

## EUROPEAN ARREST WARRANT relating to JULIAN PAUL ASSANGE

**Expert Opinion on the four alleged offences specified in the Arrest Warrant (with some additional remarks relating to the complainants' statements), and their implications in English law.**

**Opinion of Professor Andrew Ashworth CBE, QC (Hon), DCL, FBA, Vinerian Professor of English Law in the University of Oxford.**

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1. I am the Vinerian Professor of English Law in the University of Oxford and author of a number of books and articles on the criminal law, including *Principles of Criminal Law* (6<sup>th</sup> ed, 2009) and the leading (co-authored) article on 'Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328-346. I was editor of the *Criminal Law Review* from 1976 to 1999, and I am now a Case Commentator. I was a member of the Criminal Committee of the Judicial Studies Board from 2001-2008, and gave some lectures at the JSB's Serious Sexual Offences seminar. I have been asked by Finers Stephens Innocent, lawyers for Mr. Assange, for my expert opinion on questions of double criminality arising from the extradition case of Julian Assange.
  2. I understand my duties as an expert witness and that the purpose of this report is to assist the court. I can confirm that its contents are true to the best of my knowledge and belief.
  3. I was first asked to consider the double criminality issue solely on the basis of the allegations set out in the European Arrest Warrant ("EAW") issued by a Swedish Prosecutor against Mr. Assange. My opinion, on that basis, is set out below. That is the primary focus of this opinion.
  4. I was subsequently asked to consider, in relation to the Prosecution's argument that it is permissible to infer allegations of *mens rea* in this case, the complainants' statements, with a view to considering whether the allegations in those statements
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provided a basis for inferring *mens rea*. I have indicated in the text where I base my opinion on those statements as well.

5. In preparing this opinion, I have had access to the EAW, the Prosecutor's statement before the Svea Court of Appeal (referred to in box (b) of the EAW), the Prosecution's Opening Note and (subsequently) the statements of the two complainants.
6. The prosecution is relying on four offences, and these will be discussed *seriatim*.

1. Allegation of "Unlawful Coercion"

7. The crucial issue for relevant English offences is consent. The wording of the EAW (European Arrest Warrant) refers to 'violence' and 'force', although it is not at all clear how the parties came to be in the position described. However, taking the allegation at face value, the relevant offence in English law would be sexual assault. This is an offence against section 3 of the Sexual Offences Act 2003, which provides that 'A person (A) commits this offence if:

- a) He intentionally touches another person (B),
- b) The touching is sexual
- c) B does not consent to the touching, and
- d) A does not reasonably believe that B consents.'

8. Assuming that there was a touching, it would only constitute the offence under section 3 of the 2003 Act if it were proved that the complainant did not consent *and*, most significantly, that Mr Assange did not reasonably believe that she was consenting. The EAW fails to include any reference to the mental element of Mr Assange at the time, whereas this mental element is crucial to the question whether this allegation discloses an offence under English law. Even if it were established that the touching was 'sexual,' there is no offence if it was consensual or reasonably believed to be consensual.

9. The statement of the complainant AA seems to suggest that as soon as Mr Assange asked Ms A why she was squeezing her legs together and she replied that she wanted him to put on a condom, he agreed to do so. It is therefore quite plausible that, before he made this request, he reasonably believed that she was consenting to the touching – having allowed Mr Assange to take off all her clothes and having lain down on her back.

2. Allegation of "Sexual Molestation"

10. The offences of rape and sexual penetration, contrary to sections 1 and 2 of the Sexual Offences Act 2003, should be considered in relation to this allegation. Sexual intercourse took place, and it appears not to be alleged that the sex itself was other than consensual. The key argument is that the complainant had made it clear that a condom should be used, and that at some stage it was not used.

11. For present purposes, the relevant elements of the two offences of rape and of sexual penetration are the same. Thus, according to sections 1 and 2 of the Sexual Offences Act 2003 the prosecution must establish:

- a) intentional penetration,
- b) absence of consent by the complainant, and
- c) absence of a reasonable belief by the defendant that the complainant was consenting.

12. The first question arises under b), as to whether there was consent. Section 76(2)(a) conclusively presumes a lack of consent where 'the defendant intentionally deceived

the complainant as to the nature or purpose of the relevant act.' This is a restrictive provision, confined to cases where the deception concerns 'nature and purpose.' As the Court of Appeal held in *B.* [2006] EWCA Crim 2945, if the complainant agrees to the act of intercourse, this constitutes consent for the purpose of the Sexual Offences Act 2003 even if she would not have consented, if she had known all of the facts. It is possible that the facts outlined in the EAW indicate a slightly stronger case than *B.*, in that the complainant had made clear her insistence that the intercourse was only to take place (or continue) if a condom was used. However, this would not be enough to bring the case within the conclusive presumption in section 76(2)(a) of the 2003 Act, and so the case would have to be argued under section 74 of the 2003 Act. That section states that:

'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'

13. There is no further guidance on the circumstances in which a person may and may not be taken to have 'agreed by choice', but the general drift of the case-law for many years has been that, for offences as serious as rape (and also sexual penetration), a person who agrees to the act of sexual intercourse gives consent for this purpose. The only decision that appears to suggest otherwise is the doubtful case of *Devonald* [2008] EWCA Crim 527, where a man pretended to be a woman of 20, befriended the victim and then persuaded him to masturbate in front of a webcam – all in order to humiliate him, for mistreating his daughter. The Court of Appeal held that this fell within section 76(2)(a) of the 2003 Act, regarding it as a deception as to the 'purpose' of the act. However, as argued in the current edition of Smith and Hogan's *Criminal Law* (12 ed., 2008, by David Ormerod), at pp. 688-689, the victim 'had clearly masturbated for a sexual purpose' and 'there was no deception as to that.' Section 76(2)(a) is restrictively phrased, and must be interpreted restrictively, and section 74 cannot fill any apparent gaps.

14. The pre-2003 law included a separate, lesser offence of obtaining sexual intercourse by false representation (s. 3 of the Sexual Offences Act 1956), but this offence was abolished by the 2003 Act without replacement. Furthermore, the offence under section 3 of the 2003 Act would only be made out if it were proved that Mr Assange did not reasonably believe that the complainant was consenting. The conclusion, therefore, is that the failure to wear a condom when the complainant had insisted on this is not sufficient to constitute this as the offence of rape in English law, and that there is no available lesser offence.

15. The complainant's statement opens up a further possibility – that Mr Assange was unaware that the condom was no longer in place and effective, if indeed that was the case. If the sex was energetic and involved more than one entry, this is distinctly possible. This suggests that if, contrary to the argument above, it is thought that English law recognizes that consent may be given conditionally, Mr Assange may have reasonably believed that he was complying with the condition; and that would have the effect of negating any offence.

### 3. Allegation of "Sexual Molestation"

16. The only possible offence in English law disclosed by these facts would be sexual assault, contrary to section 3 of the Sexual Offences Act 2003. A person (A) commits this offence if:

- a) He intentionally touches another person (B),
- b) The touching is sexual
- c) B does not consent to the touching, and
- d) A does not reasonably believe that B consents.

17. Requirements a) and b) are fulfilled by the assumed facts, but there is no suggestion in the EAW that elements c) and d) are fulfilled. There is no allegation of lack of consent; and it would also have to be established that Mr Assange did not reasonably believe that the complainant would consent to this interaction. Whatever the position in Swedish law, the existence of reasonable grounds for believing in consent is sufficient to negate the offence of sexual assault in English law. Section 3(2) of the 2003 Act states that:

18. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

19. The fact that Mr Assange evidently took no steps to ascertain whether the complainant consented is not determinative, since the circumstances may have been such that he may well have reasonably believed, on the basis of events during the previous days, that she would have no objection to his advances. The complainant's statement may be thought to lend credence to this: although she states that she had rejected his advances on the days before Wednesday 18<sup>th</sup> August 2010, when the alleged conduct occurred, she had not asked him to leave her apartment until then. Her failure to ask him to leave (and her apparent continuing to sleep in the same bed as him) may have given him reasonable grounds for believing that she might again welcome his advances, as she had done on the earlier occasion.

#### 4. Allegation of "Rape"

20. The allegation of rape raises various questions about the relevant English law. Section 1 of the Sexual Offences Act 2003 provides:

A person (A) commits an offence if –

- a) He intentionally penetrates the vagina ... of another person (B) with his penis,
- b) B does not consent to the penetration, and
- c) A does not reasonably believe that B consents.

21. It is alleged by the rape complainant in her statement that sexual intercourse between the two parties had already taken place on a number of occasions that night. If it is assumed that the complainant was asleep at the time when Mr Assange penetrated her – and the Swedish prosecutor appears to maintain (report of the Svea Court of Appeals, p. 3) that when the complainant described herself as 'half asleep' she meant that she was sleeping lightly rather than deeply – what implications would this have in English law?

22. Section 75 of the 2003 Act provides for a rebuttable presumption of non-consent in various situations, of which this is the relevant one:

- d) The complainant was asleep or otherwise unconscious at the time of the relevant act.

23. Thus the fact (if it was so) that the complainant was asleep means that she is taken not to have consented 'unless sufficient evidence is adduced to raise an issue' as to whether she consented: section 75(1) of the 2003 Act. In this case there appears to be sufficient evidence to raise the issue of consent, stemming from several previous acts of intimacy. Moreover, the presumption in section 75(2)(d) is also relevant on the question whether Mr Assange reasonably believed that the complainant was consenting: once again, there appears to be sufficient evidence to raise the issue of reasonable belief in consent, particularly if the statement of the complainant S.W. is accepted. She stated that they had sex several times that night, that on a previous occasion she noticed that he had not worn the condom properly but 'she let it be'; and

that when she awoke to find his penis inside her vagina, she decided to let him continue even though she knew he was not wearing a condom. These surrounding circumstances make it quite plausible that Mr Assange may have reasonably believed she was consenting, even if he did penetrate her when she was asleep (if that is established).

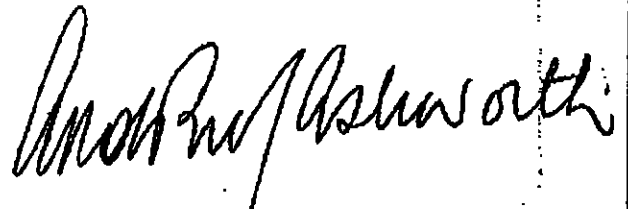
24. One of the reasons why Parliament enacted that the presumption in section 75(2)(d) is rebuttable (rather than placing it in the category of irrebuttable presumptions, set out in section 76 of the Act) was to preserve the possibility of arguing that consent was reasonably presumed as a result of previous sexual relations. For instance, if a wife had made it clear that she enjoyed the sensation of waking up with her husband penetrating her, it would surely be entirely reasonable for the husband to proceed on this basis. If the presumption were irrebuttable, however, the husband would commit the offence of rape simply because consent was not given on the particular occasion. The conclusion on this issue is therefore that the facts in the EAW do not disclose an offence under English law. It should be added that this appears also to have been the position at common law: in *Page* (1846) 2 Cox CC 133, at p. 134, Coleridge J held that there was no lack of consent when the defendant penetrated the complainant whilst she was asleep, since he had done so on several previous occasions and she had always acquiesced as she was waking. On this occasion she pushed him away on waking, when she saw that a woman was watching them, but that did not convert the offence into rape.

25. Lastly, there is a further question of the effect of having intercourse without the use of a condom. The analysis under (2) above applies equally here. This does not affect the complainant's consent to sex, since there is no deception as to the 'nature and purpose' of what is being done. It would therefore be a question under section 74 of the 2003 Act whether the complainant may be said to have consented, in the sense of having 'agreed by choice'; and, if so, whether Mr Assange may be said to have reasonably believed that she was consenting. Again, the statement of the complainant points to several surrounding circumstances that may have given Mr Assange reasonable grounds for forming the belief in consent.



5) Conclusions.

26. In conclusion, and for the reasons given above, I do not consider that any of the incidents alleged in box (c) of the EAW is sufficient of itself to constitute any offence under English law. In respect of none of the four alleged incidents is there a clear allegation of lack of consent to the touching; moreover, in respect of none of the incidents is there any allegation that Mr Assange did not reasonably believe that the complainants were consenting to the touching. I am told that the prosecution will argue that allegations of *mens rea* can be inferred. I see no basis for such an inference, in the EAW as it stands. Taking the allegations in the EAW at their highest, they are not, in my opinion, capable of sustaining the necessary finding of *mens rea*. Nor do the complainants' statements contain any allegation, explicit or implicit, that Mr Assange did not reasonably believe in consent. On the contrary, those statements raise real issues as to consent and *mens rea*.



Andrew Ashworth

25 January 2011.