



HIGH COURT OF AUSTRALIA

14 May 2014

MICHAEL ALAN GILLARD v THE QUEEN

[2014] HCA 16

Today the High Court unanimously allowed Michael Alan Gillard's appeal against his convictions for four sexual offences.

Mr Gillard was tried before the Supreme Court of the Australian Capital Territory on a number of sexual offences against DD. He was convicted of three offences that occurred before DD turned 16 years old. The appeal to the High Court was confined to separate convictions for: three offences of sexual intercourse with DD, without DD's consent, contrary to s 54(1) of the *Crimes Act 1900* (ACT) ("the Act"); and one offence of committing an act of indecency in the presence of DD's sister, JL, without JL's consent, contrary to s 60(1) of the Act. These offences were alleged to have occurred when DD was aged 17 and 18 years and when JL was aged 16 years.

The offences were said to arise during school holidays on occasions when DD and JL were staying at Mr Gillard's home. Mr Gillard, who was a friend of DD's and JL's father, acknowledged that it was his understanding that DD and JL had been entrusted to his care during these visits. Under s 67(1)(h) of the Act, a complainant's consent to sexual intercourse, or the commission of an act of indecency, is negated if the consent is caused by the abuse by a person of a position of authority over, or other trust in relation to, the complainant. One way in which the prosecution case was put at Mr Gillard's trial was that DD's and JL's consent had been caused by Mr Gillard's abuse of his position of authority.

The mental element of the offences provided by ss 54(1) and 60(1) is either knowledge that the complainant is not consenting to sexual intercourse or the commission of the act of indecency, or recklessness as to consent. Section 67(3) relevantly provides that where an accused person knows that consent to sexual intercourse, or to an act of indecency, has been caused by his or her abuse of authority over the complainant, he or she is deemed to know that the complainant is not consenting. The jury at Mr Gillard's trial were directed that the prosecution could establish the mental element of liability for the ss 54(1) and 60(1) offences by proof either of knowledge or recklessness.

Mr Gillard appealed to the Court of Appeal of the Supreme Court of the Australian Capital Territory. He argued that at a trial in which the prosecution relies on the accused's abuse of his or her position of authority as negating the complainant's consent, it is necessary to establish that the accused knew that the abuse of authority was the cause of the consent and that recklessness as to consent is not sufficient. The Court of Appeal rejected the argument holding that the mental element of liability for the offences includes recklessness as to consent.

By special leave, Mr Gillard appealed to the High Court. The High Court held that recklessness as to consent is a state of mind of indifference as to whether the complainant is consenting. The Court distinguished this state of mind from that of an accused who is heedless of the risk that he or she may be abusing a position of authority over the complainant or the risk that such abuse of authority may have caused the complainant to consent. The directions given to the jury at Mr Gillard's trial wrongly conveyed that it was open to convict Mr Gillard if the jury was satisfied that he was

reckless in either of these respects. The Court held this was a material misdirection affecting each of the counts that were the subject of the appeal and directed a new trial be had of those counts.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*