**False beliefs and consent to sex**

**Question:** When, if ever, does the falseness of a belief that V holds render sexual activity non-consensual despite V’s seeming consent?

**The ‘Refined Model’**: The falseness of a belief that V held while putatively consenting to sexual activity will make what happened non-consensual, when it means either

1. that what happened to V fell outside the (consideredly or unreflectively selected) boundaries of the object of V’s consent, or
2. that a precondition that V consideredly set for her consent, had not been met.

V sets the preconditions for, and boundaries of the object of, her consent at the time of agreeing to sexual activity.

**Application**

In the cases below, V’s beliefs relate to dealbreakers. Unless specified otherwise, V formed these beliefs unilaterally, or due to something a third party, not acting in concert with D, did or said.

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|  | **Case** | **Outcome** |
| 1 | *V believes D is performing a medical procedure on her. D performs a sexual act instead.* | No successful exercise of *sexual* autonomy. No consent. |
| 2 | *V believes that she and D have just been married at the registry office. Having previously refused to sleep with D, V now agrees. In fact, V and D had just given notice of an intention to marry.* | Probably a preconditions case; so likely, no consent. |
| 3 | *V has sex with D, who she believes is a fellow animal rights activist. In fact D is an undercover police officer infiltrating V’s activist group.* | Unlikely that at the point of exercising sexual autonomy, V set a relevant parameter or precondition. Consent not vitiated. |
| 4 | *V has sex with D, who she believes is a millionaire. In fact, D is nowhere near as rich.* | Could go either way. Probably not a parameters case, but though unlikely, V could, theoretically have (consideredly) made D’s wealth a precondition for her consent when exercising her sexual autonomy re this sexual encounter. If so, V’s putative consent is vitiated. |
| 5 | *V has sex with D, who she believes is Jewish. In fact, D is Muslim.* | Could go either way. Unlikely that V made D’s being Jewish a precondition, or defined the object of her consent as ‘sex with a Jewish man’. But if she did, then her putative consent is vitiated. |
| 6 | *V has unprotected sex with D, who she believes is sterile. D is fertile.* | Could go either way. But if V made D’s being sterile a precondition for consent to unprotected sex, or she consented to ‘sex with a sterile man’ (both of which seem plausible), then her putative consent is vitiated. |
| 7 | *V has sex with D, thinking he is using a condom. He is not.* | Plausibly either a parameters or a preconditions case. Either way, V’s putative consent is vitiated by the fact that D is not wearing a condom. |
| 8 | *V has sex with D, who she believes will withdraw before ejaculation. In fact D (deliberately) does not.* | No consent. V could have defined the object of her consent by reference to the parameter that D intends to withdraw before ejaculation, i.e. consent to “sex without (deliberate) ejaculation inside the vagina”. If she did, then she gave no consent to the sex that occurred. Alternatively, she could have made it a precondition for her consent that D withdraw before ejaculation. In that case, consent to (continued) intercourse at the point of ejaculation did not arise. |
| 9 | *V has sex with D, who she believes has done the dishes. In fact, he has not.* | Unlikely, but possible that consent is vitiated. Extremely unlikely to be a parameters case. Also unlikely that V made D’s having done the dishes a precondition for her consent to sex, but if she did, then consent is vitiated. However, D may well have a mens rea based defence. |
| 10 | *V has sex with D, who she believes will pay her for the sex immediately afterwards. D has no intention of doing so.* | Could go either way. If, but only if, (a) V made it a parameter of the object of her consent that D be willing to pay for sex at all relevant times, or (b) V made D’s continuing willingness to pay for sex at all relevant times a precondition for consent to the continuing sexual intercourse, then there is no consent. |
| 11 | *V has sex with D, thinking D wants it for sexual gratification. In fact, this forms no part of D’s purpose for having sex with V – D wants only to humiliate V.* | Could go either way. Unlikely that V made it a precondition for consent that D’s purpose be sexual gratification, but she might (probably unreflectively) have made the pursuit of mutual sexual gratification a parameter of the object of her consent. If so, then V did not consent. But if V only cared about her own sexual gratification, she would not care, even instinctively, about whether D was deriving any sexual gratification. On those facts, V did consent to sex. |
| 12 | *V has sex with D, who she believes does not have HIV. In fact, D is HIV+.* | Could go either way. It is possible that V consideredly made it a precondition for her consent that D was not HIV+. It is less likely (though not impossible) that she either consideredly or unreflectively made D not being HIV+ a parameter of the object of her consent. If either happened, then V did not consent to the sexual act. But it is also possible that V gave no thought to D’s HIV status, or had unreflectively defined the object of her consent without reference to it. If so, then V did consent to the sexual intercourse. |
| 13 | *V allows D to digitally penetrate her vagina believing D to be a cisgender male. In fact, D is a transgender male.* | Probably no consent. Assuming that V identified as heterosexual, it is quite plausible to think that even if she gave no express thought to whether D was cisgender when agreeing to D digitally penetrating her, V unreflectively consented only to ‘straight digital penetration’. Since what happened was not what *she understood as* a heterosexual sexual act, V did not consent to it. Whether D ought to be convicted of a sexual offence though, also depends on whether D had the mens rea for the offence. |
| 14 | *V has sex with D, believing he is actually her partner, P.* | No consent. V unreflectively defines the object of her consent as ‘sex with P’. Since that is not what happened, V does not consent to the sex. |
| 15 | *The counterparts of cases 1 to 14, except that V’s false belief is caused by D’s deception.* | Outcomes in cases 1 to 14 unchanged – D’s deception may be relevant to mens rea, but not to whether V consented. |