

# The defence of mistaken belief in consent\*

THEA ILLSEY\*\*

## Introduction

Two noteworthy events have recently added momentum to the debate on the law of sexual assault in South Africa. The first is the commencement, on 16 December 2007, of the Criminal Law (Sexual Offences and Related Matters) Amendment Act ('the new Act').<sup>1</sup> The Act is based on the South African Law Reform Commission's proposals and, once operative, will bring about vast changes to the legal framework regulating substantive as well as procedural aspects of sexual assault in South Africa.

The second significant event is the controversial rape trial of former deputy president Jacob Zuma, which captured the nation's attention in 2006. Zuma was charged with raping an acquaintance at his house in Johannesburg in November 2005 and in May 2006 was found not guilty by the High Court.<sup>2</sup> The *Zuma* case highlighted the enduring difficulties of both the *mens rea* requirement and the issue of consent in the prosecution of sexual assault,<sup>3</sup> as well as the availability to the accused of a defence of mistaken belief in consent.<sup>4</sup>

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\*\* LLB (Pret) LLM (Unisa) LLM (McGill), *Senior Lecturer in Law, University of Pretoria, Attorney of the High Court.*

<sup>1</sup> Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007. Chapters 1 to 4 as well as chapter 7 took effect on 16 December 2007, while chapter five of the Act takes effect on 21 March 2008 (or an earlier date fixed by the President by proclamation in the Government Gazette. Chapter 6 of the Act takes effect on 16 June 2008 (or an earlier date fixed by the President by proclamation in the Government Gazette). *Media statement issued by the Department of Justice and Constitutional Development* 13 December 2007, available at <http://www.info.gov.za/speeches/2007/07121409451002.htm> (accessed 25 February 2008).

<sup>2</sup> *S v Zuma* 2006 (7) BCLR 790 (W).

<sup>3</sup> It can safely be said that most issues relating to the culpability of the accused in a case of sexual assault and rape are related to the issue of consent. Some recent contributions to the debate regarding consent in the context of sexual relations and sexual violence include J Wright 'Consent and sexual violence in Canadian public discourse: reflections on *Ewanchuk*' (2002) 16 *Canadian Journal of Law and Society* 16; J McEwan 'Proving consent in sexual cases: legislative change and cultural revolution' (2005) 9 *International Journal of Evidence and Proof* 1.

<sup>4</sup> The application of this defence to the element of *mens rea* in a case of sexual assault has as yet not been the focus of widespread academic debate in South Africa. Only one article could be found that directly addresses the issue: JMT Labuschagne 'Dwaling ten aansien van toestemming as verweer by verkragting: strafregtelike en regsantropologiese evaluasie' (1999) 12 *South African Journal of Criminal Justice* 348. The current legal position regarding the defence of mistaken belief in consent is also discussed in JM Burchell *Principles of Criminal Law* (3ed) 2005, 347.

The House of Lords' judgment in *Director of Public Prosecutions v Morgan*<sup>5</sup> is widely regarded as the *locus classicus* regarding the defence of mistaken belief in consent<sup>6</sup>. The facts, in brief, were that Morgan had invited three strangers to have sexual intercourse with his estranged wife. He told them that any resistance offered by his wife should be seen as nothing more than a manner of sexual stimulation on her part: she was 'kinky' and only pretended to resist. On a charge of rape, the accused relied on the defence of mistaken belief in consent. The House of Lords held that there could be no conviction on a charge of rape where a man honestly believed that a woman consented to sexual intercourse, however unreasonable this belief may have been.<sup>7</sup>

The experience in other jurisdictions shows that the availability of this defence is fraught with difficulties. It should be kept in mind that sexual assault presents itself in a multitude of circumstances. On the one end of the spectrum there are cases where the complainant clearly does not consent to the sexual activity in question. This would, for instance, be the case where she or he submits to such activity as a result of force which they could not overcome by active resistance. On the other end of the spectrum is the situation where the complainant clearly did consent. Between these two extremes we find various scenarios where it is not clear at all whether consent was indeed given.<sup>8</sup> Somewhere in this grey area we find the situation of non-stranger or acquaintance rape. Feminist commentators such as Estrich have consistently criticised the stereotypical notion that 'real rape' occurs in the situation where it is perpetrated by a stranger in a dark alley.<sup>9</sup> The law is reluctant to determine whether there was indeed consent in a case where the parties had some kind of prior relationship (whether it is a casual acquaintance or a serious and intimate relationship).<sup>10</sup> Berliner indicates a general tendency on the part of courts to presume consent as the relationship between the accused and the complainant becomes closer.<sup>11</sup> Particularly in a case of non-stranger or acquaintance rape, as

<sup>5</sup> *Director of Public Prosecutions v Morgan* 2 All ER 347(1975). In *Zuma* the court specifically referred to this judgment at 86.

<sup>6</sup> See, for instance, D Alexander 'Twenty years of Morgan: a criticism of the subjectivist view of mens rea and rape in Great Britain' 1995 (7) *Pace International Law Review* 207.

<sup>7</sup> This position has now been changed by s 1(1)(c) of the Sexual Offences Act (2003), which introduced the requirement of reasonableness. See A Ashworth & J Temkin 'The Sexual Offences Act 2003: rape, sexual assaults and the problems of consent' (2004) *Criminal Law Review* 328 at 340-2.

<sup>8</sup> G Dingwall 'Addressing the boundaries of consent in rape' (2002) 12 *Kings College Law Journal* 31.

<sup>9</sup> S Estrich *Real Rape* (1987) 23.

<sup>10</sup> *Ibid.*

<sup>11</sup> D Berliner 'Rethinking the reasonable belief defense to rape' (1991) 100 *Yale Law Journal* 2687.

was the case in *Zuma*, the complainant is less likely to offer significant resistance so that there will be more scope for the accused to argue that he honestly, albeit mistakenly, believed that the complainant consented to sexual intercourse.

A proper analysis of the scope and contemporary application of this defence would involve the consideration of a multitude of issues relating to substantive as well as procedural law.<sup>12</sup> Such an ambitious endeavour is beyond the limited scope of this contribution. The purpose of the article is to sketch some of the most pressing issues relating to the application of the defence. In the first instance, it provides an overview of the substantial law applicable to the defence of mistaken belief in consent. This section examines how the demise of the requirement of resistance on the part of the victim may potentially increase the availability of the defence. It then considers the legal position regarding the application of this defence in Canada, where it has been the subject of rigorous legislative and judicial activity. It also considers the issue of the limits, if any, that are to be placed on the different types of evidence which may potentially be used to support a defence of mistaken belief in consent. In conclusion, it makes some observations regarding the effect of the new legislation on the application of this defence in the South African context.

For all the media hype and political controversy surrounding the case, the facts of *Zuma* were similar to many cases which are prosecuted in our courts every day: the complainant and accused had known each other for many years, the sexual intercourse took place in the accused's home, the complainant had visited his home out of her own free will and there was no indication that the accused had used force to overcome any resistance on the side of the complainant. The trial centred mainly around the consent (or lack thereof) on the part of the complainant and, in the final analysis, the court acquitted the accused on the basis that the state was unable to sufficiently prove that he had the *mens rea* required in order to sustain a conviction.

The accused in *Zuma* did not expressly raise the defence of mistaken belief. The judgment indicates, however, that the main thrust of his defence was that he had, at the time of the incident in question, believed the complainant to have consented. The most significant indication that this was the essence of the accused's defence can be found in the cross-examination of the complainant by defence counsel.

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<sup>12</sup> These include the debate regarding whether an objective or a subjective test should be used to assess *mens rea* in sexual assault. For an excellent exposition of the main tenets of this debate, see B Rolfe's 'The golden thread of criminal law: moral culpability and sexual assault' (1998) 61 *Saskatchewan Law Review* 87. See also H Power 'Towards a redefinition of the mens rea of rape' (2003) 23 *Oxford Journal of Legal Studies* 379.

Having stated that the accused did not ask her for consent before he had intercourse with her, the complainant was then asked the following question: 'Did you give him your consent or was there anything in your conduct which could have led the accused to believe that you gave him consent to have intercourse with you?' (emphasis added). The complainant answered 'No, I did nothing to make him believe that, no'.<sup>13</sup>

In *Zuma*, the defence not only cross-examined the complainant about her previous sexual experiences, but also adduced evidence in this regard by calling several men with whom she is alleged to have had sexual relations in the past.<sup>14</sup> The court allowed the evidence under s 227(2) of the Criminal Procedure Act,<sup>15</sup> in terms of which the court is given a discretion to allow such evidence if the evidence is relevant.<sup>16</sup>

The accused in *Zuma* also testified that he believed that the complainant had sent him sexual signals such as wearing a knee length skirt and wearing a short wrap or kanga, without any underwear underneath the wrap she wore to bed.<sup>17</sup> The accused further testified that, according to the cultural belief of the Zulus (the ethnic group to which he belongs) a man who leaves an aroused woman without going ahead and having sexual intercourse with her, may be accused of rape.<sup>18</sup>

## Legal context of mistaken belief in consent

A brief overview of the substantial criminal law principles regarding sexual assault, *mens rea* and mistake may be useful in order to appreciate the complexities of the application of this defence.

Before its amendment by the new legislation, South African law defined rape as the unlawful, intentional sexual intercourse with a woman without her consent.<sup>19</sup> Although the legislative provisions create several new sexual offences, the absence of consent remains a definitive aspect of all these crimes.<sup>20</sup>

<sup>13</sup> *Zuma* (n2) 20.

<sup>14</sup> *Zuma* (n2) 27.

<sup>15</sup> Criminal Procedure Act 51 of 1977 ('the Act').

<sup>16</sup> See *infra* discussion of the amendment to this section as proposed by the new Act.

<sup>17</sup> A Musgrave & J Evans 'Zuma: she gave signals' *Mail and Guardian* 4 April 2006.

<sup>18</sup> F Moya '100% Zuluboy' *Mail and Guardian* 12 April 2006.

<sup>19</sup> Burchell op cit (n4) 705.

<sup>20</sup> Section 1(2) of the new Act defines consent as 'voluntary or uncoerced agreement'. The issue of consent and the inclusion of lack of consent in the new legislation remains problematic. Despite recommendations by the South African Law Reform Commission that the focus of the crime of rape be shifted away from lack of consent to 'coercive circumstances', the Portfolio Committee on Justice and Constitutional Development in 2004 recommended that the absence of consent remain part of the definition of rape; Burchell op cit (n4) 713.

Snyman distinguishes between crimes where the law recognises consent merely as a ground of justification (such as theft and malicious injury to property) and crimes where the lack of consent is a definitional aspect of the crime.<sup>21</sup> Rape falls in the latter category, with the result that lack of consent plays a crucial role in the dogmatic construction of the crime of rape.<sup>22</sup> It is essential to the prosecution's case that lack of consent on the part of the complainant is established beyond reasonable doubt and failure to do so will result in the acquittal of the accused.<sup>23</sup>

In South Africa, as in most Anglo-American systems, a mistake regarding whether the complainant consented in a particular instance is regarded as a mistake of fact.<sup>24</sup> The mistake must relate to one of the definitional requirements of the crime. As a result, mistake regarding consent may have the effect that the wrongdoer escapes liability, provided that the mistake is a bona fide mistake. The mistake will then result in the absence of the mens rea requirement of the crime (the knowledge of the wrongfulness of the conduct) and will lead to an acquittal.<sup>25</sup>

Against this backdrop, the discussion now turns to the demise of the so-called 'resistance requirement' and its inverse proportionality to the availability of a mistaken belief in consent.

## **The resistance requirement**

The pivotal role of consent in the legal definition of rape gave rise to the requirement that rape victims present evidence of their active resistance to the accused's sexual advances. As such, women were traditionally expected to show that their resistance was overcome by force on the part of the accused.<sup>26</sup> The specific requirement that rape complainants actively and continuously offer physical resistance to sexual advances in order to indicate lack of consent has operated as a significant hurdle to a successful prosecution in such cases.<sup>27</sup>

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<sup>21</sup> CR Snyman *Criminal Law* (4ed) 2002 124.

<sup>22</sup> *Ibid.*

<sup>23</sup> Burchell *op cit* (n4) 707.

<sup>24</sup> Labuschagne *op cit* (n5) 349. Some commentators have argued that mistaken belief on the part of the accused as to whether the complainant had consented or not, should be categorised as a mistake of law. See generally L Vandervort 'Mistake of law and sexual assault: consent and mens rea' (1987) *Canadian Journal of Women and Law* 233; C Boyle & M MacCrimmon 'To serve the cause of justice: disciplining fact determination' (2001) 20 *Windsor Yearbook of Access to Justice* 55 at 64-65.

<sup>25</sup> Burchell *op cit* (n4) 347.

<sup>26</sup> Berliner *op cit* (n11) 2687.

<sup>27</sup> S Murphy 'Rejecting unreasonable sexual expectations: limits on using a rape victim's sexual history to show the defendant's mistaken belief in consent' (1991) 79 *California Law Review* 541 at 547.

Since the resistance requirement was traditionally the test for consent, a case was generally not prosecuted if the complainant's behaviour was ambivalent in the sense that active physical resistance could not clearly be shown.<sup>28</sup> The elimination of the resistance requirement (also called the 'utmost resistance' requirement) has been a significant goal of rape law reform. The growing realisation that there may be other reasons why complainants do not actively resist, such as fear, duress or threats of violence,<sup>29</sup> has had the result that most legal systems have now moved away from the requirement of physical force.<sup>30</sup> Rape cases are now more readily prosecuted in circumstances where there is no clear evidence of resistance because the complainant submitted to the actions of the accused for reasons other than consent.<sup>31</sup>

Although the demise of the resistance requirement may, theoretically, have been a victory for the reform of sexual assault law, it may have the practical result of introducing an implicit resistance requirement and, consequently, opening the door to the defence of mistaken belief. In the absence of physical resistance by the victim, the accused has more scope to argue that he thought, albeit mistakenly, that the victim had consented because she did not offer any signs of resistance.<sup>32</sup> Berliner notes that '(i)n theory, the reasonable belief defence was created to guard against feared miscarriages of justice that could result from miscommunication. In practice, the defense has become a proxy for the resistance requirement, with its attendant drawbacks'.<sup>33</sup>

The Supreme Court of Canada has considered the defence of mistaken belief in consent on a number of occasions.<sup>34</sup> The case law generated by the Court on this issue specifically recognises that the mistaken belief defence raises questions about the protection of fundamental

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<sup>28</sup> Murphy op cit (n27) 545.

<sup>29</sup> Burchell op cit (n4) 707.

<sup>30</sup> Burchell op cit (n4) 713. See also D Dripps 'Beyond rape: an essay on the difference between the presence of force and the absence of consent' (1992) 92 *Columbia Law Review* 1780 at 1783.

<sup>31</sup> In the Canadian case of *R v McFie* [2001] 277 AR 86 (CA), for instance, the accused was found not guilty of sexual assault of his estranged wife (whom he later killed). In her statement to the police, the complainant stated that, although she had not consented, she went along with it because she was scared of what he would do if she tried to resist. Similarly, in *R v Sansregret* [1985] 1 SCR 570, the accused had broken into the home of his former girlfriend, threatening her with a butcher's knife and forcing her to undress in order to prevent her from fleeing. In order to appease him, she pretended to be willing to resume the relationship and initiated sexual intercourse.

<sup>32</sup> For criticism of the 'silence equals consent' approach, see S Schulhofer *Unwanted sex: the culture of intimidation and the failure of law* (1998) 267-73.

<sup>33</sup> Berliner op cit (n11) 2695.

<sup>34</sup> *Pappajohn v The Queen* [1980] 2 SCR 120; *Sansregret v The Queen* [1985] 1 SCR 570; *R v Osolin* [1993] 4 SCR 595; *R v Park* [1995] 2 SCR 836; *R v Esau* [1997]; *R v Ewanchuk* [1999] 1 SCR 330; *R v Davis* (1999) 29 CR (SCC).

human rights such as the right to equality, human dignity and bodily integrity.<sup>35</sup> Given that these rights are also entrenched in the South African Constitution,<sup>36</sup> an attempt will be made in the next section to identify a number of significant aspects of the Canadian jurisprudence regarding this defence, with the purpose of extracting some insights for the South African situation.

## Canadian experience

The Canadian common law position regarding mistaken belief in consent has significantly evolved through the judgments of the Supreme Court. The application of this defence is now governed by s 273.2 of the Criminal Code.<sup>37</sup> This particular section forms part of a number of legislative reforms in the arena of sexual assault which were enacted in 1992.

Section 273.2 removed the defence of implied consent and set out significant limits on the availability to an accused of belief in consent. The provision reads as follows:

It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
  - (i) self-induced intoxication, or
  - (ii) recklessness or willful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

### 'Air of reality'-test

An accused who wishes to validly raise the defence of mistaken belief in consent must provide some evidence which gives the defence an 'air of reality'. This test has been established in a line of Supreme Court judgments. In *Pappajohn v The Queen*, the accused alleged that he had engaged in sexual intercourse with the complainant believing that she had consented.<sup>38</sup> The majority of the court held that the defence had to be supported by sources other than the accused's bare statement

<sup>35</sup> In *Park* (n34) para 38, L'Heureux-Dube J emphasised the importance of the link between the *mens rea* requirement in cases of sexual assault and the equality provision contained in section 15 of the Canadian Charter of Rights and Freedoms. See also J Temkin *Rape and the legal process* (2005) 131.

<sup>36</sup> These fundamental rights are protected by ss 9, 10 and 12, respectively, of the Constitution of the Republic of South Africa (1996).

<sup>37</sup> RSC 1985, c C-46. This legislation took effect on 15 August 1992.

<sup>38</sup> *Op cit* (n34).

that the complainant had consented.<sup>39</sup> Although the majority rejected the accused's defence of mistaken belief, it did restate and confirm the common law position that an honest belief in consent was a full defence to sexual assault, even when the belief was unreasonable.

The essence of the 'air of reality' test was set out as follows by the Supreme Court in *R v Park*:<sup>40</sup>

'Essentially, for there to be an air of reality to the defence of honest but mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence. Although there is not, strictly speaking, a requirement that the defence be corroborated, that evidence must amount to more than a bare assertion. There must be some support for it in the circumstances. The search for support in the whole body of evidence or in the circumstances can complement any insufficiency in legal terms of the accused's testimony. The presence of independent evidence supporting the accused's testimony will only have the effect of improving the chances of the defence (emphasis added).'

In *R v Esau*, the Court stated that the defence will have an 'air of reality' if (1) there is lack of consent to the sexual acts in question, and (2) there is evidence, notwithstanding the actual refusal, that the accused honestly but mistakenly believed that the complainant was consenting.<sup>41</sup> The threshold for putting the defence of honest but mistaken belief to a jury is that there must be some plausible evidence in support so as to give an air of reality to the defence.<sup>42</sup>

### 'Wilful blindness'

Even if an accused presents evidence which gives his defence of mistaken belief the required air of reality, he will nevertheless be precluded from successfully raising this defence if the prosecution can prove that he acted with recklessness or wilful blindness to the complainant's lack of consent. The Supreme Court addressed this issue in *R v Sansregret*.<sup>43</sup>

The trial judge in this case found that the complainant consented out of fear and that the accused had blinded himself to the obvious by not making an inquiry as to the nature of the consent which was given.<sup>44</sup> The Supreme Court found that, to proceed with intercourse in such

<sup>39</sup> *Pappajohn v The Queen* supra (n34) para 128.

<sup>40</sup> *R v Park* supra (n34) para 20.

<sup>41</sup> *R v Esau* supra (n34) para 14.

<sup>42</sup> *R v Esau* supra (n34) para 57.

<sup>43</sup> For a critique of this judgment, see M McElman 'A new conception of wilful blindness: the Supreme Court of Canada's decision in *R v Sansregret*' 2000 (9) *Dalhousie Journal of Legal Studies* 324.

<sup>44</sup> *R v Sansregret* (n34) par 23.



circumstances without further inquiry, constitutes self-deception to the point of willful blindness. Where the accused is deliberately ignorant as a result of blinding himself to reality, the law presumes knowledge — in this case knowledge of the forced nature of the consent. There was therefore no room for the application of the defence.<sup>45</sup>

McIntyre J distinguished between ‘wilful blindness’ and ‘recklessness’ as follows:<sup>46</sup>

‘Willful blindness is distinct from recklessness because, while recklessness involves *knowledge of a danger or risk* and persistence in a course of conduct which creates a risk that the prohibited result will occur, willful blindness arises where a person who has become aware of the need for some inquiry *declines to make the inquiry because he does not wish to know the truth*. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in willful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry (my emphasis).’

### Reasonable steps

Once it has been established that there is an air of reality to the defence and that the accused had not been reckless or willfully blind as to whether the complainant had consented, s 273.2(b) requires the factual adjudicator to determine if the accused, in the circumstances known to him at the time, took reasonable steps to ascertain that the complainant was consenting.

The question whether the accused had taken the required reasonable steps was considered in *R v Esau*.<sup>47</sup> The facts were briefly that the accused was charged with sexual assault and testified that, at a party at the complainant’s house and subsequent to the other guests having left, he and the complainant kissed each other. According to his testimony, she then invited him to her bedroom, where they had sexual intercourse. The complainant, on the other hand, denied the kissing episode as well as the allegation that she invited him to her room. She testified that she could not remember any of the events in question and that she only realised the next morning, when she woke up, that she had had intercourse with the accused. She alleged that she would not, however, have consented to intercourse with him because they are related.<sup>48</sup>

<sup>45</sup> *Sansregret v The Queen* supra (n34) par 24.

<sup>46</sup> *Sansregret v The Queen* supra (n34) par 22.

<sup>47</sup> *R v Esau* (n34).

<sup>48</sup> *R v Esau* supra (n34) par 91.

The state appealed to the Supreme Court against the Court of Appeal decision, which appeal was denied. Major J, for the majority, ruled that the complainant's loss of memory as well as her co-operative behaviour earlier the evening did, in fact, give the required air of reality to the accused's defence of mistaken belief in consent.<sup>49</sup> In her dissenting judgment, McLachlin J pointed out that, given the clear evidence that the complainant was quite drunk at the time when the intercourse had taken place, the accused was precluded from raising the defence in these circumstances due to an absence of any evidence that he had taken the required reasonable steps.<sup>50</sup>

The Supreme Court recently also dealt extensively with the defence of mistaken belief in *R v Ewanchuk*.<sup>51</sup> The case involved a 17-year old complainant who met the accused for a job interview in his van in the parking lot of a shopping mall. She entered the van with the understanding that he was to show her his wood-working portfolio, but became afraid when he locked the door of the van behind them. The accused made several sexual advances; these included a request for a massage, which the complainant gave him, but he also started touching her sexually, to which she explicitly said 'no'. When the complainant said 'no, stop' to the accused lying on top of her, grinding his pelvis into hers and putting his penis against her pelvis, the accused got up and said '(s)ee, I'm a nice guy, I stopped'. He then gave her money for the massage and she left the van. The complainant testified that she was afraid of 'egging him on' and, as a result, lay still when he laid on top of her.<sup>52</sup>

The complainant's lack of explicit refusal of consent to sexual activity resulted in a finding by the trial judge that she had implicitly consented. The court also found and that, although she was afraid and distressed during the encounter, she did not sufficiently indicate this to the accused and that her subjective feelings were irrelevant.<sup>53</sup> The case went on appeal to the Alberta Court of Appeal, who confirmed the trial court's ruling,<sup>54</sup> and was then appealed to the Supreme Court.<sup>55</sup>

According to L'Heureux-Dube J, the accused clearly did not take the required reasonable steps in this case. In her judgment she made two

<sup>49</sup> Ibid.

<sup>50</sup> *R v Esau* supra (n34) para 95. See also the discussion of this requirement in J McInnes & C Boyle 'Judging Sexual Assault Law against a Standard of Equality' (1995) 29 *University of British Columbia Law Review* 341.

<sup>51</sup> *R v Ewanchuk* supra (n34).

<sup>52</sup> *R v Ewanchuk* supra (n34) par 7.

<sup>53</sup> *R v Ewanchuk* supra (n34) par 15.

<sup>54</sup> [1998] 6 WWR. 8; (1998), 13 C R (5th) 324 ; (1998), 57 Alta. L.R. (3d) 235.

<sup>55</sup> The judgment has generated considerable debate. See generally D Stuart 'Ewanchuk: asserting "no means no" at the expense of fault and proportionality principles' (1999) 22 *Criminal Reports (Articles)*.

particularly significant points dealing with the requirement of reasonable steps. In the first instance, she pointed out that, when the accused went from massaging to sexual contact, he did not enquire whether the complainant consented. His interpretation of her lack of refusal of the massage clearly did not amount to a reasonable step.<sup>56</sup> Secondly, she noted that, where a complainant expresses non-consent, the obligation on the accused to take additional steps to ascertain consent escalates. In the present instance the complainant's repeatedly voiced objections did not move the accused to take any steps (especially not reasonable ones) to ascertain consent.<sup>57</sup>

### Shifting the burden: the communicative model<sup>58</sup>

Murphy advocates a communicative approach to sexual assault which involves an obligation on the part of the accused to determine consent based on the communication of consent by the complainant.<sup>59</sup> This approach corresponds with the third of three basic requirements for considering a defence of mistaken belief, as set out by McLachlin J in *Esau*:

- (1) it must be clear that the complainant did not consent;
- (2) the accused must have believed, despite the unwillingness of the complainant, that she had consented (this belief must have been a bona fide belief); and
- (3) there needs to be evidence explaining how it could be that the complainant's non-consent could honestly be regarded by the accused as consent.<sup>60</sup>

The last of these requirements embodies what has been called the 'communicative model' of sexual relations. This model recognises the need to shift the focus of the enquiry regarding whether there was consent or not. According to this approach, the traditional notion of 'lack of consent' as it applies to mens rea in the context of sexual assault should be substituted with an assessment of whether, and how, the accused ascertained that the complainant was consenting to the

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<sup>56</sup> *R v Ewanchuk* supra (n34) para 99.

<sup>57</sup> *Ibid.*

<sup>58</sup> See also J McEwan "I thought she consented...": defence of the rape shield law or the defence that shall not run' (2006) *Criminal Law Review* 969 at 976.

<sup>59</sup> Murphy op cit (n27) 562.

<sup>60</sup> McLachlin J (dissenting) in *Esau* supra (n34) para 63.

sexual activity.<sup>61</sup> McLachlin J succinctly captures the essence of this shift in focus as follows:<sup>62</sup>

'Given the fact that human beings have the capacity to understand each other on matters such as these, the two states usually do not go together. In order for them to believably be combined, these two propositions require a third element of proof. There must, in short, be evidence of a situation of ambiguity in which the accused could honestly have misapprehended the complainant as consenting to the sexual activity in question' (emphasis added).

This shift in focus will have the effect that the *mens rea* of sexual assault is expanded to include, in addition to cases where the accused knew that the complainant had said 'no', to situations where the accused knew that the complainant was not saying 'yes'.<sup>63</sup> More importantly, seeing consent as communication will make it possible for factual adjudicators to separate myth and stereotype from fact and to identify situations where stereotypical beliefs on the part of the accused may have led him to be reckless towards whether a woman is consenting or not.

### Evidence in support of a defence of mistaken belief in consent

One of the principles of the law of evidence is that an accused needs to at least establish an evidentiary basis for his defence.<sup>64</sup> A particularly challenging issue in a case of sexual assault is the type of evidence which may be used to substantiate such a defence. The following section examines the evidence which could be used by the accused to lay an evidentiary basis for his defence of mistaken belief and specifically evaluates two potentially problematic categories of evidence which featured in *Zuma*: the previous sexual history of the complainant and the cultural beliefs of the accused.

The sexual history evidence of a complainant was traditionally used for two purposes: the first, which was to prove consent on the part of

<sup>61</sup> RD Wiener 'Shifting the communication burden: a meaningful consent standard in rape' (1983) 6 *Harvard Women's Law Journal* 143; see also Vandervort op cit (n24) 275.

<sup>62</sup> *R v Esau* supra (n34) para 63. This view corresponds with the 'equivocality' rule adopted in the United States. In *People v Mayberry* 542 P 2d 1337 (1975) at 1346, the court indicated that there needs to be evidence pointing to 'equivocal' behaviour on the part of the complainant which may have misled the accused into believing that she was consenting. See R Cavallaro 'A big mistake: eroding the defense of mistake of fact about consent in rape' (1996) 86 *Journal of Criminal Law and Criminology* 815 at 824.

<sup>63</sup> L'Heureux-Dube J in *Park* (n34) para 39.

<sup>64</sup> Burchell op cit (n4) 716. This corresponds with the principle that evidence should be adduced which gives the defence an air of reality, as discussed above.

the complainant, was based on the traditional stereotypical view that an unchaste woman is more likely to consent to sexual intercourse. The second purpose was to attack the credibility of the complainant by implying that an unchaste woman had a propensity for dishonesty and was more likely to lie under oath.<sup>65</sup> The unlimited use of sexual history evidence by defence lawyers to support and perpetuate misogynist views and stereotypes has been curtailed by the enactment of legislative provisions in most Anglo-American jurisdictions.<sup>66</sup> Several commentators have, however, expressed concern about the use of sexual history evidence to support a defence of mistaken belief.

Murphy notes that, while rape shield laws may prevent the use of sexual history evidence of the complainant to prove consent, this type of evidence may be allowed to 'slip in through the back door' when introduced by the defence to show the accused's state of mind.<sup>67</sup> In the case of *Doe v United States*,<sup>68</sup> for instance, the accused presented evidence about the fact that the complainant had a reputation for being sexually experienced and alleged that, based on his knowledge of her promiscuity, he lacked the required intent to have sex with her against her will. Murphy supports the notion, alerted to earlier, that consent should not be based on anything other than the communication between the parties during the encounter in question.<sup>69</sup>

In the context of the United Kingdom's Sexual Offences Act (2003), Ashworth and Temkin indicate that the evidence which may be used for this purpose is not entirely unproblematic.<sup>70</sup> Section 1(2) of this Act states that, in order to assess whether the belief is reasonable, all the circumstances should be taken into account, including any steps the

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<sup>65</sup> These have generally become known as the 'twin myths' which formed the basis of the use of this type of evidence; see generally *R v Seaboyer* [1991] 2 SCR 577. See also Murphy op cit (n27) 550. See generally M Redmayne 'Myths, relationships and coincidences: the new problems of sexual history' (2003) 7 *International Journal of Evidence and Proof* 75.

<sup>66</sup> These provisions, which have become known as rape shield laws, are contained, for instance, in the Youth Justice and Criminal Evidence Act (1999), s 271 of the Canadian Criminal Code and s 227 of the Criminal Procedure Act. In its amended form, this section now specifically provides that '(t)he court shall not grant an application referred to in subsection (2) if, in its opinion, such evidence or questioning —

- a) relates to the sexual reputation of the complainant and is intended to challenge or support the credibility of the complainant;
- b) is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant —
  - (i) is more likely to have consented to the offence being tried; or
  - (ii) is less worthy of belief.

<sup>67</sup> Murphy op cit (n27) 543.

<sup>68</sup> *Doe v United States* 666 F2d 43 (4Cir) 1981.

<sup>69</sup> Murphy op cit (n27) 544.

<sup>70</sup> Ashworth & Temkin op cit (n7) 342.

accused has taken to ascertain whether the victim had consented. The authors contend that the natural meaning of the phrase 'all the circumstances' is so wide as to include a very wide spectrum of evidence and is not limited to evidence of circumstances which existed at the time of the event in question. A broad interpretation of this term may have the effect that evidence regarding the previous sexual history of the complainant as well as evidence about culturally engendered beliefs of the accused may be considered relevant. As will be indicated in the next section, concerns regarding the use of sexual history evidence to indicate a lack of mens rea and support a defence of mistaken belief are not entirely laid to rest by the introduction of amendment to s 227.

Another type of evidence which may be used to establish the evidentiary basis for a defence of mistaken belief, according to Ashworth and Temkin,<sup>71</sup> is evidence regarding the particular cultural beliefs of the accused. The facts of *Zuma* illustrate the danger of what McLachlin J calls 'substituting unfounded assumptions for evidence of consent'.<sup>72</sup>

### **The new legislative provisions and the defence of mistaken belief**

It has already been noted that the South African law of sexual assault will be changed radically by the provisions of the new Act. Two aspects of the new Act are significant for the present discussion regarding the defence of mistaken belief in consent. The first is the introduction of the concept of 'coercive circumstances' and the second relates to the provisions regarding the admissibility of the sexual history evidence of the complainant.

As set out earlier in this comment, the common law definition of rape had the effect that a lack of clear evidence of active resistance by the complainant usually resulted in an acquittal for the accused. The new Act introduces a new component to the definition of sexual assault by recognising that, under certain circumstances, a complainant may not be able offer active resistance. The introduction of the concept that the sexual assault is assumed to have taken place if perpetrated under these 'coercive circumstances' is in line with the notion that sexual assault has less to do with sex and more to do with force and coercion.<sup>73</sup> It clearly indicates a shift away from an inquiry into whether the

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<sup>71</sup> Ibid.

<sup>72</sup> *R v Esau* supra (n34) para 84.

<sup>73</sup> For a discussion of the notion of 'coercive circumstances' as contained in the Namibian Combating of Rape Act 8 of 2000, see N Bohler-Muller '*Valuable lessons from Namibia on the combating of rape*' (2001) 14 SACJ 71.

complainant had consented towards an inquiry whether the accused coerced the complainant in order to have sex with her.<sup>74</sup>

Section 1(2) of the New Act provides that the absence of consent will be presumed if the sexual act is committed under certain circumstances listed in subsection (3).<sup>75</sup> The first three of these scenarios, being the ones significant for this discussion, are where the complainant submits or is subjected to such a sexual act as a result of

- (i) the use of force or intimidation by the accused (A) against the complainant (B), a third person (C) or another person, or against the property of either of these parties, or
- (ii) a threat of harm by A against B, C or D or against the property of B, C or D; or
- (iii) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act.

The degree to which this provision may protect a complainant against a defence of mistaken belief in consent will depend to a large extent on how our courts interpret the scope of these listed circumstances. A narrow interpretation of these factors may have the effect that an accused could still argue that the complainant's consent was not tainted by the factors listed in subsec (3). It is suggested that coercive circumstances should be interpreted in broader terms and with reference to the question whether the accused was aware of any circumstances which may have affected the voluntary nature of the consent.<sup>76</sup>

The second aspect of the new Act which is significant for the present discussion relates to the amendment of s 227 of the existing Criminal Procedure Act. The South African Law Reform Commission has recognised that the present legislative provision is in need of reform in order to delineate the circumstances under which evidence of previous sexual history may be adduced. As a result, subsec (5) of the amended section makes it mandatory that a court takes into account a number of factors when determining the relevance of evidence about the sexual history of the complainant. According to the provision, a court shall take into account, when considering its relevance, whether the evidence or questioning

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<sup>74</sup> L Artz & H Combrinck 'A wall of words: redefining the offence of rape in South African law' (2003) *Acta Juridica* 72 at 75. See also J Milton 'Re-defining the crime of rape: the Law Commission's proposals' (1999) 12 *SACJ* 364 at 366.

<sup>75</sup> The new Act clearly states that the circumstances may include, but are not limited to, those listed in subsec (3).

<sup>76</sup> L Vandervort 'Sexual assault: availability of the defence of belief in consent' 2005 (84) *Canadian Bar Review* 89 at 97.

- (a) will advance the interests of justice, with due regard to the accused's right to a fair trial;
- (b) is in the interests of society in encouraging the reporting of sexual offences;
- (c) relates to a specific instance of sexual activity relevant to a fact in issue;
- (d) is likely to rebut evidence previously adduced by the prosecution;
- (e) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;
- (f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
- (g) is fundamental to the accused's defence.

There is little doubt that the amended s 227 is a vast improvement on the existing provision in terms of eliminating the use of sexual history evidence. The explicit recognition of the need to balance the fair trial rights of the accused with the complainant's right to dignity and privacy is of particular consequence for the defence of mistaken belief in consent. The fears expressed in this comment regarding the use of sexual history evidence as a basis for a defence of mistaken belief are, however, not entirely allayed by the provisions of the new Act.

The most pressing concern is that our courts, in weighing the interests of the accused and those of the complainant in its interpretation of s 227, may be tempted to tilt the scale in favour of the accused on the strength of the factors in subsections (a) and (g). When tempted to place excessive emphasis on these factors, our courts would do well to heed the sentiment expressed by L'Heureux-Dube J in *Seaboyer*<sup>77</sup> regarding the accused's right to a fair trial in the context of sexual assault. In her dissenting judgment in this case, L'Heureux-Dube made it clear that an accused should not be allowed, 'whether under the rubric of a right to a fair trial or the right to make full answer and defence, to adduce evidence that prejudices or distorts the fact-finding process at trial'.<sup>78</sup> She also emphasised that the concept of relevance in the arena of sexual assault has been injected with the several stereotypes about complainants and that private beliefs still play a pivotal role in the decision of whether evidence is relevant or not in the case of sexual assault law.<sup>79</sup>

At the basis of the test for admissibility of evidence is relevance: can the evidence in question prove or disprove a fact in issue?<sup>80</sup> Recent

<sup>77</sup> *R v Seaboyer* supra (n65).

<sup>78</sup> *R v Seaboyer* supra (n65) para 248

<sup>79</sup> *R v Seaboyer* supra (n65) para 269.

<sup>80</sup> PJ Schwikkard & SE van der Merwe *Principles of Evidence* (2002) 45.



scholarship has emphasised the problematic nature of fact-finding in the context of sexual assault.<sup>81</sup> Such fact-finding is to a large extent based on the common sense reasoning regarding human behaviour. If fact-finding is to take place on an egalitarian basis without reliance on myths and stereotypes regarding the sexual roles of men and women, it may be necessary to control the process of fact-finding. Such control would, for instance, involve the recognition of the fact that the determination of the relevance of evidence is not value-neutral, but that it often involves reliance on discriminatory beliefs.<sup>82</sup>

## Conclusion

The defence of mistaken belief in consent aims to protect those who have not been proven guilty of sexual assault from the social stigma attached to sexual offenders. Although the doctrine underlying this defence has been criticised for defining sexual assault from the perspective of the accused as opposed to that of the complainant,<sup>83</sup> it is also recognised that it cannot be entirely abolished.<sup>84</sup>

An attempt has been made in this comment to point out some of the difficulties arising from the defence of mistaken belief in consent against the background of the *Zuma*-case. It has been suggested that law reform initiatives aimed at alleviating secondary victimisation of complainants in sexual assault cases may be one of the reasons for the potentially increased availability of this defence — an indication that success and failure exist side by side when it comes to inevitably controversial reforms of this kind.<sup>85</sup>

Some important developments regarding the application of the defence in Canada have also been noted. The Canadian experience indicates that, when an accused relies on a defence of mistaken belief in consent, the defence should adduce evidence which gives the defence an air of reality. According to this approach an accused is also required to take such steps as could be deemed reasonable in order to determine whether the complainant had consented, and should not have been blinded by self-interested notions of whether the complainant had indeed consented. Arguably the most important development in the Canadian approach is the explicit recognition that, for purposes of a determination of *mens rea* in sexual assault, non-communicative

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<sup>81</sup> C Boyle, M MacCrimmon & D Martin *The law of evidence: fact-finding, fairness and advocacy* (1999) 49.

<sup>82</sup> See also Boyle & MacCrimmon op cit (n24) 64.

<sup>83</sup> C MacKinnon 'Reflections on sex equality under law' (1990-1991) 100 *Yale Law Journal* 1281 at 1304.

<sup>84</sup> Berliner op cit (n11) 2702.

<sup>85</sup> Ashworth & Temkin op cit (n37) 346.

tion of consent should be viewed as the same as communication of non-consent.<sup>86</sup>

In the final instance, it has been argued in this comment that the process of determining which evidence may be relevant to support a defence of mistaken belief may have to be limited in order to ensure the sexual autonomy of complainants and the equal protection of the law for victims of sexual assault. It has been indicated that certain categories of evidence, such as the evidence of the complainant's previous sexual history and the cultural beliefs of the accused, may have a particularly distorting effect on the fact-finding process.

The preamble to the new Act states that one of its objectives is 'to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide'. The availability to an accused of the defence that he had genuinely, though mistakenly, believed the complainant to have consented to the sexual activity in question may pose complex challenges to these objectives. If these objectives of the new Act are to be realised, our courts should remain constantly vigilant to these challenges.<sup>87</sup>

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<sup>86</sup> Vandervort *op cit* (n76) 92.

<sup>87</sup> Temkin *op cit* (n35) 96 eloquently summarises these challenges as follows: 'In the new millennium, the criminal process still fails to protect sexual autonomy. Amongst those who influence the development of the law, it is still far from accepted that the overriding objective of the law of rape and allied offences should be the protection of sexual choice, that is to say, the right to choose, whether, when, and with whom to have sexual intercourse as long as that choice does not impinge on the same right of others.'