affirming *Dee*. For a discussion of the impersonation cases generally, see *Linekar* supra n 1, 73-75; Reed 'An Analysis of Fraud Vitiating Consent in Rape Cases' (1995) 59 Journ Crim L 310; Scutt 'Fraudulent Impersonation and Consent in Rape' (1975) 9 Uni Qld L Journ 59.

For obvious reasons impersonation cases such as this seldom arise in practice; nevertheless the court in *Linekar* was firmly of the view that when they do occur they should continue to be treated as rape, as they have been for over a century.

An example of (ii) (the medical cases) is *Case*,²¹ where the victim, a girl of 14, was induced by a quack doctor to submit to intercourse in the mistaken belief that she was undergoing a medical procedure which would improve her breathing. Since the fraud related to the 'nature' of the act (ie, the girl believed she was having medical treatment whereas in fact she was submitting to sexual intercourse), consent was vitiated and the man was guilty of rape.

In contrast to these cases, *Linekar's* deception related neither to his identity nor to the nature of the act. It related to the collateral matter of payment and thus did not negative consent according to the traditional view. This meant that he was not guilty of rape. The court went on to hold, however, that he could have been convicted under section 3 of the Sexual Offences Act 1956 (UK), had he been charged with this offence. Section 3 makes it a crime:

For a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse in any part of the world.

It has long been accepted that the notion of false pretences in this section is much wider than the notion of fraud in rape.²² It appears to cover *any* false pretence which in fact induces a woman to give a consent that she would not otherwise have given, though it is arguable that the pretence must be one which would influence a reasonable woman.²³ Clearly there would have been no difficulty in proving that *Linekar's* pretence regarding payment in fact induced the prostitute to engage in intercourse with him and thus it seems certain that he could have been convicted under this section. However, since L had not been charged with the offence under section 3, but only with rape, and there was no provision for an 'alternative verdict', the court felt that it had no option but to quash his conviction entirely.

LINEKAR AND THE CRIMINAL CODE

How would *Linekar's* case be decided if the facts were to arise in Western Australia today? In this state the offence of rape was abolished in

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21. (1850) 1 Den 580; cf *R v Flattery* (1877) 2 QBD 410. *R v Bolduc and Bird* (1967) 61 DLR (2nd) 494 is a borderline case: see the interesting article by Roberts 'Dr Bolduc's Speculum and the Victorian Rape Provisions' (1984) 8 Crim L Journ 296.
 22. In *R v Williams* [1923] 1 KB 340, 344, Hewart CJ said it was 'obvious' that the words of s 3 'go far beyond the case of rape'.
 23. J C Smith & B Hogan *Criminal Law* 6th edn (London: Butterworths, 1988) 440.

1992 and replaced with a new offence of 'Sexual Penetration Without Consent' under section 325 of the Code. Could Linekar be convicted under this provision?

Section 325 states:

A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years

This definition is similar to that of rape under the equivalent English legislation; but, importantly, the Criminal Code provides a statutory definition of 'consent' for the purposes of section 325, whereas the English legislation leaves the definition of consent exclusively to the judges.

The statutory definition of 'consent', applicable to section 325, is laid down in section 319(2)(a) of the Code. This states:

'Consent' means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means

At first glance, the phrase 'a consent obtained by...deceit, or any fraudulent means' seems to suggest that *any* deceit or subterfuge that in fact induces a woman to give a consent that she would not otherwise have given is enough to destroy that consent and render the man guilty of an offence under section 325. On this view, a man could be convicted, for example, if he persuaded a woman to sleep with him by pretending to be rich and famous, or to be in love with her, or by misrepresenting that it was his intention to marry her. By the same token Linekar's pretence that he intended to pay the prostitute would vitiate her consent and make him guilty under section 325, since it can safely be assumed that she would not have agreed to have intercourse with him had she known of his true intention.

There are however three difficulties with the view that virtually any false pretence (and not merely those which relate to the identity of the man or to the nature of the act) may negative consent and render D guilty under section 325. The first point is that this interpretation would render another offence in the Code, namely section 192(2), largely or perhaps wholly redundant. Section 192(2) ('procuring by false pretences') provides that it is a crime, punishable by two years' imprisonment,^{23A} for a person:

By any false pretence [to procure] a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Western Australia or elsewhere

23A. Compare the maximum punishment of 14 years' imprisonment where D is convicted under s 325

As with the corresponding English legislation, it has long been established that *any* false pretence is sufficient to bring D within this section, provided of course that the pretence actually induces the woman to engage in sexual intercourse.²⁴ Clearly there would be little point in retaining this offence if *any* false pretence was also capable of bringing D within the ambit of the offence of sexual penetration without consent under section 325.²⁵ This suggests that the notion of 'deceit, or any fraudulent means' in section 319(2)(a) must be given a somewhat narrower interpretation which would cover only *some*, but not all, types of false pretence. This approach would ensure that section 192(2) had a different and wider ambit than section 325 and that it was not subsumed by it.²⁶

The second point relates to section 202 of the Code. This section makes it clear that a man can be convicted of procuring a woman to have sexual intercourse by false pretences, contrary to section 192(2), even though the woman consents to the intercourse. Section 202 states:

It is no defence to any charge defined in section 192, that the act of the accused person by which the offence was committed was done *with the consent of the person* with respect to whom the act was done

It seems to be implicit in this provision that there must be at least some types of false pretence which may induce a woman to have sexual intercourse with a man, but which do *not* vitiate her consent to it. An example would be that given by Wills J in *Clarence* where a man knowingly gives a prostitute 'bad money' (eg, a forged cheque or counterfeit currency) in order to procure her agreement to have sex with him. As Wills J stated, it would be 'childish' to argue that the prostitute did not consent to intercourse merely because she had been duped into thinking that she had been paid for her services.

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24. Smith & Hogan *ibid*, see also the quote from Hewart CJ's judgment in *Williams* *supra* n 22. S 192(2) of the Code is the Western Australian equivalent of s 3 of the Sexual Offences Act 1956 see p 343 *infra*
25. Note that s 192(2) applies where D procures a woman to have intercourse either with him (D) or a third party. *R v Williams* (1898) 62 JP 310
26. It should be noted however that there is one type of fraud which falls clearly within s 192(2), but only debatably within s 325. This is where D induces a woman by false pretences to have intercourse not with him (D) but with a third party. In this case it seems certain that D can be convicted under s 192(2). see n 25 *supra*. On the other hand it is difficult to see how D can be convicted under s 325, at least as a principal offender, if he does not himself have intercourse with the woman. Possibly in this situation D can be convicted as an accessory (ie, he can be charged with using false pretences to procure an offence under s 325 between the woman and the third party (see Criminal Code s 1(4)). However this is not certain. S 192(2) may have been retained to deal with this case (amongst others) and hence it may be unconvincing to suggest, as I do in the text, that if *any* false pretence is sufficient to vitiate the woman's consent for purposes of s 325, this necessarily renders s 192(2) 'largely or perhaps wholly redundant'

However, if this type of pretence does not negative consent for purposes of section 192(2) it must surely follow that it does not negative consent for purposes of section 325 either. Since section 325 requires proof of sexual penetration *without consent*, it follows that in Wills J's hypothetical case, the man cannot be convicted under this section.

The third point concerns the wording of section 325. This section applies where a person 'sexually penetrates another person without the consent of that person.' How are these words to be interpreted? The answer perhaps is to be found in the High Court's judgment in *Papadimitropoulos* which, although it dealt with rape at common law, appears to establish a principle which applies equally to the interpretation of section 325 of the Code. In the passage quoted earlier (page 337 above), the High Court held that the key element in rape is 'carnal knowledge of a woman without her consent'. The court went on:

Carnal knowledge is *the physical fact of penetration*; ... [and] it is the consent to that which is in question [O]nce the consent is comprehending and actual *the inducing causes* cannot destroy its reality.

This view seems to distinguish between, on the one hand, the 'physical fact of penetration' and, on the other, the 'inducing causes' (ie, the factors which motivate the woman to submit to intercourse with the man). According to the High Court, consent relates *only* to the first of these — the physical fact of penetration. From this it follows that if the woman correctly understands the nature of the act and knows the identity of the man, then intercourse with him is ipso facto consensual. It is really irrelevant that the man deceives the woman as to some collateral matter (eg, he claims that it is his intention to marry her or to pay for her services) because, as the High Court asserts, mere 'inducing causes' can never destroy the reality of the woman's consent.

Of course, the High Court in *Papadimitropoulos* was dealing with rape at common law but the same principle can be applied to section 325. That section requires proof of sexual penetration of the victim; and, to borrow from the High Court's judgment, 'it is the consent *to that* which is in question.' It follows that so long as the woman comprehends the nature of the act and knows the identity of the man her consent to the sexual penetration is established. Fraud as to a collateral matter cannot 'destroy its reality'.

It is true that section 319(2)(a), which applies to section 325, speaks not merely of 'consent' but of 'a consent *freely and voluntarily given*'; but it is doubtful whether these words alter the fundamental requirement that consent relates exclusively to the 'physical fact of penetration' and that an inquiry into 'inducing causes' is not in point.

If the foregoing argument is correct it follows that Linekar could not

have been convicted of sexually penetrating the prostitute without her consent under section 325. The prostitute was aware of the nature of the act and no question of mistaken identity arose. It follows that, for legal purposes, her consent to the intercourse was 'freely and voluntarily given'; the mere fact that she was deceived as to the question of payment does not alter that conclusion. As the Court of Appeal stated:

The prostitute here consented to sexual intercourse with the appellant. The reality of that consent is not destroyed by being induced by the appellant's false pretence that his intention was to pay the agreed price of £25 for her services.²⁷

It is submitted, therefore, that Linekar could not have been convicted under section 325. There is however a possible counter-argument. In *Linekar*, the Court of Appeal seems to have been swayed towards the view that the appellant could not be convicted of rape by the fact that he could have been charged with the less serious offence under section 3(1) of the Sexual Offences Act 1956 ('procuring sexual intercourse by false pretences'). The equivalent of that offence in Western Australia is section 192(2) of the Code, set out above. Both provisions have their genesis in section 3(2) of the Criminal Law Amendment Act 1885 (UK). However, in England, parliament decided in 1956 to broaden the offence by deleting the words 'not being a common prostitute or of known immoral character',²⁸ whilst those words have been retained in the equivalent Western Australian legislation. The effect is that, if the foregoing analysis is correct, L could not be convicted in this state either of sexual penetration without consent under section 325 (because the prostitute's consent was not vitiated by the fraud in question) or of the offence under section 192(2) (because that section does not apply where the victim is a common prostitute).

This does not mean, however, that Linekar could not be convicted of any offence under the Code. Section 409 deals with a wide range of frauds and is certainly broad enough to cover L's conduct in this case. In particular it is suggested that he could be charged under section 409(1)(c) with gaining a benefit²⁹ (viz, sexual intercourse) for himself by deception, or alternatively, under section 409(1)(e) with inducing the prostitute by deception to engage in sexual intercourse (an act which she was 'lawfully entitled to abstain from doing'). In other words there is no need to give section 325 an artificially wide interpretation in order to secure the conviction of a man such as Linekar. He can be adequately dealt with under the general fraud

27. *Linekar* supra n 1, 78.

28. *Id.*, 75.

29. But query whether there is a 'benefit' to D where the transaction (sexual intercourse with a prostitute) is contrary to public policy: see J C Smith *The Law of Theft* 7th edn (London: Butterworths, 1993) ¶¶ 4.73-4.74. However it is submitted that there is a benefit for the purposes of s 409(1)(c) in the case under consideration.

provision of the Act, section 409.

To sum up: whilst the position is certainly far from clear it is suggested that the complicated definition of 'consent' in section 319(2)(a) does not significantly alter the law from what it was previously understood to be in this state³⁰ and what it is still understood to be in common law jurisdictions such as England. To vitiate consent, and bring the defendant within section 325, the fraud must relate either to the identity of the man or to the nature of the act.³¹ Other frauds, which do not vitiate consent, can be dealt with either under section 192(2) or section 409. As to section 192(2) there might be some value in removing the words 'who is not a common prostitute or of known immoral character' (as was done in England in 1956) as it seems anomalous that the protection given by this misdemeanour should not extend to prostitutes and others of ill fame.³²

CONSENT OBTAINED BY THREATS: A COMPARISON WITH FRAUD

Whilst this article has so far been concerned exclusively with fraud, and its effect on consent in rape cases, it is worth noting that similar problems arise with respect to threats.³³ The statutory definition of consent, set out at page 340 above, states that for purposes of section 325, a consent 'is not freely and voluntarily given if it is obtained by...threat'. This raises the question, does 'threat' mean *any* threat? Alternatively, is it necessary to draw a distinction between threats which do negative consent and those which do not? If so, where is the line to be drawn? No one would doubt that a threat of physical violence to the woman herself would negative her consent. But what of other threats? Suppose, for example, that D threatens a woman that, if she does not submit to intercourse with him, he will (i) report her to the Tax Office for tax evasion; or (ii) make sure that she is dismissed from her job; or (iii) make it difficult for her to get a bank loan which she desperately needs; or (iv) cease 'dating' her on a regular basis. Surely the Criminal Code requires a line to be drawn somewhere, but

30. Note however that the Code previously limited fraud as to identity to cases where D impersonated the husband of a married woman see the former s 325 (repealed in 1992). It is arguable that this limitation no longer applies and that impersonation of a husband, 'de facto', boyfriend or any other person would now suffice. Fisse supra n 5, 182-183.

31. Cf Edwards, Harding & Campbell supra n 5, 542, who suggest that s 319(2)(a) has not significantly changed the law. Fisse supra n 5, 182 takes the opposite view, holding that any type of fraud may now vitiate consent.

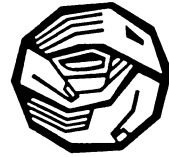
32. A recommendation to this effect by the then Crown Counsel, Mr M Murray QC *The Criminal Code: A General Review* (Perth, 1983) 123 has not been taken up by state parliament.

33. Fisse supra n 5, 183-186; Smith & Hogan supra n 23, 439.

regrettably section 319(2)(a) gives no clue as to where it is to be drawn.³⁴ Possibly the judges will leave it to the jury to decide on a case by case basis whether a particular threat (or, in the case of fraud, a particular deception) did or did not negative the woman's consent. The problem with this approach, however, is that it would tend to produce inconsistent verdicts and thus give rise to uncertainty and confusion in the law. The other possibility would be for the judges to direct juries, as a matter of law, as to which types of threat — and indeed which types of falsehood — may vitiate consent. This approach would promote certainty in the law and would be fair and workable in practice. But a judge who looks to the Criminal Code itself for guidance as to which threats and which frauds may vitiate consent for purposes of section 325 will look in vain. For this reason, the recent reform of sexual offences legislation in Western Australia, and in particular the reform of the law of rape, cannot be regarded as a complete success.

34. There is a definition of 'threat' in s 338, but this applies only to ch XXXIIIA of the Code (Threats) and not to ch XXXI (Sexual Offences)

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