

Sleeping with the Enemy – Might Undercover Officers be Guilty of Sexual Offences?

Did undercover officers who slept with activists have their consent, asks [Robert Brown](#)

The case of an undercover policeman, reported to have infiltrated environmental protest groups, has been back in the news, as a group of women who had been in sexual relationships with undercover officers appeared in the High Court. These women are bringing claims against the police for the emotional trauma caused by the deception underlying these relationships.

The women have chosen to air their grievances through the civil courts but the facts raise an interesting question of criminal law: in being deceived about the true identity of the police officers, were these women truly consenting to sexual relations with them? Put more simply, might these officers be guilty of committing sexual offences?

Under the law as it stood before the Sexual Offences Act 2003, there was a criminal offence of “procuring sexual intercourse by false pretences”, which appears wide enough to include the conduct of the undercover officers in this case. Despite the Home Office recommending the replication of this offence in the new law as one of “obtaining sexual penetration by threats or deception”, the Government, for reasons unknown, chose not to include the offence in the eventual White Paper. This means that deception by one party (apart from the specific case of individuals with a mental disorder) must be considered solely as an issue of consent.

The definition of consent can be found in s.74 of the act: “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. Specific circumstances which are presumed to vitiate consent are outlined in ss.75 to 76. Section 75 deals with situations involving threats or inability to consent due to drugs, sleep and so on, which do not apply in the present case.

Section 76 deals with issues of deception, but is limited to two specific examples: deception as to the “nature or purpose” of the act; or impersonating someone “known personally to the complainant”. So, although s.76 is designed to deal with deception, it is too narrow to cover the situation of undercover police.

Instead, it is the broader definition from s.74 which must be evaluated to determine if an individual has consented to sexual activity.

Does deception regarding someone’s identity or characteristics remove a person’s “freedom and capacity” to choose? It seems likely that, if, before embarking on a sexual relationship, one of the police officers had revealed that he had been spying on the woman and that their relationship had been based on a lie, the woman may well have changed her mind and withdrawn her consent. The issue is whether this renders the consent invalid.

This area of law is fraught with ethical and policy concerns. Whilst the law would not want to encourage people being tricked into sexual relationships, neither is it desirable to extend the law to prohibit minor fabrications.

Would any of us be comfortable with the idea that lying about what car you drive could vitiate consent in sexual relations?

In *R. v B* [2006] EWCA Crim 2945, the court held that “the fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under s.74 in relation to the sexual activity in this case”. This seems to suggest that deceptions short of those outlined in s.76 will not extinguish consent.

However, when Julian Assange appeared in the High Court to fight extradition proceedings ([2011] EWHC 2849 (Admin)), the court reached a different conclusion. One of the allegations was that Mr Assange had sexual intercourse with a woman after leading her to believe that he was wearing a condom, when in fact he was not, against her express wishes. The court did not allow Mr Assange to rely on *R. v B*, stating that whether or not he was using a condom could be relevant to the issue of the woman’s consent.

The law in this area is not clear and it is complicated by numerous ethical concerns. If the sexual relationships currently being challenged in court are only the tip of the iceberg, it will be fascinating to see how the courts choose to juggle the issues at play, as this controversial area of law develops.

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