# THE NECESSARY INTENT IN RAPE

## *D.P.P.* v. *MORGAN*

Mr. Morgan and the other three defendants were all members of the R.A.F. and had been drinking together. The other three men were amazed when Morgan, who was older than they and considerably their senior in rank, invited them to his house to have sexual intercourse with his wife, but were eventually persuaded that he was serious. He told the men that his wife was "kinky" and to ignore any signs of resistance on her part as this was only an act to increase her own sexual excitement. When the four men arrived at the Morgan home they woke Mrs. Morgan and dragged her from her bed and into another room where there was a double bed. Despite her screaming and struggling, each man in turn then had intercourse with her while the other three men held her down.

The Court of Appeal[1] dismissed the defendants' appeals against their convictions for rape, saying that an accused would be entitled to an acquittal if he could show that he lacked the necessary *mens rea* for the crime, because he had honestly believed on reasonable grounds that the woman was consenting. Leave was given to appeal to the House of Lords to determine whether this belief had to be based on reasonable grounds or not. The House of Lords[2] held, by a majority of three to two[3] that where a man has intercourse with a woman without her consent, he cannot be convicted of rape if he honestly believed that she was consenting. Accordingly it was a misdirection if the jury was instructed that there had to be reasonable grounds for such a belief.

Lord Cross pointed out that *mens rea* is necessary for rape as it is not an absolute offence, and what the House really had to examine was the quality of belief which entitled the accused to an acquittal.[4] Much of Lord Cross's decision was occupied with refuting the argument that *R.* v. *Tolson*[5] applied to a rape situation. *Tolson* was a bigamy case in which it was held that a mistaken belief based on reasonable grounds

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[1] *R.* v. *Morgan* [1975] 1 All E.R. 8.

[2] *D.P.P.* v. *Morgan* [1975] 2 W.L.R. 913; [1975] 2 All E.R. 347.

[3] Lord Cross, Lord Hailsham and Lord Fraser; Lord Simon and Lord Edmund-Davies dissenting.

[4] [1975] 2 W.L.R. 913 at 923.

[5] (1889) 23 Q.B.D. 168.

in the existence of facts, which if true would have made the act charged an innocent one, afforded a defence. Lord Cross pointed out that the question of whether reasonable grounds were necessary was not really argued in *Tolson*, but since the case had stood for so long and been followed so many times, the element of reasonableness was now firmly entrenched in a "*Tolson* defence".[6] There was, of course, no hardship in requiring the mistake to be reasonable if the offence charged was an "absolute" one, i.e. one for which no *mens rea* need be proved. So in the situation in *Morgan*, reasonableness would have to be shown if the accused was charged with an absolute-type offence such as "having intercourse with a woman who is not consenting to it". The appellants however, were charged under Section 1 of the Sexual Offences Act 1956 (U.K.), which provides that it is an offence "for a man to rape a woman". There being no definition of "rape" in the Act, one has to ask how the common law defines it. Lord Cross said that both in ordinary language and in law a man could not be said to have raped a woman if he honestly believed that she was consenting, as he would not have attempted to have intercourse but for his belief.[7] The reasonableness or otherwise of this belief is irrelevant and he overruled the Court of Appeal on this point.

Lord Hailsham thought that the judgment of the lower courts could be summed up in two propositions:[8]

(i) each defendant must have intended to have sexual intercourse without her consent, not merely that he intended to have intercourse but that he intended to have intercourse without her consent;

(ii) it is necessary for any belief in the woman's consent to be a "reasonable belief" before the defendant is entitled to be acquitted.

His Lordship maintained that these two propositions are totally irreconcilable.[9] For a crime to be committed there must be both *actus reus* and *mens rea*—in rape the *actus* is intercourse without the woman's consent and the *mens rea* is that stated in proposition (i) above —an intention to have intercourse without consent. Lord Hailsham added one important qualification to this definition of *mens rea*:[10] if the accused intends, recklessly and not caring whether the woman consents or not, to have intercourse, then that is equivalent to intending to have intercourse without a woman's consent. In the light of this definition, to insist on proposition (ii) above (i.e. the requirement of reasonableness) is "to insist that either the accused is to be found guilty of intend-

[6] [1975] 2 W.L.R. 913 at 925-26.

[7] *Id.* at 926.

[8] *Id.* at 931.

[9] *Ibid.*

[10] *Id.* at 932.

ing to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if it be honest but not rational".[11]

Lord Hailsham pointed out that the prosecution, who argued in favour of the requirement of reasonableness, only had direct support in New South Wales cases, and in the most important of these, *R.* v. *Sperotto*, the Court of Criminal Appeal approved a test of the mental ingredient of rape similar to the one he himself proposed, when they said that the accused must be aware that the woman had not consented or that he was determined to have intercourse whether she was consenting or not.[12] The main cases upon which the Crown based its argument were the bigamy cases following *Tolson*. His Lordship declined to overrule these cases as they had stood for such a long time and in any case such a drastic step was not necessary. He pointed out that *mens rea* means a number of different things in different crimes, e.g. the intention to do something; a state of mind; a state of knowledge; or a combination of these last two. A court should thus not apply a point decided in cases relating to offences where *mens rea* means one thing to cases where it means something else. It was logically impermissible to take the requirement of reasonableness, which came from cases on the construction of statutes (e.g. bigamy) and apply it in decisions on common law offences (e.g. rape).[13]

His Lordship pointed out that if it was necessary for the accused's belief in consent to be reasonable, the necessary mental ingredient in rape would be no longer "to have intercourse without her consent" but either:

(i) "to have intercourse", subject to a special defence of honest and reasonable belief, or

(ii) "to have intercourse without a reasonable belief in her consent".[14]

None of the authorities suggest that rape is another type of statutory offence, and Lord Hailsham said that it is incorrect to even speak of there being a "defence" of honest belief to a charge of rape—the prosecution must prove that the accused had the necessary intent, and it fails to do so if the accused had an honest belief that the woman was consenting. Although that belief had to be honest but did not have to be reasonable, Lord Hailsham thought that "the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held".[15]

The third majority judge, Lord Fraser, agreed substantially with the logic of Lord Hailsham, saying that if the evidence showed that

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[11] *Ibid.*

[12] *R.* v. *Sperotto* (1970) 92 W.N. (N.S.W.) 223 at 226.

[13] [1975] 2 W.L.R. 913 at 936.

[14] *Id.* at 932.

[15] *Id.* at 937.

an accused believed or may have believed that the woman was consenting then he cannot have had an intention to have intercourse without her consent, and thus the Crown had not discharged its burden of proving that both *actus reus* and *mens rea* existed. In such a case the only relevance of the reasonableness of the accused's belief would be as evidence of whether the defendant truly held that belief.[16] Lord Fraser also felt it necessary to distinguish the *Tolson*-type cases and he did so by contrasting the effect of belief on intent in both the rape and bigamy situations. If a defendant is charged with bigamy, his belief on reasonable grounds that his spouse is dead affords him a defence. But this belief does not involve the absence of the intent necessary for the commission of bigamy, which is the intention to go through with the marriage ceremony. In contrast to this situation, the belief of an accused charged with rape that the woman does consent necessarily negatives the essential *mens rea* which must exist before the accused can be found guilty.[17] Lord Fraser also thought that the Australian cases which required the mistaken belief to be based on reasonable grounds created some difficulties, but dismissed them by saying that "in none of these cases did the precise point with which we are now concerned arise for decision".[18]

Lord Simon, one of the two dissenting judges, commenced his argument by distinguishing between crimes of basic intent, where the *mens rea* does not extend beyond the *actus reus*, and crimes of ulterior intent where the *mens rea* does extend beyond the *actus reus,* e.g. wounding with intent to cause grievous bodily harm.[19] He then distinguished between a probative burden of proof, which the Crown bears throughout a criminal trial, and an evidential burden, which may shift back and forth between Crown and accused.[20] If the crime is one of basic intent then proof of *actus reus* is generally sufficient *prima facie* proof of the *mens rea* to shift the evidential burden of proof to the accused. Since Lord Simon saw rape as a crime of basic intent there is an evidential burden on the accused to negative this inference as to *mens rea,* and he can do this by showing that he believed that the woman was consenting.[21] His Lordship regarded that it was settled that the belief had to be based on reasonable grounds because of the decision in *Tolson* and the many bigamy cases which have followed it.[22] He also claimed support from several self-defence cases. Lord Simon pointed out that in *Tolson* itself the majority of the court, in holding that reasonable grounds were necessary, thought that this was a result of general common law principles. Indeed the minority in that case did not even dissent on this point.

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[16] *Id.* at 959.
[17] *Ibid.*
[18] *Id.* at 960.
[19] *Id.* at 939.
[20] *Id.* at 939-940.
[21] *Id.* at 941.
[22] *Ibid.*

Lord Simon agreed with the Court of Appeal that a statement of belief for which the accused can indicate no reasonable grounds is "evidence of insufficient substance to raise any issue requiring the jury's consideration".[23] He also thought that there was a necessity to strike a fair balance between the victim and the accused, and this could be done by requiring the accused's belief to be based upon reasonable grounds, saying:

> A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.[24]

The approach of the other dissenting judgment, given by Lord Edmund-Davies, fell between that of the majority and that of Lord Simon. His Lordship recognized that an accused should be acquitted if he holds an honest belief that the woman was consenting, as this negatives the *mens rea* necessary for the crime of rape. He too thought that the reasonableness of such a belief should be taken into account by a jury in deciding whether such a belief was honestly held.[25] But while recognizing that as a matter of logic an honest belief that the woman was consenting cannot exist alongside an intention to rape her, he felt constrained by the weight of legal authority to hold otherwise.[26]

Of the Victorian cases, he thought that *R.* v. *Daly*[27] gave little support to the "reasonable grounds" argument, but that the Supreme Court in *R.* v. *Flannery*,[28] while criticising the trial judge's directions regarding the burden of proof, indirectly approved the view that the accused's belief had to be reasonable. In New South Wales, the Court of Criminal Appeal in *Sperotto* clearly laid down that the defendant must point to circumstances which provided him with reasonable grounds for his mistake, and *R.* v. *Flaherty*[29] had also affirmed that reasonableness was necessary. Lord Edmund-Davies did criticise this case, however, as Asprey, J.A. had spoken in terms of a "defence of mistake". The accused's belief should not be treated this way, His Lordship said, rather it should be seen as a direct challenge that the *mens rea* necessary for rape existed.[30] His Lordship noted that no decision could be cited which squarely states that honest belief alone is enough. Turning to other types of cases, he noted that the decision in *Tolson,* which was followed in many other bigamy cases, notably *R.* v. *King*,[31] *Thomas* v.

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[23] *Id.* at 943.
[24] *Ibid.*
[25] *Id.* at 948.
[26] *Id.* at 949.
[27] [1968] V.R. 257.
[28] [1969] V.R. 31.
[29] (1968) 89 W.N. (Pt. 1) (N.S.W.) 141.
[30] [1975] 2 W.L.R. 913 at 951.
[31] [1964] 1 Q.B. 285.

*R.*[32] and *R.* v. *Gould,*[33] supported the requirement of reasonableness, and he thought there were no grounds for differentiating between bigamy and rape on this matter.[34] He too pointed out that in *Tolson,* the majority considered that they were only applying general principles of established law. Reasonable grounds were also required in other types of cases, such as those concerning self-defence, and *Bank of N.S.W.* v. *Piper*[35] which concerned fraud. In the light of all the above authorities, Lord Edmund-Davies felt constrained to hold that for a belief in consent to exculpate it had to be based on reasonable grounds, although he re-emphasised that the approach of the majority in the present case was the one which he preferred.

Having examined the views of the five Law Lords on the requirement of reasonableness, there is one other matter which must be discussed to complete this examination of the case, and that is their Lordships' views as to whether the proviso to Section 2(1) of the Criminal Appeal Act 1968 (U.K.) should be applied. This enables a court to dismiss an appeal even if the point raised in the appeal has been decided in the appellant's favour, where they consider that no miscarriage of justice has actually occurred.

The majority of the Law Lords in *Morgan* who had held that there had been a misdirection by the trial judge because he held that reasonable grounds were necessary, were all in favour of applying the proviso. In evidence given by Mrs. Morgan, she stated that she did not consent to the acts of intercourse and had made this opposition quite plain by yelling for her boys to call the police, and screaming and struggling while the intercourse took place. The appellants' version of the events which occurred after they arrived at the Morgan home was that Mrs. Morgan had "not merely consented but took an active and enthusiastic part in a sexual orgy which might have excited unfavourable comment in the court of Caligula or Nero".[36] The jury had to choose between two diametrically opposed versions and they accepted Mrs. Morgan's statement as true. In their view there was no possible chance that the appellants believed, either reasonably or unreasonably, that their victim was consenting. Lord Cross stated that since the jury considered that the men's evidence was a "pack of lies", one can only assume that any other jury would have taken the same view, and thus no miscarriage of justice was done in spite of the judge's misdirection.[37] The two dissenting Law Lords also recognised this and said that even if they had decided that the element of reasonableness was irrelevant, they too would have applied the proviso and dismissed the appeals.

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[32] (1937) 59 C.L.R. 279.
[33] [1968] 2 Q.B. 65.
[34] [1975] 2 W.L.R. 913 at 953.
[35] [1897] A.C. 383.
[36] [1975] 2 W.L.R. 913 at 929 *per* Lord Hailsham.
[37] *Id.* at 927.

**The Position in England after D.P.P. v. Morgan**

The decision in *Morgan* caused a furore in the press in both England and Australia, as a result of which the Heilbron Committee was set up to investigate the decision. The Report of the Committee affirms everything decided in *Morgan* and recommends that the decision be put into statutory form for two reasons:

(i) *Morgan* is the first English case which clearly states that recklessness as to consent is sufficient *mens rea* for a conviction, and the Committee wants to legislate to this effect so that this principle will not be later dismissed as *obiter dictum*;

(ii) to declare clearly that the jury in a charge of rape has to consider whether the accused honestly believed that the woman consented, taking into account the reasonableness of grounds for holding this belief along with all the other evidence, in deciding whether the accused genuinely held such a belief.[38]

One critic[39] of the Report suggests that it does not go far enough, and fails to recognize that *Morgan* is a case concerned with knowledge of circumstances generally. Just as Section 8 of the Criminal Justice Act 1967 (U.K.) (which resulted from the problems arising in *D.P.P.* v. *Smith*[40]) laid down a general principle concerning foresight of results, it is suggested that a similar section be enacted providing that a subjective test be applied where the law requires proof of the knowledge of a circumstance, e.g. in *Morgan*, the House of Lords said that a court had to look at whether the defendant actually believed that the woman was consenting, not whether a reasonable man would have done so.

The decision in *Morgan* has since been applied by the Court of Appeal in *R.* v. *Cogan.*[41] Cogan was convicted for rape at first instance after he had gone home with the second defendant Leak, and had intercourse with Mrs. Leak, who was unwilling to do so but was frightened of her husband. On appeal Cogan's conviction for rape was quashed as he had honestly believed that Mrs. Leak was consenting because of statements that her husband had made about her. The Court of Appeal stated that in so doing they were applying the principle in *Morgan.*

Leak had originally been convicted of aiding and abetting rape and he appealed arguing that since no offence had been committed by Cogan he could not possibly be convicted of aiding and abetting a non-crime. The Court of Appeal rejected this argument, saying that Cogan's intercourse with Mrs. Leak was the *actus reus* of the offence, and since Leak intended that Cogan should have sexual intercourse without Mrs. Leak's consent, he thus had the necessary *mens rea.* Leak had procured Cogan to have intercourse with his wife in order to "punish" her, and thus could have been charged as a principal offender with rape. It is

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[38] *Cmnd.* 6352 (1975), para. 83.

[39] J. C. Smith, "The Heilbron Report", [1976] *Crim. L.R.* 97 at 99.

[40] [1961] A.C. 290.

[41] [1975] 3 W.L.R. 316.

often said that a man cannot be guilty of raping his own wife during cohabitation and this is because the law presumes consent from the marriage ceremony.[42] However, there is no such presumption when a husband deliberately procures another man to do the physical act for him.[43] The Court of Appeal went on to say that Leak could therefore be convicted of "aiding and abetting rape".

Another recent English decision may have a great bearing on future rape cases if an accused claims that he was so drunk that he did not possess the necessary intent. In *D.P.P.* v. *Majewski*[44] the House of Lords held that where a person is charged with a crime of basic intent it is no defence to say that "by reason of self-induced intoxication, the accused did not intend to do the act alleged to constitute the offence" Although the case concerned a drunken assault, Lord Russell[45] spent much of his argument stating that rape is indeed a crime of basic intent, a view echoing Lord Simon's statements in *Morgan*. It would now seem that in England, drunkenness provides an exception, in the case of crimes of basic intent, to the rule that there cannot be a crime without a guilty mind. Lord Edmund-Davies[46] recognized that such an exception is illogical, but represents a compromise between imposing total liability or complete exculpation for drunkenness.

**The Position in South Australia and Victoria**

A Special Report of the Criminal Law and Penal Methods Reform Committee of South Australia[47] has also come out in favour of the decision in *Morgan*, pointing out that as rape is a serious crime, responsibility should not be imposed on the basis of negligence or unreasonable belief. The Report said also that if the accused asserts an honest belief in consent, a jury would be likely to disbelieve him if it was shown that force or threats of violence were used.[48] The Committee stated that the issue in any criminal case is between the Crown and the accused, not between the prosecutrix and the accused as some supporters of the requirement of reasonableness tend to view it.[49] The Committee suggested that the principles in *Morgan* were good law and rejected the idea of creating a statutory offence of "unlawful carnal knowledge without the consent of the person carnally known", saying that an accused's actions "should not be viewed in the light of what the hypothetical reasonable man would believe, but in the light of what the accused person did believe".[50]

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[42] Hale, *Pleas of the Crown*, Vol. 1 (1778), p. 629.

[43] *Audley* [1631] St. Tr. 401.

[44] [1976] 2 All E.R. 142.

[45] *Id.* at 171.

[46] *Id.* at 168.

[47] Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report*: *Rape and Other Sexual Offences* (March 1976).

[48] *Id.* p. 6.

[49] *Id.* p. 8.

[50] *Id.* p. 9.

It would seem that the principles of *Morgan* were the law in South Australia before this Report anyway, as in *R.* v. *Brown,*[51] decided earlier in 1975 than *Morgan,* the Supreme Court of South Australia held that the existence of an honest belief that the girl was consenting is inconsistent with the necessary *mens rea* for rape and that the reasonableness of such belief is irrelevant. The court also included recklessness as to whether the girl is consenting or not in their definition of rape.

Until recently the position in Victoria has not been as clear. The Victorian courts have always stressed that the element of intention is essential to a charge of rape, e.g. *R.* v. *Daly.* In that case the Supreme Court resolved that since the jury had rejected the accused's version of the incident, there was no need to consider the question of the quality of the accused's belief in consent. In *R.* v. *Flannery,* as Lord Edmund-Davies pointed out in *Morgan,* the trial judge misdirected the jury as to the burden of proof in proving consent, but the issue as to whether there had to be reasonable grounds for a belief in consent to exculpate was again left unresolved. The Victorian pattern, of stressing that the accused had to have the intention to have intercourse without consent before he can be convicted of rape, was brought to its logical conclusion in the recent case of *R.* v. *Maes.*[52] The Supreme Court found that the trial judge's directions to the jury on the matter of intention were sufficient as they implied that an honest belief that the woman is consenting negates the guilty intent necessary to constitute the crime. Thus it would seem that the law in South Australia and Victoria is now the same as the law in England after *Morgan,* but the same cannot be said of the situation in our own State.

**The Position in New South Wales**

In *R.* v. *Taylor,*[53] Brereton, J. said that the jury must ask whether a reasonable man would have thought that the woman was consenting. To be acquitted, therefore, an accused would have to show evidence of reasonable grounds for his belief. In *R.* v. *Flaherty,* Asprey, J.A. felt constrained by authority to hold that a belief in consent had to be both honest and reasonable in order to exculpate. These two cases exemplified the New South Wales view that the question of the accused's belief as to whether consent existed was merely an example of "mistake of fact". This was in contrast to the Victorian view that the accused's belief was vital to the question of whether or not he had the requisite intention. A specially constituted Court of Criminal Appeal in *R.* v. *Sperotto* discussed these two views and sought to reconcile them. They held that the probative burden lay on the Crown throughout the trial to establish that the accused intended to have intercourse without the woman's consent,[54] but that the accused may demonstrate that he did

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[51] (1975) 10 S.A.S.R. 139.

[52] [1975] V.R. 541.

[53] (1967) 85 W.N. (Pt. 1) (N.S.W.) 392.

[54] (1970) 92 W.N. (N.S.W.) 223 at 226.

not have such an intention if it is shown that he held an honest belief that the woman was consenting. The court felt constrained by authority however, to hold that the accused had to have reasonable grounds for such a belief.[55]

On this point the decision in *Sperotto* is in direct conflict with the House of Lords in *Morgan*. Indeed it will be remembered that *Sperotto* was one of the main cases relied upon by Lord Edmund-Davies in his dissenting judgment. Decisions of the House of Lords are of course not binding on Australian courts, but until the decision in *Sperotto* is considered by the High Court it must be taken to be correct law in New South Wales.

In *Brown,* Bray, C.J. attempted to reconcile the decision in *Sperotto* with principles such as were expressed in *Morgan*. He said that "the absence of *mens rea* and the existence of a mistaken belief in circumstances which would make the act innocent are not necessarily identical" and therefore *mens rea* could co-exist alongside such a belief, e.g. if a man intended to have intercourse without a woman's consent, but mistakenly believed at the time that she was consenting.[56] It is submitted that such a reconciliation of the cases must fail, because the belief in the woman's consent necessarily negatives any chance of an intention to have intercourse without consent existing. The courts are not interested in an accused's state of mind generally but in his intention with regard to the specific act of intercourse in question.

Perhaps the most damning criticism of *Sperotto* is that the requirement of reasonable grounds is totally inconsistent with the definition of *mens rea* given in the case itself. The court held that the mental element in rape is either (i) awareness of the accused that the woman is not consenting or (ii) recklessness to the possibility that she is not consenting. The question of even a purely honest belief cannot be raised if the first alternative applies. As to the second half of the definition, if an accused is reckless as to consent, then that recklessness shows that he did not hold a particular belief one way or the other as to whether the woman was consenting—again no question of an honest belief can be raised, let alone whether there are reasonable grounds.[57] An honest belief in consent held by an accused will negative *mens rea,* as defined by the Court of Criminal Appeal in *Sperotto,* and thus the question of reasonableness must be irrelevant.

The requirement of reasonableness has been criticised in that it may penalise a dull person who honestly believes that the woman consented on grounds which would not suggest themselves to a "reasonable man".[58] A second criticism is that if a judge thinks that the grounds

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[55] *Id.* at 227.
[56] (1975) 10 S.A.S.R. 139 at 144.
[57] (1976) 50 *A.L.J.* 92 at 94.
[58] R. P. Roulston, *Introduction to Criminal Law* (1975) p. 124.

for an accused's belief are unreasonable, he may withhold the issue from the jury.[59] Surely it is desirable that the jury examines the views of both the accused and the prosecutrix, to consider whether a reasonable doubt is raised in their minds by the accused's version. It should be noted, however, that in *Sperotto* the Court of Criminal Appeal stated that "slight evidentiary material may, in the appropriate case, be sufficient to justify the trial judge submitting that question to the jury".[60]

Critics of *Morgan* say that it is now possible for an accused to claim that he believed that the woman was consenting when the weight of the evidence in the case shows that the intercourse was without her consent.[61] To this it can be answered that it still has to be established that the accused's belief was honestly held. It must be remembered that in both *Morgan* and *Brown* the jury rejected the accused's version of the evidence and found that they could not have honestly believed that their victim was consenting. The Heilbron Committee pointed out that the "recklessness" aspect of *Morgan* was a new safeguard,[62] but of course this was the situation in Australia even before *Morgan*. Many academics have submitted that the reasonableness of the grounds for a belief in consent should be evidence to be considered in determining whether the belief was honestly held or not,[63] and the Heilbron Committee's recommendations in this respect would give statutory force to this. Perhaps these safeguards will be sufficient to convince critics of *Morgan* that the decision will not allow dangerous men to escape criminal sanctions, but rather ensures that a man will not be convicted if he did not intend to commit a crime.

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[59] P. Brett, "Did The Victim Consent Or Was She Raped?", [1975] *A.C.L.D.*, DT85.

[60] (1970) 92 W.N. (N.S.W.) 223 at 228.

[61] *Per* Sangster, J. in *R.* v. *Brown* (1975) 10 S.A.S.R. 139 at 167.

[62] *Cmnd.* 6352 (1975), para. 77.

[63] A. Roden, "That Unreasonable Mistake", [1975] *A.C.L.D.*, DT109.