HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

DIRECTOR OF PUBLIC PROSECUTIONS FOR THE NORTHERN TERRITORY OF AUSTRALIA APPELLANT

AND

WJI RESPONDENT

Director of Public Prosecutions (NT) v WJI [2004] HCA 47
6 October 2004
D14/2003

ORDER

Appeal dismissed.

On appeal from the Supreme Court of the Northern Territory of Australia

Representation:

D F Jackson QC with W J Karczewski QC and M J Carey for the appellant (instructed by Office of the Director of Public Prosecutions for the Northern Territory)

S J Odgers SC with S J Cox for the respondent (instructed by Northern Territory Legal Aid Commission)

CATCHWORDS

Director of Public Prosecutions (NT) v WJI

Criminal law – *Criminal Code* (NT), ss 192(3) and 31 – Sexual intercourse without consent – Mental element required – Whether relevant "act" is sexual intercourse or sexual intercourse without consent – Whether prosecution must prove beyond reasonable doubt that accused intended to have sexual intercourse with the complainant without consent – Application of *Criminal Code* (NT), s 32.

Statutes – Interpretation – Criminal Codes – *Criminal Code* (NT).

Practice and procedure – Trials – Jury directions.

Words and phrases – "act", "event", "act, omission or event", "sexual intercourse with another person without the consent of the other person".

Criminal Code (NT), ss 1, 31, 32, 192(3).

1 GLEESON CJ. This is an appeal from a decision of the Court of Criminal Appeal of the Northern Territory which, by a majority of four to one[1], upheld a trial judge's directions to a jury in a case of alleged rape where the principal issues related to the complainant's consent, or lack of it, and the accused's state of mind about that matter. The relevant directions were as follows:

> "A ...
>
> 1. The indictment contains one charge of having sexual intercourse without consent.
>
> 2. The charge consists of three elements. The Crown must prove each of the elements beyond reasonable doubt.
>
> B1. The charge consists of the following three elements:
>
> 1.1 That on or about 27 January 1998 at Palmerston the accused had sexual intercourse with TRR.
>
> 1.2 That TRR did not give her consent to the accused having sexual intercourse with her.
>
> 1.3 That the accused intended to have sexual intercourse with TRR without her consent.
>
> ...
>
> 4. Element 1.3
>
> 4.1 The accused knew TRR was not consenting or may not be consenting and proceeded regardless.
>
> 4.2 If the accused mistakenly believed that TRR consented to his having sexual intercourse with her, he will NOT have intended to have sexual intercourse with her without her consent. The Crown must therefore prove beyond reasonable doubt that the accused held no mistaken belief that TRR consented to having sexual intercourse with him.
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> 4.3 Such a 'mistaken belief' does NOT have to be based on reasonable grounds. However, if there is no reasonable basis for such a mistaken belief, you are entitled to take that

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1 *Director of Public Prosecutions Reference No 1 of 2002* (2002) 12 NTLR 176 (Martin CJ, Thomas and Bailey JJ and Gallop AJ; Angel J dissenting).

> into account in deciding whether or not the Crown has proved that no mistaken belief existed."

2 Those directions, we were told, followed a pattern that had been used in the Northern Territory for several years[2], but there was a dispute about whether they were in conformity with the currently applicable provisions of the *Criminal Code* (NT) ("the Code" or "the Northern Territory Code"). They would not come as a surprise to a lawyer from one of the "common law States"[3], but they are different from the law as applied in other "code States"[4]. Our concern, however, is to interpret and apply the Northern Territory Code which, in some respects, is unique.

3 The principal points in contention relate to sub-par B1.3 of the directions and, as a corollary, sub-pars B4.2 and B4.3. Those points can only be understood by reference to the detail of the relevant provisions of the Code. In brief, however, the appellant contends that the prosecution was only required to establish elements B1.1 and B1.2, and, further, that the accused intended to have sexual intercourse. It was not required to establish that he intended non-consensual intercourse. On that approach, there may have been available to the accused an excuse (which the prosecution had to negative) that he had an honest and reasonable, but mistaken, belief that the complainant was consenting. The practical importance of the difference will often turn upon the question of reasonableness.

4 The offence with which the accused was charged is created by s 192(3) of the Code, which prohibits "sexual intercourse ... without ... consent". The Code, in s 1, contains an extended definition of sexual intercourse, but that is presently immaterial. What was involved (and undisputed) in this case was sexual intercourse within the ordinary meaning of that expression. Section 192(3) provides that any person who has sexual intercourse with another person without the consent of the other person is guilty of a crime, and is liable to imprisonment for life.

5 Two general provisions of the Code are of potential relevance to the mental element necessary for a contravention of s 192(3).

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2 *McMaster v The Queen* (1994) 4 NTLR 92.

3 cf *Director of Public Prosecutions v Morgan* [1976] AC 182; *R v McEwan* [1979] 2 NSWLR 926.

4 eg *Snow v The Queen* [1962] Tas SR 271; *Arnol v The Queen* [1981] Tas R 157; *Re Attorney-General's Reference No 1 of 1977* [1979] WAR 45.

6 Section 31(1) provides that a person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct. It is that provision that the trial judge intended to reflect in sub-par B1.3 of the above directions. The directions assume that the relevant "act" prescribed by s 192(3), for the purpose of s 31(1), is not merely the act of sexual intercourse (which is legally neutral) but the act which is made criminal, that is to say, sexual intercourse without consent (or, to use a more old-fashioned word, rape).

7 Whether that approach is correct, as it was held to be by a majority in the Court of Criminal Appeal, turns upon the identification of the act to which s 31(1) refers when it is applied to s 192(3). In the Northern Territory Code, "act" is defined, in s 1, in relation to an accused person, to mean "the deed alleged to have been done by him", and "it is not limited to bodily movement". There is also a definition of "event", but it is presently irrelevant. It means the result of an act or omission. If, as held by Angel J in dissent, the relevant act of the accused was the act of sexual intercourse, the absence of consent was not the result of that act.

8 There are judgments in which expressions such as "extrinsic circumstances" or "external circumstances" have been used, in other contexts, to distinguish between the physical act involved in an offence and some other circumstance which must be present in order to make the act criminal. In a case concerning the Queensland Criminal Code, *Kaporonovski v The Queen*[5], Gibbs J referred to absence of consent on a charge of rape as an extrinsic circumstance accompanying the act of the accused, that is, sexual intercourse. For present purposes, however, the question to be asked is whether, in relating ss 192(3) and 31(1) of the Northern Territory Code, having regard to the definition of "act" ("deed ... not limited to bodily movement"), the act for which a person is excused from criminal responsibility unless it was intended is intercourse, or intercourse without consent. Is the "deed" sexual intercourse, or rape? If the wider concept of the relevant act is adopted, then there will be criminal responsibility only if there was an intent to have sexual intercourse without consent. It will not suffice to establish criminal responsibility that there was an intent to have sexual intercourse.

9 If the narrower concept of the relevant act is adopted, that would not leave an accused bereft of any possible exculpation arising from a misunderstanding about consent. Section 32 provides that a person who does an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist. This, according to the appellant, is

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5 (1973) 133 CLR 209 at 231.

the statutory rubric which covers the mental element of an accused concerning the consent of a person with whom he has sexual intercourse. On that approach, reasonableness is a factor that always comes into play as an ingredient of the "defence", and not merely as a matter of potential evidentiary significance on the question of intention.

10 Sections 31 and 32 are general provisions with possible application to a variety of offences. The presence of s 31 does not mean that it will provide the exclusive answer to any problem of intention or foresight involved in criminal responsibility, regardless of the elements of the substantive offence involved: *Charlie v The Queen*[6]. A provision such as s 32 might have little, if any, room for practical operation in a case where the nature of the elements which the prosecution must prove in order to establish criminal responsibility is such that the possibility of mistake is caught up within those elements[7]. In a given case, there may be no occasion for an accused to rely upon the excuse provided by s 31 or s 32, because of what the prosecution needs to prove in order to establish the elements of the offence.

11 Section 32 is not to be treated in every case as an answer which demands a question. If, because of the interaction of s 31(1) and s 192(3), the prosecution has to show that the accused intended, not just to have sexual intercourse, but to have sexual intercourse without consent, then it may very well be that, in a given case, of which the present is an example, s 32 would not arise for consideration.

12 It does not appear to me to be helpful to ask whether the complainant's absence of consent was an extrinsic circumstance. Extrinsic to what? It was extrinsic to the accused in the sense that it was a quality, not of the accused, but of the alleged victim. To describe it as extrinsic to the conduct which attracted criminal responsibility is to beg the question. Having sexual intercourse with someone who is not consenting is a "deed" which is not limited to the bodily movement of the perpetrator. It involves violence, and a serious affront to the dignity and personal integrity of the victim. It is consistent with the ordinary use of language to describe the absence of consent as a part of the deed which attracts criminal responsibility. It is a defining aspect of the deed.

13 In my view, in the Northern Territory Code, for the purpose of applying s 31(1) to s 192(3), the relevant act is having sexual intercourse with another person without the consent of the other person. It follows that the directions of

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6 (1999) 199 CLR 387. See also *Vallance v The Queen* (1961) 108 CLR 56 at 58 per Dixon CJ.

7 cf *King v The Queen* (2003) 77 ALJR 1477; 199 ALR 568.

the trial judge were correct. I agree with the majority in the Court of Criminal Appeal.

14 The appeal should be dismissed.

15 GUMMOW AND HEYDON JJ. The Criminal Code of the Northern Territory of Australia ("the Code") is Sched 1 to the *Criminal Code Act* (NT). That statute was enacted in 1983 and s 3 repealed a deal of earlier legislation including various South Australian Acts in their application to the Territory.

16 The Code has apparent affinities with the Griffith Code and the Codes of Tasmania and Western Australia, but it has some distinctive features of its own. That is not surprising, given that the Northern Territory legislation is the most recent of the four Codes and was enacted in the light of many decisions construing the State Codes.

The Code and the common law

17 As is well known, Sir Samuel Griffith regarded it as a mark of the success of the Queensland Code that no longer would it be necessary to consider "the old doctrine of *mens rea*"; he said that "the exact meaning" of that common law doctrine had been the subject of much discussion[8]. That discussion has continued. Is the voluntary nature of the conduct of the accused an element of the *actus reus*, as an essential constituent of the "act" in question, or an element of the *mens rea*[9]? Where the existence of a particular intent or state of mind is a necessary ingredient of an offence, may the accused exculpate himself by an honest and reasonable mistaken belief[10]? Does such a mistake necessarily negate the existence of *mens rea*[11]?

18 There may be no requisite "act" at all where the offence fixes upon an omission or treats as sufficient the proof of the existence of a specified event, state of affairs, status or situation[12]. Offences of "strict liability" may be created by statute. With these considerations in mind, is it correct to say that the *actus*

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8 *Widgee Shire Council v Bonney* (1907) 4 CLR (Pt 2) 977 at 981.

9 *Ryan v The Queen* (1967) 121 CLR 205 at 216-217, 231-232, 235, 244-246; Smith & Hogan, *Criminal Law*, 10th ed (2002) at 37-38.

10 See the judgment of Windeyer J in *Iannella v French* (1968) 119 CLR 84 at 110-111.

11 See the judgment of Bray CJ in *R v Brown* (1975) 10 SASR 139 at 144, 147.

12 Smith & Hogan, *Criminal Law*, 10th ed (2002) at 42-44; Cohen, "The '*Actus Reus*' and Offences of 'Situation'", (1972) 7 *Israel Law Review* 186 at 190-192. An example was s 7 of the *Immigration Restriction Act* 1901 (Cth), which made every prohibited immigrant found in Australia in contravention of that statute guilty of an offence.

reus includes all the elements of the crime in question except for that which is required (if any) as the mental element of the offence? In *He Kaw Teh v The Queen*[13], Brennan J affirmed that "a presumption is made that mens rea is an element in a statutory offence though the offence is defined only by reference to its external elements". The phrase "external elements" and cognate expressions have a significance for the issues that arise on this appeal respecting the construction of the Code.

19 With the above questions of common law classification, this appeal is not concerned. However, they lie behind, or at least can assist in, an understanding of the scheme of the Code.

The meaning of "act"

20 In construing the Codes of the States, particular difficulty has arisen as to the meaning of the term "act" appearing in provisions dealing with general principles of liability[14]. Was all that was indicated the activity performed by the accused, for example firing a shot, or also the consequences of that action or the circumstances in which the action occurred?

21 In *Vallance v The Queen*[15], the Court was concerned with the unlawful wounding provision of the Tasmanian Code. Kitto J and Menzies J held[16] that the word "act" in the provision in s 13(1) that no person was to be criminally responsible for an act unless it be voluntary and intentional, referred to the physical action of a person charged; it did not extend, in its application to the unlawful wounding provision of s 172, to all that was comprised in the notion of wounding. Dixon CJ and Windeyer J[17] were of the contrary view; Taylor J tended[18] to favour the opinion of Kitto J and Menzies J. The Code was enacted

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13 (1985) 157 CLR 523 at 565-566.

14 Specifically, Criminal Code (Q), s 23; Criminal Code (WA), s 23; Criminal Code (Tas), s 13.

15 (1961) 108 CLR 56.

16 (1961) 108 CLR 56 at 64, 71 respectively.

17 (1961) 108 CLR 56 at 60-61, 79 respectively.

18 (1961) 108 CLR 56 at 68-69. See *Kaporonovski v The Queen* (1973) 133 CLR 209 at 228-230 where Gibbs J discusses *Vallance* and the subsequent support given the views of Dixon CJ and Windeyer J in *Timbu Kolian v The Queen* (1968) 119 CLR 47.

in terms which involved a response to *Vallance*[19]. Before coming to the particular legal issues involved in the appeal, it is necessary to say something of the facts.

The facts

22 The respondent was acquitted at his trial in the Supreme Court of the Northern Territory before Riley J and a jury on a count of sexual intercourse without the consent of the complainant, contrary to s 192(3) of the Code. Section 192(3) states:

> "Any person who has sexual intercourse with another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for life."

23 An aide memoire distributed to the jury as part of Riley J's directions in part read:

> "If the accused mistakenly believed that [the complainant] consented to his having sexual intercourse with her, he will NOT have intended to have sexual intercourse with her without her consent.
>
> The Crown must therefore prove beyond reasonable doubt that the accused held no mistaken belief that [the complainant] consented to having sexual intercourse with him.
>
> Such a 'mistaken belief' does NOT have to be based on reasonable grounds. However, if there is no reasonable basis for such a mistaken belief, you are entitled to take that into account in deciding whether or not the Crown has proved that no mistaken belief existed."

24 Section 414(2) of the Code states:

> "A Crown Law Officer may, in a case where a person has been acquitted after his trial on indictment, refer any point of law that has arisen at the trial to the [Court of Criminal Appeal] for its consideration and opinion thereon."

The term "Crown Law Officer" is defined in s 1 of the Code so as to include the present appellant.

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19 Gray, "A Class Act, an Omission or a Non-event? Criminal Responsibility Under Section 31 of the Criminal Code (NT)", (2002) 26 *Criminal Law Journal* 175 at 176.

25 Under s 414(2) of the Code, the following points of law were referred for consideration:

> "1. Was the learned trial judge correct in directing the jury, in respect of the elements of the offence prescribed by section 192(3) of the [Code], that the Crown must prove beyond reasonable doubt, ***not only***
>
> (a) that the accused had sexual intercourse with the complainant, and
>
> (b) that the complainant did not give her consent to the accused having sexual intercourse with her
>
> ***but also***
>
> (c) that the accused intended to have sexual intercourse with the complainant without her consent?
>
> 2. Was the learned trial judge correct in directing the jury, in respect of the issue of the accused's mistaken belief as to consent, that such a mistaken belief need not be based on reasonable grounds?"

26 The Court of Criminal Appeal (Martin CJ, Thomas and Bailey JJ and Gallop AJ; Angel J dissenting) answered each question "Yes"[20].

27 Section 407(1) of the Code stipulates that the Supreme Court shall be the Court of Criminal Appeal. Pursuant to s 35AA of the *Judiciary Act* 1903 (Cth), an appeal lay to this Court by special leave from a judgment, decree, order or sentence of the Supreme Court sitting as the Court of Criminal Appeal. The order that the questions referred be answered in the affirmative answered the description of a judgment, decree, order or sentence[21].

28 The appellant contends that the Court of Criminal Appeal erred in not answering each question in the negative. We have concluded that the Court of Criminal Appeal did not err and that the appeal should be dismissed.

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20 *Director of Public Prosecutions Reference No 1 of 2002* (2002) 12 NTLR 176; 171 FLR 403.

21 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289.

The structure of the Code

29 It is necessary to make some further reference to the structure and scope of the Code. The Code follows the outline described by Dixon CJ in *Vallance*, with reference to the Tasmanian Code. His Honour referred to[22] "the use in the introductory part of the [Tasmanian Code] of wide abstract statements of principle about criminal responsibility" which "come *ab extra* and speak upon the footing that they will restrain the operation of what follows"; what follows are "many chapters defining particular crimes more often than not in terms adopted long before as occasion demanded by a legislature introducing a new crime or crimes into a common law system".

30 The abstractions of doctrine, "framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do", do not represent "generalized deductions from ... particular instances"[23]. What then is to be seen in the framing of the Australian Codes is an application to statutory schemes of what has been described as "top-down reasoning"[24], whereby general principle is imposed by a particular theory rather than derived from decisions upon particular instances.

31 A particular theory of the framers of the State Codes may have been displaced by later common law decisions. An example, after *Woolmington v The Director of Public Prosecutions*[25], was the placement of the burden respecting issues of accident or provocation in the trial of a murder indictment[26]. Further, as the present appeal demonstrates, in relating the general to the specific portions of the Code, there is a risk that the requisite intent which is to be proved may be distorted. There is thus wisdom in the statement by Dixon CJ in *Vallance*[27],

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22 (1961) 108 CLR 56 at 58.

23 *Vallance v The Queen* (1961) 108 CLR 56 at 58 per Dixon CJ.

24 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544-545 [72]-[74].

25 [1935] AC 462.

26 *R v Mullen* (1938) 59 CLR 124 at 136; *Murray v The Queen* (2002) 211 CLR 193 at 206-207 [40]. However, with respect to the Code, s 440 provides a standard of proof beyond reasonable doubt, save for matters to be proved by the defence, where the standard is the balance of probabilities.

27 (1961) 108 CLR 56 at 61.

adopted by Gaudron J in *Murray v The Queen*[28], that the operation of those provisions of the Codes dealing with general principles can be worked out only by specific solutions of particular difficulties raised by the precise facts of given cases.

32 Section 192(3) of the Code is found in Pt VI, Div 5 (ss 187-193), which is headed "*Assaults*". Part VI is headed "OFFENCES AGAINST THE PERSON AND RELATED MATTERS".

33 The central elements of s 192(3) "sexual intercourse with another person without the consent of the other person" have some affinity with the definition of the common law crime of rape as "carnal knowledge of a woman without her consent", carnal knowledge being "the physical fact of penetration"[29]. However, there is in s 1 an expanded definition of the term "sexual intercourse" and sub-ss (1) and (2) of s 192 both indicate that "consent" means "free agreement" and indicate various circumstances in which there will not be that free agreement. Nothing turns immediately upon these provisions for this case.

34 Part II (ss 22-43) is headed "CRIMINAL RESPONSIBILITY" and contains the wide abstract statements of principle about criminal responsibility to which Dixon CJ referred in *Vallance*. The critical provision is s 23 which is found in Div 1 (ss 22-25), headed "*General Matters*". Section 23 states:

> "A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorized, justified or excused."

The section is so drawn as to encompass the diverse range of offences specified in Pts III-VIII of the Code. These include not only crimes proscribing certain activities, with or without the achievement of a particular result, but also crimes of omission, and what earlier in these reasons have been described as situation crimes.

35 This is indicated by the postulate in s 23 that an offence is constituted by one or more of an "act, omission or event". An "event" means "the result of an act or omission" (s 1). There is no definition of "omission". However, s 1 contains a detailed definition of "act" which sets the Code apart from the State Codes. The provision reads:

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28 (2002) 211 CLR 193 at 198 [12].

29 *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 261. See also *R v Flannery* [1969] VR 31 at 33.

> "'act', in relation to an accused person, means the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention".

The reference to "deed" reflects a passage in the judgment of Windeyer J in *Vallance*. There, in the course of construing s 13(1) of the Tasmanian Code, which read:

> "No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance",

his Honour said[30]:

> "The statement that no person shall be criminally responsible for an act, unless it is voluntary and intentional refers, I think, as a mere matter of construction, to an act for which, if done voluntarily and intentionally, a person would be criminally responsible. The definition of 'criminally responsible' in s 1[31] seems to confirm this construction. The 'act' referred to is thus a deed that, if done wilfully and intentionally (and in cases where a specific intent is an ingredient of the crime, done with that intent), would make the doer criminally responsible."

36 Section 23 uses the phrase "authorized, justified or excused". The Code does not contain any further definition of those expressions. Their content is to be gathered from the balance of Pt II. Division 2 (s 26) is headed "*Authorization*", Div 3 (ss 27-29) "*Justification*", and Div 4 (ss 30-43) "*Excuse*".

Section 31 of the Code

37 The most important provision found in Div 4 is s 31. This states:

> "(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
>
> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that

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30 (1961) 108 CLR 56 at 79.

31 The term meant "liable to punishment as for an offence".

particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

(3) This section does not apply to the offences defined by Division 2 of Part VI."

The offences covered by sub-s (3) are concerned with certain dangerous acts or omissions and failures to rescue. Further, by reason of express provision (s 162(4)) or as a matter of true construction[32], s 31 is not applicable to two of the four categories of murder specified in s 162(1) of the Code. However, s 31 does apply across a range of offences specified in Parts succeeding Pt II of the Code. These offences include s 192(3), the crime of which the respondent was acquitted.

38 In these cases, s 31 says negatively that there shall be no guilt unless the act, omission or event, being the crime specified in another Part of the Code, was intended by the accused or foreseen by the accused as a possible consequence of the conduct of the accused. In this way there is a congruence between the general principles stated in Pt II and the specific provisions made in other Parts of the Code. The general scheme of the Code is that these latter provisions do "no more by way of defining the crime than stating the external elements necessary to form the crime" and s 31 is relied upon to define and import the elements going to state of mind; the reference to "external elements" is to the judgment of Dixon CJ in *Vallance*[33].

39 Dixon CJ used the phrase "external elements" in a similar fashion to Professor Glanville Williams. In his *Criminal Law – The General Part*[34], he espoused "[t]he view that *actus reus* means *all* the external ingredients of the crime". Later[35], he wrote that "*actus reus*" denoted "the external situation forbidden by law – the external elements of the offence". He continued by explaining that he meant by "external elements" those parts of the offence that were "not in the defendant's mind", adding[36]:

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32 *Charlie v The Queen* (1999) 199 CLR 387.

33 (1961) 108 CLR 56 at 59.

34 2nd ed (1961) at 19 (original emphasis).

35 *Textbook of Criminal Law*, (1978) at 30.

36 *Textbook of Criminal Law*, (1978) at 30.

> "Rape, for example, is (1) sexual intercourse by a man with a woman without her consent, (2) the man knowing that she does not consent or realising that she may not be consenting and being reckless whether she consents or not. The elements that I have put under (1) are the external elements, and they include the lack of consent by the woman, which is to some extent a reference to her state of mind. The external elements are all the elements of the offence other than the defendant's mental element."

40 The adaptation of these remarks to the Code with the assistance of Dixon CJ's observations in *Vallance*, together with the significance of the adoption in the definition of "act" in s 1 of the Code of the term "deed", are critical for the outcome of the present case.

41 The correct process of construction of the Code is that indicated by Burbury CJ and Cox J in *Snow v The Queen*[37]. Their Honours said[38]:

> "The first step in determining the mental elements in the crime of rape under the Tasmanian *Criminal Code* is to consider the statutory definition of the crime itself and then to consider the application to the elements of the crime so defined the general provisions of Chapter IV of the [Tasmanian Code] relating to criminal responsibility."

"Rape" was defined by s 185 of the Tasmanian Code and "carnal knowledge" by s 1. Burbury CJ and Cox J continued[39]:

> "Section 185 as in the case of s 172 (unlawful wounding) must, we think (in the words of *Dixon* CJ in *Vallance v The Queen*[40]):
>
> > '... be read in the Code as doing no more by way of defining the crime than stating the external elements necessary to form the crime' (ie (1) physical penetration of a woman not married to the accused, (2) absence of her consent) ... 'relying upon the introductory part' (ie Chapter IV) 'or so much of it as deals with criminal responsibility to define and import the elements which go

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37 [1962] Tas SR 271.

38 [1962] Tas SR 271 at 275.

39 [1962] Tas SR 271 at 275.

40 (1961) 108 CLR 56 at 59.

> to intention or other state of mind necessary or sufficient completely to constitute the crime.'
>
> Absence of the woman's consent (as defined in s 1) involves of course the woman's state of mind but it is an external element of the crime *vis à vis* the accused."

42 Thereafter, in *Kaporonovski v The Queen*[41], which involved a conviction under the Queensland Code for unlawfully doing grievous bodily harm, Gibbs J said of the word "act" appearing in the first paragraph of s 23 of that Code[42] that it would be a departure from the ordinary meaning of that word to regard it as including all the ingredients of the crime other than the mental element[43]. Gibbs J said that perhaps the strongest indication of the intent with which "act" was used in the first paragraph of s 23 was[44]:

> "to be found in the very words of that paragraph, which, by distinguishing between an act and its consequences, show that 'act' is not intended to embrace the consequences as well as the action that produced them".

He also observed[45]:

> "Putting aside cases where a specific intention is required, there are many offences which are constituted only if the act of the accused was accompanied by some extrinsic circumstance (eg absence of consent on a charge of rape or the age of the girl on a charge of unlawful carnal knowledge) or had some particular consequence (eg the causing of grievous bodily harm, as in the present case). It would be straining language to regard the word 'act' as extending to all such external circumstances."

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41 (1973) 133 CLR 209.

42 This read:

> "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

43 (1973) 133 CLR 209 at 230.

44 (1973) 133 CLR 209 at 231.

45 (1973) 133 CLR 209 at 231.

43 It will be apparent that Gibbs J used the expressions "external circumstances" and "extrinsic circumstance" in a sense quite different to that in which Dixon CJ used "external circumstances" in *Vallance*. Gibbs J distinguished the "act" of the accused from a circumstance such as absence of consent on a charge of rape or the causing of grievous bodily harm. Dixon CJ spoke of "the external elements necessary to form the crime, that is to say the wounding or the causing of grievous bodily harm"[46], other than the mental element provided for in the general provisions as to liability found in the Tasmanian Code.

The outcome on the appeal

44 In *Kaporonovski*, Gibbs J was influenced by the absence of any definition of "act" in the Queensland Code and what he took to be its "ordinary meaning"[47]. That concern does not arise with s 31 of the Code. Even without the distinct treatment of "event" as meaning the result of an act or omission, and the separate treatment of acts and omissions, the definition of "act" indicates that that word means "the deed alleged to have been done" by the accused person and is not limited to bodily movement. The significance of the choice of the term "deed" in the light of remarks by Windeyer J in *Vallance*[48] has been emphasised earlier in these reasons.

45 In construing s 31, the central question is the identification of that which, if done intentionally, gives rise to criminal responsibility. This for the present case was the charge of the sexual intercourse of the respondent with the complainant without her consent, as specified in s 192(3) of the Code.

46 The outcome is consistent with the common law as understood at the time of the enactment of the Code in 1983. In 1975, the House of Lords decided *Director of Public Prosecutions v Morgan*[49]. The critical holding by the majority appears in the following passage in the speech of Lord Hailsham of St Marylebone[50]:

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46 *Vallance v The Queen* (1961) 108 CLR 56 at 59.

47 (1973) 133 CLR 209 at 230.

48 (1961) 108 CLR 56 at 79.

49 [1976] AC 182.

50 [1976] AC 182 at 214.

> "Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a 'defence' of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent, or it does not."

Section 32 of the Code

47 Something should be said respecting s 32 of the Code. This states:

> "A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist."

48 The framing of the second question for the Court of Criminal Appeal, in speaking of "the issue of the accused's mistaken belief as to consent", appears to have assumed some role in the present case for s 32, perhaps to the displacement of s 31.

49 Martin CJ, with respect, correctly, pointed out that s 32 was not exhaustive and that it would be wrong to assume that it was only the provisions of s 32 that applied in all cases where the belief of the accused was relevant and mistake raised in the evidence[51]. His Honour continued[52]:

> "In the case of the offence under s 192(3), I have already indicated that the Crown must prove that the accused intended to have sexual intercourse with another person without that person's consent. That necessarily involves negating any material capable of indicating that the accused honestly believed the other person was consenting. That does not require the application of s 32. It is simply part of the burden resting on the Crown to discharge the onus resting upon it to prove the mental element of the offence."

50 Bailey J, with reference to what had been said by Bray CJ in *R v Brown*[53], emphasised that in some instances there was no necessary identity between a

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51 (2002) 12 NTLR 176 at 183; 171 FLR 403 at 406.

52 (2002) 12 NTLR 176 at 183; 171 FLR 403 at 406.

53 (1975) 10 SASR 139 at 144, 147.

mistaken belief in circumstances that would make an act innocent and the absence of the necessary *mens rea*[54]. It is unnecessary to pursue the distinction between s 31 and s 32 as a matter of abstract principle and in the absence of a difficulty raised by precise facts in other given cases.

Juries and reasonable basis

51 There is one further point to be made. After the decision in *Morgan*, provision was made in s 1 of the *Sexual Offences (Amendment) Act* 1976 (UK) to the effect that the presence or absence of reasonable grounds for a belief that the other party was consenting to sexual intercourse is a matter to which the jury is to have regard in considering whether the defendant is to be believed[55]. Of the necessity for such a statutory provision, Sir John Smith wrote[56]:

> "Whenever a jury has to decide whether a person knew a fact or foresaw a consequence, the fact that a reasonable man would have known the fact or foreseen the consequence is evidence tending to show that the accused knew or foresaw; but the decision must be made in the light of the whole of the evidence, including the accused's own testimony, if he gives it, that he did not know or foresee as the case may be. It is unfortunate that a matter of common sense should be enacted at all, particularly that it should be enacted in relation to one offence."

52 In the present case, Bailey J described the essential issue raised by the reference to the Court of Criminal Appeal as somewhat theoretical[57]. He added[58]:

> "Juries are invariably directed that if there is no reasonable basis for an accused's mistaken belief, they are entitled to take that into account in deciding whether or not the Crown has proved that no mistaken belief existed. I think that, in the light of such a direction, the prospects of a jury acquitting an accused who had no reasonable basis for believing that the complainant was consenting to intercourse because they were not satisfied beyond reasonable doubt that the accused's belief in consent was not honest are so remote as to be near fanciful."

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54 (2002) 12 NTLR 176 at 207-208; 171 FLR 403 at 422.

55 See Fisse, *Howard's Criminal Law*, 5th ed (1990) at 172.

56 Smith & Hogan, *Criminal Law*, 10th ed (2002) at 467.

57 (2002) 12 NTLR 176 at 194; 171 FLR 403 at 414.

58 (2002) 12 NTLR 176 at 194-195; 171 FLR 403 at 414.

Orders

53 The appeal should be dismissed.

54 KIRBY J. The issues raised by this appeal are similar to those which have separated this Court in the past[59]. They divided the Court of Criminal Appeal of the Northern Territory[60], although four of the appellate judges agreed with the view taken by the trial judge (Riley J) as to the requirements of the Criminal Code of the Northern Territory ("NT Code"), applicable to the circumstances. Those requirements, and especially s 31, have been considered by this Court recently in *Charlie v The Queen*[61]. There too the Court was divided[62]. Commentators who have addressed the operation of s 31 of the NT Code have likewise expressed sharply different views as to its meaning and effect[63].

55 Such differences suggest that something deeper lurks in the points that have divided so many judges and commentators. If this is so, it is unlikely that the resolution of the differences will be found in a purely verbal analysis. The divergence of so much thought (although in differing statutory circumstances) raises the possibility that there is an undisclosed premise of reasoning that we should expose and evaluate. In my view, this premise concerns the basic purposes of the criminal law (as revealed in the NT Code) and concepts of moral culpability that justify the assignment of a criminal quality to particular acts, omissions and events, especially where conviction potentially carries very serious consequences for human liberty. In the present case, where the crime involved was "sexual intercourse with another person without the consent of the other person", contrary to s 192(3) of the NT Code[64], establishment of the offence

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59 See *Vallance v The Queen* (1961) 108 CLR 56; *Timbu Kolian v The Queen* (1968) 119 CLR 47; *Kaporonovski v The Queen* (1973) 133 CLR 209; *R v Falconer* (1990) 171 CLR 30.

60 *Director of Public Prosecutions Reference No 1 of 2002* (2002) 12 NTLR 176 (Martin CJ, Thomas and Bailey JJ and Gallop AJ; Angel J dissenting).

61 (1999) 199 CLR 387.

62 Gleeson CJ, McHugh and Callinan JJ. Hayne J and I dissented.

63 Gray, "A Class Act, an Omission or a Non-event? Criminal Responsibility Under Section 31 of the Criminal Code (NT)", (2002) 26 *Criminal Law Journal* 175; Hemming, "A Tour de Force, a Faux Pas or a Coup de Grace? A Rejoinder to Criminal Responsibility Under Section 31 of the Criminal Code (NT)", (2002) 26 *Criminal Law Journal* 344; Pincus, "Criminal Cases in the High Court of Australia: *Ugle v The Queen*; *Murray v The Queen*", (2002) 26 *Criminal Law Journal* 365; Gray, "A third look at criminal responsibility under section 31 of the Criminal Code (NT)", (2003) 27 *Criminal Law Journal* 211.

64 The language of the offence in the NT Code forecloses debates that might otherwise arise concerning whether, in its essential character, the offence so provided is truly (or merely) of a sexual kind, as distinct from a profound assault

(Footnote continues on next page)

exposed the prisoner, if convicted of it, to a maximum penalty of imprisonment for life[65].

56 In the Court of Criminal Appeal, Bailey J (who delivered the leading opinion[66]) described the problem for decision thus[67]:

> "The key question raised by the reference is whether or not the Crown is required to prove a mental element in relation to a completed crime contrary to s 192(3) [of the NT Code] (ie 'rape')."

57 Later, in the same vein, his Honour went on[68]:

> "In the case of rape, the virtually non-existent mental element which the Crown seeks to assign to the offence militates very strongly against exclusion of s 31 [in its application in this case to s 192(3) of the NT Code]."

58 These remarks help to explain the response which the majority judges in the Court of Criminal Appeal in this case adopted to the problem presented by the NT Code. Being informed by an important general principle of the criminal law normally upheld in Australia[69], intuitively, the reaction of the judges seems correct. The crime of sexual intercourse without consent could not be viewed as non-criminal "in the real sense" or as merely a statutory offence of an administrative character. On the face of things (absent express language) it is therefore one of those crimes ordinarily informed by the general principle that subjective intent or foresight (in this case, to have sexual intercourse without

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upon the person, privacy, autonomy and human dignity of a victim. For the victim (and for the perpetrator), such assaults may not have a predominantly "sexual" character. Nor may the "sex" necessarily be experienced as "intercourse". See eg Lewis, "Recent Proposals in the Criminal Law of Rape: Significant Reform or Semantic Change?", (1979) 17 *Osgoode Hall Law Journal* 445; Smart, *Law, Crime and Sexuality: Essays in Feminism*, (1995) at 110-112; Cahill, "Foucault, Rape, and the Construction of the Feminine Body", (2000) 15 *Hypatia* 43.

65 NT Code, s 192(3). The section is set out in the reasons of Hayne J at [115].

66 *Reference No 1* (2002) 12 NTLR 176 at 192 [39].

67 With which, in substance, Martin CJ agreed: *Reference No 1* (2002) 12 NTLR 176 at 183 [19]; see also at 185 [29] per Thomas J, 208 [85]-[86] per Gallop AJ.

68 *Reference No 1* (2002) 12 NTLR 176 at 204 [72].

69 See *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528-529, 564-565, 598-599.

consent) must be proved by the prosecution in order to secure a conviction[70]. Typically, the more serious the potential consequences for an accused on conviction, the less likely it is that subjective intent or foresight will be treated as absent from a statutory definition of an offence[71]. By this test, conviction of sexual intercourse without consent, with such grave punitive consequences, attracts the presumption that intent or foresight to have sexual intercourse without consent is required. However, the question remains whether, in the present case, the language of the NT Code supports that conclusion or requires the opposite outcome.

59 By the time contested questions of statutory construction reach this Court they are "notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong"[72]. In the present appeal, we have to resolve an ambiguity. Neither solution might be unarguably correct or incorrect. However, a deep principle of our criminal law, against the background of which the NT Code was drafted, suggests that the trial judge and the majority of the Court of Criminal Appeal did not err in the construction of the NT Code which they successively adopted.

The facts and the provisions of the NT Code

60 *The facts and practicalities*: The present proceedings arose following contested directions given at the trial of the accused for sexual intercourse without consent, the acquittal of the accused, and a subsequent reference to the Court of Criminal Appeal by the Director of Public Prosecutions of a question of law[73].

61 In the course of the trial judge's summing up to the jury he told them[74]:

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70 *He Kaw Teh* (1985) 157 CLR 523 at 594; *Von Lieven v Stewart* (1990) 21 NSWLR 52 at 66-67. See also *Sherras v De Rutzen* [1895] 1 QB 918 at 922-923; *Proudman v Dayman* (1941) 67 CLR 536; *Lim Chin Aik v The Queen* [1963] AC 160 at 176. Compare *R v Woodrow* (1846) 15 M and W 404 [153 ER 907]; *Parker v Alder* [1899] 1 QB 20.

71 *He Kaw Teh* (1985) 157 CLR 523 at 529-530.

72 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1524 [42] per McHugh J; 200 ALR 157 at 168.

73 As provided for by the NT Code, s 414(2). See *Reference No 1* (2002) 12 NTLR 176 at 186 [30].

74 Summing up of Riley J, 25 May 2001 at 5.

> "[Y]ou are required to be satisfied beyond reasonable doubt that the accused man intended to have sexual intercourse with [the complainant] without her consent or that he knew she may not be consenting and proceeded regardless."

62 As the judge observed[75], there was no dispute that "sexual intercourse" had taken place between the accused and the complainant:

> "The issue is whether she consented or not, and if she did not consent, whether the accused man knew that she did not, or alternatively, knew that she may not be consenting but proceeded with his actions regardless."

63 To assist the jury, the judge described the record of interview videotaped by the police, and sworn evidence given by the accused, asserting that although the complainant did not give him verbal permission to have sexual intercourse with her, she did so by "her actions"[76]. The evidence disclosed that the complainant had contacted police from a public telephone close to the accused's residence alleging sexual intercourse without consent soon after it was claimed to have occurred. She said that she had protested loudly during and after the "sexual intercourse". The accused denied this. He called a witness who was nearby who said that he had heard no such thing. The case was therefore typical of its kind in that the evidence presented a direct contradiction. As the evidence was described to the jury by the trial judge, there was little room for argument over mistake, misunderstanding, confusion or accident. The ultimate question for the jury was whether the prosecution had proved the charge of sexual intercourse without consent against the accused beyond reasonable doubt.

64 To assist the jury further, the trial judge sensibly gave them a written memorandum elaborating the direction on the law which they were to apply to the facts as they found them. The essence of the memorandum is set out in other reasons[77]. There is no contest over the first and second of the elements which the judge told the jury that the prosecution had to prove beyond reasonable doubt[78]. Nor is there a contest that the first element was satisfied. The prosecution asserted that the facts established the second element (the complainant's want of

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75 Summing up of Riley J, 25 May 2001 at 7.

76 Summing up of Riley J, 25 May 2001 at 21, referring to the videotaped interview of the accused by police.

77 Reasons of Gleeson CJ at [1]-[3]; reasons of Gummow and Heydon JJ at [23]; reasons of Hayne J at [112]-[113].

78 That is, that the accused had "sexual intercourse" with the complainant and that she did not give her consent to his having "sexual intercourse" with her.

consent) and, more importantly, that the law (the NT Code) excluded the third element – that the accused intended to have sexual intercourse with the complainant without her consent.

65 The contest at trial, as described in the summing up, suggests that the jury may well have reached their verdict on the disputed second element without having to proceed to the third. In that sense, this case was not particularly well suited to present a factual contest to be resolved by the application of the law stated in the third element. However, the issue remains whether the third element is part of the law of the Northern Territory. It was not submitted that this Court's determination of that issue would involve an impermissible resolution of a theoretical question[79]. Because this Court is unaware of the basis of the jury's verdict, it is proper to accept the possibility that the third element was a relevant consideration, for some jurors at least, justifying determination by this Court of its legal correctness[80].

66 I have referred to the facts to strengthen a point made by Bailey J in the court below. In practical terms, the main issue that falls for decision in this appeal is not likely to affect the outcome of most cases[81]:

> "[T]he essential issue raised by the reference is not so much absurd, but rather academic or theoretical. Juries are invariably directed that if there is no reasonable basis for an accused's mistaken belief, they are entitled to take that into account in deciding whether or not the Crown has proved that no mistaken belief existed. I think that, in the light of such a direction, the prospects of a jury acquitting an accused who had no reasonable basis for believing that the complainant was consenting to intercourse because they were not satisfied beyond reasonable doubt that the accused's belief in consent was not honest are so remote as to be near fanciful."

67 *The provisions of the NT Code*: The applicable provisions of the NT Code are contained or described in other reasons[82]. I agree that the starting point for

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79 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267. See also *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303-304.

80 See *Domican v The Queen* (1992) 173 CLR 555 at 566.

81 *Reference No 1* (2002) 12 NTLR 176 at 194-195 [50].

82 Reasons of Gummow and Heydon JJ at [24], [27], [32]-[37], [47]; reasons of Hayne J at [115]-[119].

textual analysis is s 192[83]. This creates the offence with which the accused was charged. I also agree that that offence is not one containing a specific, or express, mental element[84]. In this, I concur in what Hayne J has written and with the exposition of the dissenting judge in the Court of Criminal Appeal[85].

68 The last point is, for me, a significant step in reasoning that supports the argument of the respondent. To render the conduct of the accused criminally liable, so that it exposes the accused to the risk of the punishment provided in s 192(3) of the NT Code, the normal features of our criminal law would suggest that the subjective element of intention or foresight (to have sexual intercourse without consent) would be introduced in a significant way. It is possible that the NT Code, properly analysed, will negate that expectation. However, it would not be in the slightest surprising that a general provision in the NT Code would introduce a requirement that, to secure such a conviction, the prosecution had to prove a relevant intention or foresight. As Bailey J remarked[86], a direction such as the trial judge gave to the jury in this case would have been correct in law in, for example, the United Kingdom[87], New South Wales[88] and South Australia[89], where the common law of "rape" applies to the elements of the offence. For the NT Code to adhere to such a deeply entrenched rule of the common law would not, therefore, be strange. For this Court to so hold would have the advantage of promoting the kind of uniformity in basic principles of the criminal law throughout Australia that this Court has upheld in the past, absent some contrary demand of language in the applicable law[90].

69 It is in this way that the issue presented by the legislation is brought ultimately to the text of the NT Code; the rules that govern the construction of

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83 Reasons of Gummow and Heydon JJ at [32]-[33]; reasons of Hayne J at [124]-[125].

84 Reasons of Hayne J at [123], [125].

85 *Reference No 1* (2002) 12 NTLR 176 at 184 [23] per Angel J. See reasons of Hayne J at [125].

86 *Reference No 1* (2002) 12 NTLR 176 at 192 [40].

87 *R v Morgan* [1976] AC 182.

88 *R v McEwan* [1979] 2 NSWLR 926.

89 *R v Brown* (1975) 10 SASR 139.

90 *Zecevik v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665.

such legislative codifications[91]; and the past authority of this Court as to the provisions of criminal codes other than that of the Northern Territory, so far as they are analogous.

Approach to the meaning of the NT Code

70 *Codes: rules of construction*: The NT Code is Sched 1 to the *Criminal Code Act* (NT) ("NT Criminal Code Act"). That Act is an ordinary statute of the Northern Territory legislature. However, the choice of the words "Criminal Code", and the establishment of the NT Code as "*the* law of the Territory in respect of the various matters therein dealt with"[92] suggest that what was intended was a statement of the entire law on the subjects covered, to the exclusion of the previous common law where this was inconsistent[93].

71 The first loyalty in interpreting a statutory codification is to the code[94]. The starting point for construction is the language of the code. It must be given its natural meaning so as to effect its disclosed purposes[95]. Codification puts a brake on the modern technique of looking beyond the statutory language. It focuses the attention of the decision-maker on the text of the code. That, after all, is the object of replacing the vast mass of decisional law with codified provisions. The purpose of codification would be undermined if lawyers, in the guise of construction, reintroduced all of the common law authority which the NT Code was intended to replace.

72 Before the NT Code was enacted, the adoption of criminal codes in other Australian jurisdictions was greatly influenced by the draft code prepared by Sir Samuel Griffith in Queensland. His criminal code was based on earlier Italian, English and Indian attempts to codify the criminal law[96]. Because of the similarities of the criminal codes adopted in Queensland, Western Australia and

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91 *R v Barlow* (1997) 188 CLR 1 at 31-33. See also *R v Jervis* [1993] 1 Qd R 643 at 670-671.

92 NT Criminal Code Act, s 5 (emphasis added). The NT Criminal Code Act was originally introduced into the Northern Territory in 1983. See *Charlie* (1999) 199 CLR 387 at 407 [62] per Callinan J.

93 *Brennan v The King* (1936) 55 CLR 253 at 263.

94 *Jervis* [1993] 1 Qd R 643 at 647.

95 *Barlow* (1997) 188 CLR 1 at 31.

96 See eg Cullinane, "The Zanardelli Code and Codification in Countries of the Common Law", (2000) 7 *James Cook University Law Review* 116 at 116-117.

(to a lesser extent) Tasmania, this Court has observed a rule that, so far as the language permits, consistency in the interpretation of the Australian criminal codes should be upheld[97]. I support that approach. It is sustained by considerations of linguistic similarity, history and practicality in achieving the other general objective, namely, broad consistency in the basic principles of the criminal law throughout Australia: codified, statutory and common law[98]. These matters of approach, derived from many earlier decisions of this Court and other courts, were noted by all of the judges below[99]. They are not controversial.

73 *Peculiarity of the NT Code*: The point of difference concerns precisely what rule has been established by the course of authority, in relation to the provisions of the State criminal codes said to be analogous with s 31 of the NT Code. The provenance of the NT Code was different from State codes. It was enacted nearly a century after the Griffith Code was adopted in Queensland[100] and long after the adoption of the criminal codes in Western Australia[101] and Tasmania[102]. As was mentioned in *Charlie*[103], the NT Code grew out of

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97 *Barlow* (1997) 188 CLR 1 at 32; *Charlie* (1999) 199 CLR 387 at 410 [69].

98 *Jervis* [1993] 1 Qd R 643 at 647; *Barlow* (1997) 188 CLR 1 at 31-33.

99 *Reference No 1* (2002) 12 NTLR 176 at 181 [7] per Martin CJ, 185 [25] per Angel J, 195-196 [52] per Bailey J (Thomas J and Gallop AJ agreeing).

100 *Criminal Code* (Q) ("Queensland Code"), scheduled to the *Criminal Code Act* 1899 (Q). The Queensland Code followed a draft prepared for the government of Queensland in 1897 by Griffith CJ, then Chief Justice of the Supreme Court of Queensland.

101 *The Criminal Code* (WA) was first enacted by the *Criminal Code Act* 1902 (WA). It was then re-enacted, incorporating amendments, as a schedule to the *Criminal Code Act* 1913 (WA).

102 *Criminal Code* (Tas) ("Tasmanian Code"). The Tasmanian Code was enacted by the *Criminal Code Act* 1924 (Tas). It did not follow exactly the Griffith draft. In the Territory of Papua (called British New Guinea before 1905: see *Papua Act* 1905 (Cth), s 5) the Queensland Code was adopted by The Criminal Code Ordinance 1902. In the Territory of New Guinea, it was adopted by the Laws Repeal and Adopting Ordinance 1921, and subsequently in the Laws Repeal and Adopting Ordinance 1924. See *Cooper v The Queen* (1961) 105 CLR 177 at 179; O'Regan, *New Essays on the Australian Criminal Codes*, (1988) at 104-106.

103 (1999) 199 CLR 387 at 395 [18].

extensive consultations in Darwin[104]. These were followed by a period of gestation that probably helps to explain the many points of difference from the other Australian criminal codes.

74 The majority in the Court of Criminal Appeal were in no doubt that the NT Code was different in relevant respects from the criminal codes of the States. Specifically, Martin CJ said[105]:

> "[The NT Code] should be taken as having been drafted with a view to avoiding the problems which have arisen in relation to the provisions such as s 23 of the Queensland Code, which has been most recently considered by the High Court in *Murray v The Queen*[106] and the similar, but not identical, s 23 of the Western Australian Code decided by that Court at the same time in *Ugle v The Queen*[107].
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> ...
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> The differences between those code provisions and s 31 of the [NT Code] are obvious."

75 Bailey J expressed a similar view[108]. Moreover, he referred to a line of authority in the Court of Criminal Appeal of the Northern Territory[109] (and he might have referred to more[110]) that draws attention to critical verbal distinctions between the State criminal codes and the NT Code.

76 These, then, are the opinions[111] of the judges who have the day to day responsibility for applying the NT Code. The dissenting judge in the Court of

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104 Criminal Code Seminar, Darwin, October 1983. See *Charlie* (1999) 199 CLR 387 at 395 [18].

105 *Reference No 1* (2002) 12 NTLR 176 at 181 [8]-[10].

106 (2002) 211 CLR 193.

107 (2002) 211 CLR 171.

108 *Reference No 1* (2002) 12 NTLR 176 at 204 [73].

109 *Reference No 1* (2002) 12 NTLR 176 at 204-205 [74], citing *R v Mardday* (1998) 7 NTLR 192.

110 eg *Attorney-General v Wurrabadlumba* (1990) 74 NTR 5; *McMaster v The Queen* (1994) 4 NTLR 92.

111 *Reference No 1* (2002) 12 NTLR 176 at 204-205 [74].

Criminal Appeal disagreed[112]. However, the majority adhered to their conclusion that the fact that the State criminal codes had been construed more narrowly than that favoured in the case of the NT Code was "not to the point"[113]. The differences in outcome could be justified by reference to the usual principles governing such matters: legal authority (textual differences); legal principle (the observance of the basic purposes of the criminal law); and legal policy (avoidance of diminishing the element of intention to virtual non-existence in the case of serious crimes)[114]. It is necessary to turn to each of these considerations. In my view, they sustain the decision of the majority in the Court of Criminal Appeal.

Considerations of legal authority

77 *Textual analysis*: Starting in the right place, with the language and structure of the NT Code, a few general points can be noticed.

78 Section 31 appears in Pt II, a general part of the NT Code dealing with "Criminal Responsibility". That part is introduced by s 23, which appears in Div 1 providing for "General Matters". Section 23 enacts, in broad language, that:

> "A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorized, justified or excused."

79 Because this part of the NT Code (and in particular s 23) is intended to apply, unless otherwise provided, throughout the NT Code, the words should be given a broad application. To narrow the ambit would be to risk rendering the general provisions on criminal responsibility inapplicable to a particular crime provided in the NT Code. That would be contrary to the obvious purpose evident in the NT Code's language and structure.

80 Section 31 appears in Div 4 of Pt II, titled "Excuse". It picks up the language of s 23. Textually, it does so in three ways. It excuses the subject from "criminal responsibility", the general phrase governing Pt II. It repeats the phrase of wide ambit "an act, omission or event". On its face, this was designed to be broad enough to refer to the factual features of the many particular crimes that appear in the NT Code. It provides a general "excuse" from "criminal responsibility" as foreshadowed by the language of s 23.

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112 *Reference No 1* (2002) 12 NTLR 176 at 184 [23].

113 *Reference No 1* (2002) 12 NTLR 176 at 205 [75].

114 *Reference No 1* (2002) 12 NTLR 176 at 204 [72].

81 Correctly, the appellant did not contest that ss 23 and 31 of the NT Code had to be read together and that s 31 applied to s 192(3) governing the specified crime of "sexual intercourse with another person without the consent of the other person". This concession follows from the decision of this Court in *Charlie*[115]. That decision held that, but for the fact that s 162(1)(a) of the NT Code (there under consideration) contained its own reference to a mental element, the general provisions of s 31 would have been imported. Because, by way of contrast, s 192(3) does *not* contain its own reference to a mental element, s 31 clearly applies to s 192(3).

82 *The critical point in the case*: The critical point is now reached. Section 31(1) excuses a person from "criminal responsibility". It does so by reference to the collective phrase ("for an act, omission or event"). The appellant endeavours to dissect that phrase so as to address attention, in relation to the excuse that s 31 provides, solely to the physical "act", relevantly of "sexual intercourse". In the present case, this act involved the insertion of the accused's penis into the vagina of the complainant (and continued until the withdrawal of his penis from her vagina)[116]. However, as the majority below point out, there are numerous textual indications that this is an incorrect reading of s 31.

83 First, there is, as such, no "criminal responsibility" for an "act" of "sexual intercourse". Such an "act", which happens on countless occasions every day, is, of itself, neutral so far as the NT Code is concerned. In the overwhelming majority of cases, the act is consensual. No criminal responsibility whatever normally attaches to it. There is nothing to be "excused". This is the fundamental reason why the reading hypothesised by the appellant does not work.

84 Secondly, that reading gives insufficient attention to the collocation "act, omission or event". The phrase is compendious. This Court has said over and over again that it is a mistake to dissect words and to endeavour to construe them in isolation. The natural unit of comprehensible communication in the English language is the sentence[117]. The approach of the appellant attempts to lead this Court back to the dark days of statutory interpretation by reference to isolated

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115 (1999) 199 CLR 387.

116 See definition of "sexual intercourse" in the NT Code, s 1.

117 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397, applying *R v Brown (Gregory)* [1996] AC 543 at 561.

words[118]. The fact that this legislation is a code affords no warrant for us to accept this inducement. On the contrary, the fact that the combined phrase appears in the general provisions of the NT Code suggests the contrary construction; as does the history of the provision when contrasted with those appearing in the State criminal codes.

85 Thirdly, unlike the State criminal codes, the NT Code defines "act" and "event"[119]. The definition of "act", by using the word "deed", indicates that something more than an isolated physical "act" was contemplated. In case there was any doubt (and in an attempt to escape the quasi-theological debates that had emerged in this Court over the State criminal codes), the drafters of the NT Code made the purpose plain. The definition says that "act" "is not limited to bodily movement". Clearly enough, this specific elaboration was designed to indicate that, in respect of the NT Code, there should be no further niceties about whether the relevant "act" was the act of firing of an air gun pellet in the direction of a victim as distinct from the act of wounding of the victim[120].

86 *The narrow and wide views*: The NT Code was written against the background of a number of decisions in this Court over just such fine factual points, arising out of the State criminal codes (and the *Criminal Code* of Papua New Guinea based on the Queensland Code)[121]. A clear purpose of the definition of "act", and of the use of the collocation "act, omission or event", in the NT Code was to avoid just such artificial reasoning as the *narrow* view in respect to the State codes adopted. In effect, it was to embrace the *wide* view of the meaning of "act" explained by Dixon CJ in *Vallance v The Queen*[122] by reference to the Tasmanian Code. That Code refers only to "an act [which] is voluntary

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118 See Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95 at 102-103.

119 NT Code, s 1. The definition is set out in the reasons of Hayne J at [119].

120 *Vallance* (1961) 108 CLR 56 at 61.

121 *Timbu Kolian* (1968) 119 CLR 47. In Papua New Guinea (at the time of the case, the Territory of Papua and New Guinea), s 23 of the *Criminal Code* followed s 23 of the Queensland Code and referred to "*an act or omission* which occurs independently of the exercise of his will, or for *an event* which occurs by accident" (emphasis added). The criminal law of Papua New Guinea is now contained in the *Criminal Code Act* 1974 (PNG).

122 (1961) 108 CLR 56 at 60-61.

and intentional" or "an event which occurs by chance"[123]. Of this provision, Dixon CJ said[124]:

> "[Section 13(1)] appears to me to be saying negatively that there shall be no guilt unless all acts of the accused forming the ingredients of the crime are voluntary and intentional. It is the punishable act or acts to which the words appear to me to refer. In the case of unlawful wounding *the punishable act is the wounding* … The wounding is the crime, the punishable act, and it is the wounding which must be voluntary and intentional."

87 As Dixon CJ went on to remark, with respect to the State criminal codes there was a weight of judicial authority to the contrary of the construction that he favoured. With hindsight, we can now see that such authority probably derived from the discredited approach to statutory interpretation that takes words in isolation and construes them in that way. We do not here need to revisit that debate. Clearly, the drafters of the NT Code were aware of it. The definition of "act" that was adopted was designed to make it clear that the "wide view" of the meaning of "act" was to be observed; not the narrow. The context should have indicated this in any event (as Dixon CJ implied). But the controversy was settled by the drafting of the NT Code. It is a serious mistake of interpretation to ignore these considerations of language and history. It is an even more serious error to take this step by picking up remarks about other criminal codes, with their different language and history.

88 When this point is appreciated, and the use of the collective phrase is contrasted with the different ways that "act" and "event" are referred to in the general provisions of the State criminal codes, the object of s 31 becomes more clear. In *Charlie*[125], I remarked on the peculiarity of the NT Code and its differences from other criminal codes and from legislative provisions as well as from the common law. Those differences are critical in the present case, as the majority judges below correctly observed[126].

89 It was the absence of a broader definition of "act" in s 23 of *The Criminal Code* (WA) and s 13(1) of the Tasmanian Code that sustained the opinion of

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123 Tasmanian Code, s 13(1). See Gray, "A Class Act, an Omission or a Non-event? Criminal Responsibility Under Section 31 of the Criminal Code (NT)", (2002) 26 *Criminal Law Journal* 175 at 182.

124 *Vallance* (1961) 108 CLR 56 at 60-61 (emphasis added).

125 (1999) 199 CLR 387 at 393 [12].

126 *Reference No 1* (2002) 12 NTLR 176 at 182 [13], 201 [66]-[67].

Mason CJ, Brennan and McHugh JJ in *R v Falconer* that the "act" referred to was "a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility"[127]. Armed with the definitions in the NT Code, we have no excuse for confining the "act" to the bodily action of "sexual intercourse". Here, the word "act" as defined, and especially as appearing in the composite phrase "act, omission or event", carries a wider meaning. Relevant to the "excuse" from "criminal responsibility", in the case of the offence of sexual intercourse without consent in s 192(3) of the NT Code, it is addressed to the conduct that would otherwise render the person performing the "act" criminally responsible. That is, it refers to the act of sexual intercourse *without consent*. No other construction accommodates the particular language of the NT Code, its definitions and unique adoption of the undecorated combination of words ("act, omission or event").

90 *Decisions on other codes*: The foregoing reasoning renders it largely irrelevant to revisit the observations in this Court in earlier cases on the State criminal codes (including as applied in Papua New Guinea). Their only present significance is that they demonstrate the reason why the drafters in the Northern Territory deliberately chose a different, and broader, approach in the language of s 31.

91 In any case, it is plain from a reflection on the earlier decisions that the judges of this Court were divided in the views that they expressed as to whether the "wide view" or "narrow view" should be adopted[128]. In *Timbu Kolian v The Queen*[129], the approach of Dixon CJ, which inevitably enjoyed considerable respect, appears to have attracted a majority of this Court. In *Kaporonovski v The Queen*[130], Gibbs J stated his preference for the narrow view of "act" adopted by Kitto and Menzies JJ in *Vallance*. In this appeal it is immaterial to identify the precise position of authority on the State criminal codes. Our duty is solely to give meaning to the different language of the NT Code. Nevertheless, the divisions of opinion in this Court concerning the meaning to be given to "act" and "event", as differently appearing in the other criminal codes, make it

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127 (1990) 171 CLR 30 at 38.

128 The classic exposition of the "wide view" is that of Dixon CJ in *Vallance* (1961) 108 CLR 56 at 60-61. The "narrow view" is expressed in *Vallance* at 64 per Kitto J, 68 per Taylor J. Menzies J also appeared to adopt the narrow view (at 71).

129 (1968) 119 CLR 47 at 52-53 per Barwick CJ, 64 per Windeyer J. See also *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 81.

130 (1973) 133 CLR 209 at 231.

extremely dangerous to pick up past *dicta* and to apply them as if they produce a solution for the present case.

92 Conflicting submissions were presented to the Court in respect of the recent decisions in *Ugle*[131] and *Murray*[132]. The respondent argued that, implicitly at least, the Court in *Ugle*, in respect of the offence of unlawful wounding, had preferred the "wide view" of the meaning of "act" adopted by Dixon CJ in *Vallance*. On this basis, it was argued, the approach adopted by Gibbs J in *Kaporonovski*[133] should now be treated as doubtful so far as the State criminal codes are concerned. On the other hand, the appellant submitted that the decisions, and especially *Murray*, lead to the opposite conclusion. Because of the textual differences, we do not need to decide that point here. It would be undesirable to do so in a proceeding where such a conclusion is unnecessary to the outcome.

93 Endorsing a common approach to the construction of criminal codes is only justified where their language, structure and history support that approach[134]. In the present case, the points of linguistic difference demand respect for the different provisions of the NT Code, especially when read against the background of the divisions of opinion in this Court on the State criminal codes and the existence of a competing approach to criminal responsibility for the crime of sexual intercourse without consent appearing in the non-code jurisdictions of Australia[135].

94 Even in Australian jurisdictions governed by a criminal code, where it has been held that the only mental element which the prosecution must prove on a charge of sexual intercourse without consent is that the accused's physical act of "sexual intercourse" was "voluntary and intentional", judges have felt disquieted by such an apparent departure from the basic principle of criminal responsibility. On this approach, "the mental element required to be proved against a person

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131 (2002) 211 CLR 171.

132 (2002) 211 CLR 193.

133 (1973) 133 CLR 209 at 230-231.

134 *Barlow* (1997) 188 CLR 1 at 32.

135 *Reference No 1* (2002) 12 NTLR 176 at 192 [40].

accused of rape is, in practical terms, virtually non-existent"[136]. In *Ingram v The Queen*, Chambers J made this point[137]:

> "[O]n the hypothesis that it is virtually impossible for a man unintentionally to effect penetration, it seems to me clear that … the mental element in the crime of rape in Tasmania is reduced to microscopic proportions."

95 In response to that outcome, arguably occasioning "blatant unfairness", inimical to the basic notions of criminal responsibility[138], the Tasmanian Court of Criminal Appeal suggested that trial judges should have frequent recourse to directing juries about the Tasmanian Code provisions dealing with mistake of fact. Thus Neasey J in *Ingram*[139] said:

> "[T]he defence of honest and reasonable belief as to consent becomes of particular importance in the law of rape as it is in this State. It is the only component of the relevant law which relates to the innocence or otherwise of the mind of the accused when the act was committed. It is therefore of more particular importance *for the sake of elementary justice* that the jury should be directed in this State to consider the question of mistake whenever the evidence leaves room for it than it is in places where the common law of rape applies."

96 *Legislature leaves code unchanged*: The Court of Criminal Appeal in the present case pointed out that, until now, such artificialities had been avoided in the Northern Territory[140]. A series of cases in that Territory, giving effect to the different language and structure of the NT Code, had insisted that s 31 obliges proof by the prosecution of the mental element, in terms consistent with the directions given by the trial judge with respect to the crime of sexual intercourse without consent in the present case[141]. This approach has stood in the Northern Territory as one of general principle for at least 17 years. In that time, the NT

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136 *Reference No 1* (2002) 12 NTLR 176 at 193 [44].

137 [1972] Tas SR 250 at 263, noted by Bailey J in *Reference No 1* (2002) 12 NTLR 176 at 193 [44].

138 *Reference No 1* (2002) 12 NTLR 176 at 193 [45].

139 [1972] Tas SR 250 at 259 (emphasis added). Burbury CJ and Chambers J were to like effect.

140 *Reference No 1* (2002) 12 NTLR 176 at 194-195 [50].

141 See *Pregelj v Manison* (1987) 51 NTR 1; *McMaster* (1994) 4 NTLR 92 at 99.

Code has been revised by the Northern Territory legislature. Thus, s 31 was amended in 1996[142]. Specifically, s 192 was substituted in 1994[143]. In 1994, ss 192A and 192B were added[144]. Section 192A is relevant. It requires a judge to direct the jury that a person is not to be taken to have consented to an act of sexual intercourse only because the person did not protest or physically resist, did not sustain physical injury, or had, on that or an earlier occasion, consented to sexual intercourse with the accused.

97 Despite the established approach to ss 31 and 192 in the Northern Territory courts, no attempt was made to amend the NT Code to alter that approach. Whilst such considerations are not now given the weight they previously enjoyed in statutory construction[145], in the sensitive area of sexual offences (which has had much legislative attention in Australia in recent years) it is more reasonable than otherwise to infer that the approach of the Northern Territory courts to the operation of the NT Code was deemed acceptable to the legislature. This would be unsurprising, given that it is the same approach as is adopted in the States with the major population centres of Australia and it is the approach that conforms to foundational principles of the criminal law.

Considerations of legal principle and policy

98 *Considerations of legal principle*: The foregoing analysis sustains the correctness of the approach of the majority in the Court of Criminal Appeal in this case. However, if there is any residual ambiguity, it is my view that considerations of legal principle and policy strengthen the stated conclusion.

99 Although the legislature may make "acts, omissions and events" criminal in character, without the requirement of intention or foresight on the part of an accused person, doing so is exceptional. Ensuring real content to the requirement of proved intention or foresight would not be unusual, at least to establish criminal responsibility for a traditional offence (such as sexual intercourse without consent) attracting the imposition of substantial punishment. Sexual intercourse without consent is an offence known in various forms and by various names in every legal system and to international law. It lies at the heart of any law on criminal offences.

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142 *Criminal Code Amendment Act* 1996 (NT), s 6.

143 *Criminal Code Amendment Act* 1994 (NT), s 12.

144 *Criminal Code Amendment Act* 1994 (NT), s 12.

145 See *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329, 351.

100 In such circumstances, it is not self-evident that a person who engages in "sexual intercourse" with another, believing that other to be consenting to the "sexual intercourse", should be liable to conviction of such a crime and exposed to condign imprisonment. This conclusion is not inapplicable simply because the other person was not *in fact* consenting and although the belief of the accused in the existence of consent might be viewed as unreasonable. In a society where much consensual sexual intercourse takes place, it is unrealistic to expect that verbalisation of consent should invariably observe set formalities. In many cases, and perhaps desirably, it does. But in other cases, consent is sufficiently indicated by conduct and implication. The law would defy reality if it endeavoured to stamp the necessity of a particular verbal formula upon conduct usually so intimate, individual and private.

101 Criminal responsibility for such a serious crime as sexual intercourse without consent, with such serious consequences upon conviction, is therefore only imposed by the NT Code where the accused's conduct is culpable and, as in most crimes of this kind, where it involves a deliberate element (intention or foresight). It is thus the intention of the accused to have sexual intercourse without the consent of another, or although the accused has foreseen that such lack of consent is a possible consequence of the conduct and continues uncaring and regardless, that attracts criminal responsibility.

102 This is the apparent meaning of s 31 of the NT Code[146]. It is reasoning compatible with the specific exceptions contemplated by s 31(3)[147]. It is consonant with the usual basic principles of criminal liability. It avoids the necessity to press other sections of the NT Code, such as s 32[148], into artificial service to avoid inflicting the "elementary [in]justice" of which Neasey J spoke in *Ingram*[149]. Particularly in the light of the deliberate variation of the NT Code from the language and approach of State criminal codes, and the absence of a particular express mental element in the crime of sexual intercourse without consent[150], it is more consistent with the general legal principles governing criminal liability for this Court to adhere to the construction of the NT Code adopted by the Northern Territory courts.

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146 See reasons of Gleeson CJ at [13].

147 That sub-section provides that s 31 does not apply to the offences defined by Div 2 of Pt VI of the NT Code (failure to rescue offences). That express exception is inapplicable to this case.

148 See reasons of Gleeson CJ at [10]-[12]; reasons of Gummow and Heydon JJ at [47]-[50].

149 [1972] Tas SR 250 at 259.

150 NT Code, s 192(3). See *Charlie* (1999) 199 CLR 387.

103 *Considerations of legal policy*: Considerations of legal policy also support this construction. Generally speaking, absent established error, the interpretation of a common provision of particular State or Territory law is the responsibility of the appellate court of that State or Territory[151]. Any decision made by this Court in the present case could not be confined to the crime of sexual intercourse without consent. It would impose an artificially narrow view, severally, of "act" and "omission" and "event" for every offence where a mental element is not expressed in the NT Code[152]. It would do so, despite the pains of the drafters to use a composite phrase of wide ambit in which the words were obviously intended as cumulative and alternative (indicated by the word "or")[153].

104 Sexual intercourse without consent is a very serious offence and an affront to the human rights and human dignity of the victim. However, conviction of that crime carries very serious consequences for the liberty, life and reputation of the prisoner. The suggestion of the dissenting judge below that his construction should be adopted lest an accused person "in drink and lust … does not advert to the question of consent at all"[154] is unpersuasive.

105 As to the reference to "drink", by s 7(1)(b) of the NT Code, unless intoxication is involuntary, "it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct". Further, complete inadvertence on the part of an accused would sometimes be criminalised under s 154 of the NT Code ("Dangerous acts or omissions")[155]. That offence carries a maximum penalty of 9 years imprisonment if the offender was intoxicated at the time[156]. The existence of this unique provision in the NT Code adds still further strength to the conclusion that, in this criminal code, the Northern Territory intended to adopt an approach to criminal responsibility different from that taken in the other Australian code jurisdictions and similar to that observed in the non-code jurisdictions.

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151 Or, in the case of federal laws, it is the responsibility of the Full Court of the Federal Court of Australia or of the Family Court of Australia.

152 *Charlie* (1999) 199 CLR 387.

153 NT Code, s 31(1).

154 *Reference No 1* (2002) 12 NTLR 176 at 185 [27] per Angel J.

155 See also *R v Kitchener* (1993) 29 NSWLR 696 at 697; *R v Tolmie* (1995) 37 NSWLR 660 at 669-671.

156 The maximum penalty is 11 years, if grievous harm is caused and 14 years, if death is caused: NT Code, s 154.

106 In practical terms, as pointed out by Bailey J[157], the prospects of a jury acquitting an accused of sexual intercourse without consent who had no reasonable basis for believing that the complainant had consented to the act, are extremely remote. That remote possibility affords no reason for this Court to distort the unique language of the NT Code and to exclude from application a basic feature of the criminal law expressed in s 31.

107 Finally, as the facts of the present case show, in most instances of this offence the battle is fought at an earlier stage of reasoning. Typically, it concerns whether the complainant consented to "sexual intercourse" or not. In the present case, the evidence, as described by the trial judge in his summing up, did not appear to flesh out the subtleties of the questions debated in this appeal. So it will be in most trials for sexual intercourse without consent. But where the issue of intention and foresight is relevant, s 31 provides answers that are clear, sensible, just to the accused and to the complainant, and conformable with the general principle and policy of criminal responsibility observed in Australian law[158].

108 In all other respects, I agree in the reasons of Bailey J in the Court of Criminal Appeal.

Orders

109 The appeal should be dismissed.

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157 *Reference No 1* (2002) 12 NTLR 176 at 194-195 [50] per Bailey J. See reasons of Gummow and Heydon JJ at [52].

158 See generally Weinberg, "The Jurisprudence of the Court: Criminal Law and Criminal Process: *Moral Blameworthiness – The 'Objective Test' Dilemma*", in Cane (ed), *Centenary Essays for the High Court of Australia*, (2004) 150 at 153-161.

110 HAYNE J. In May 2001, after a trial in the Supreme Court of the Northern Territory, the respondent was found not guilty of one count of having sexual intercourse with a female, without her consent, contrary to s 192(3) of the *Criminal Code* (NT) ("the NT Code"). Pursuant to s 414(2) of the NT Code the appellant ("the Director") referred two questions to the Court of Criminal Appeal of the Northern Territory. Those questions were:

> "1. Was the learned trial judge correct in directing the jury, in respect of the elements of the offence prescribed by section 192(3) of the Criminal Code, that the Crown must prove beyond reasonable doubt, ***not only***
>
> (a) that the accused had sexual intercourse with the complainant, and
>
> (b) that the complainant did not give her consent to the accused having sexual intercourse with her
>
> ***but also***
>
> (c) that the accused intended to have sexual intercourse with the complainant without her consent?
>
> 2. Was the learned trial judge correct in directing the jury, in respect of the issue of the accused's mistaken belief as to consent, that such a mistaken belief need not be based on reasonable grounds?"

111 The Court of Criminal Appeal (Martin CJ, Thomas and Bailey JJ and Gallop AJ; Angel J dissenting) answered[159] both questions in the affirmative. By special leave the Director now appeals to this Court. I would set aside the orders of the Court of Criminal Appeal and, in their place, order that each question be answered, "No".

The issue

112 At the respondent's trial, the trial judge directed the jury that the charge brought against the respondent required the prosecution to prove three elements beyond reasonable doubt:

(a) that the accused had sexual intercourse with the complainant;

(b) that the complainant did not give her consent to the accused having sexual intercourse with her; and

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159 *Director of Public Prosecutions Reference No 1 of 2002* (2002) 12 NTLR 176.

(c) that the accused intended to have sexual intercourse with the complainant without her consent.

113 It is the last part of the third of these elements that is now in controversy. Must the prosecution prove beyond reasonable doubt that the accused not only intended to have sexual intercourse with the complainant but also intended to have intercourse *without her consent*? That is, was the trial judge right to instruct the jury, as he did, that the prosecution must prove that the accused knew that the complainant was not consenting, or may not be consenting but proceeded regardless?

114 The questions referred for consideration by the Court of Criminal Appeal require close attention to the relevant provisions of the NT Code. It is as well to set out the text of the principal provisions in issue.

The relevant provisions

115 Section 192(3) of the NT Code provides that:

> "Any person who has sexual intercourse with another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for life."

Sub-sections (1) and (2) of that section provide that "consent" means "free agreement" and identify some particular circumstances as "[c]ircumstances in which a person does not freely agree to sexual intercourse". "[S]exual intercourse" is defined in s 1 of the NT Code (unless the contrary intention appears) in terms extending well beyond the act of vaginal intercourse alleged against the respondent in this case. It is not necessary to explore the operation of the provisions which deal with the subject of consent or the provisions defining sexual intercourse.

116 Part II of the NT Code (ss 22-43) deals with "Criminal Responsibility". Division 1 of Pt II (ss 22-25) provides for some general matters. In particular, s 23 provides that:

> "A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorized, justified or excused."

117 What is meant by "authorized, justified or excused" is amplified in subsequent divisions of Pt II. Division 2 (s 26) of that Part deals with "Authorization", Div 3 (ss 27-29) with "Justification", and Div 4 (ss 30-43) with "Excuse". Chief attention will have to be given to two of the provisions of Div 4 dealing with "Excuse" (ss 31 and 32), but it is as well to notice some other

provisions of Div 4 of Pt II. Section 30(1) provides that, subject to some qualifications, "ignorance of the law does not afford an excuse unless knowledge of the law by the offender is expressly declared to be an element of the offence". Section 33 deals with acts done in a sudden and extraordinary emergency. Section 34 deals with provocation, s 37 with diminished responsibility, ss 40 and 41 with duress and coercion. Section 38 deals with the criminal responsibility of those of immature age. It is in this setting that ss 31 and 32 deal with "Unwilled act, &c, and accident", and "Mistake of fact".

118 Section 31 provides:

> "(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
>
> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.
>
> (3) This section does not apply to the offences defined by Division 2 of Part VI."

119 Section 32 provides:

> "A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist."

"[A]ct" is defined by s 1 of the NT Code (unless the contrary intention appears) in the following terms:

> "'act', in relation to an accused person, means the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention".

"[E]vent" is defined (again by s 1, and again unless the contrary intention appears) as "the result of an act or omission". "Omission" is not defined.

The Court of Criminal Appeal

120 All members of the Court of Criminal Appeal saw the questions as turning upon how effect is to be given, in this context, to those provisions of the

NT Code (ss 31 and 32) which deal with what the headings to the sections respectively refer to as "Unwilled act, &c, and accident" and "Mistake of fact".

121 The majority of the Court of Criminal Appeal concluded that the prosecution must prove that the accused intended to have sexual intercourse with the complainant without her consent. This was said[160] to follow from the provisions of s 31 dealing with unwilled acts and accidents. A majority of the Court concluded that seldom[161], if ever[162], could there then be occasion to consider the operation of s 32 of the NT Code. That is, seldom, if ever, in a case where sexual intercourse without consent was alleged would there be occasion to consider whether the accused should be excused criminal responsibility as a person "who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things" for which there would be no criminal responsibility to any greater extent than if the real state of things had been such as the accused believed to exist. In the majority's opinion, that an accused intended to have intercourse without the complainant's consent (or regardless of whether the complainant consented) would necessarily "negat[e] any material capable of indicating that the accused honestly believed the other person was consenting"[163].

122 Angel J, who dissented in the Court of Criminal Appeal, began from the premise[164] that s 192(3) of the NT Code prescribes no specific mental element. His Honour characterised the offence as an act (namely, the act of penetration) accompanied by an extrinsic circumstance (the lack of consent) and, in this connection, referred to decisions concerning the *Criminal Codes* of Tasmania[165] and Queensland[166]. In his Honour's view[167], s 31(1) of the NT Code (excusing a

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160 (2002) 12 NTLR 176 at 182-183 [15] per Martin CJ, 205-206 [75]-[76] per Bailey J. Thomas J and Gallop AJ agreed in the reasons of Bailey J.

161 (2002) 12 NTLR 176 at 206-208 [77]-[83] per Bailey J, 185 [29] per Thomas J, 208 [86] per Gallop AJ.

162 (2002) 12 NTLR 176 at 183 [18] per Martin CJ.

163 (2002) 12 NTLR 176 at 183 [18] per Martin CJ. See also at 206 [77] per Bailey J, 185 [29] per Thomas J, 208 [86] per Gallop AJ.

164 (2002) 12 NTLR 176 at 184 [23].

165 *Arnol v The Queen* [1981] Tas R 157.

166 *Kaporonovski v The Queen* (1973) 133 CLR 209. Reference was also made to *R v Falconer* (1990) 171 CLR 30 and *R v Van Den Bemd* (1994) 179 CLR 137.

167 (2002) 12 NTLR 176 at 185 [24].

person from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct) applies to s 192(3) only "in so far as there is an act and in the absence of any event". Lack of consent not being part of the "act" of sexual intercourse, and there being no result of the physical act involved as an element of the crime, there is, in his Honour's view[168], no "event" to which s 31(1) could apply. It followed[169] that to prove the elements of an offence under s 192(3) the prosecution must prove that the accused intentionally had intercourse with the complainant and that the complainant did not in fact consent to that act at that time. If an issue of mistake about consent was raised, s 32 excused the accused only if the accused had an honest and reasonable, but mistaken, belief that the complainant consented to the act of sexual intercourse.

123 These reasons will seek to demonstrate that Angel J was right to conclude that s 192(3) of the NT Code prescribes no specific mental element for the offence of having sexual intercourse with a person without that person's consent and that neither s 31 nor s 32 requires the conclusion that the prosecution must prove that the accused intended to have intercourse without the complainant's consent, or regardless of consent. Section 32 will excuse an accused from criminal responsibility if the prosecution fails to prove, beyond reasonable doubt, that the accused had no honest and reasonable belief that the complainant consented to the act of sexual intercourse. Section 31 will be engaged in relation to a charge brought under s 192(3) if there is a question whether the act of sexual intercourse was accidental or unwilled. It is the act of sexual intercourse which is the relevant "act" for the purposes of ss 31 and 32 of the NT Code, not intercourse without consent.

Section 192(3)

124 Although the majority of the Court of Criminal Appeal began by considering the operation of the excusing provisions of ss 31 and 32, it is necessary to begin at an earlier point.

125 Section 192(3) creates an offence. Unlike a number of other offences created by the NT Code, s 192(3) says nothing about the intention of the accused. In that respect, s 192(3) may be contrasted with provisions like s 233, dealing with false accounting, which speaks of a person "who, *with a view to gain* for himself or another or *with intent to deceive* or cause loss to another". It may be contrasted with provisions like s 212, dealing with assault with intent to steal, which speaks of a person "who assaults another *with intent to steal* anything". It

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168 (2002) 12 NTLR 176 at 184 [23].

169 (2002) 12 NTLR 176 at 185 [24].

may be contrasted with provisions like s 227, dealing with criminal deception, which speaks of a person "who *by any deception*" obtains the property of another or a benefit. The examples could be multiplied. As Angel J rightly pointed out[170], s 192(3) says nothing about the intention of the person who is alleged to have had sexual intercourse with another without that other's consent. It says only that it is an offence to do so.

126 In this respect, the NT Code follows a pattern set by the *Criminal Code* of Queensland. Of that Code, its author, Sir Samuel Griffith, said[171]:

> "[U]nder the criminal law of Queensland, as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which has been the subject of much discussion. *The test now to be applied is whether this prohibited act was, or was not, done accidentally or independently of the exercise of the will of the accused person*". (emphasis added)

Whether, as Sir Samuel Griffith suggested in his note to ss 22-24 of the draft *Criminal Code* of Queensland[172], the provisions of that Code dealing with criminal responsibility produced results identical with the then understanding of common law doctrines, is not to the point. Common law doctrines of criminal responsibility have since developed in a number of very important ways, not least with the recognition in *Woolmington v The Director of Public Prosecutions*[173] that the prosecution bears the burden of proving that the accused's acts were *not* accidental or unwilled. What is presently important is that there is nothing in s 192(3) that requires demonstration of any particular intent on the part of the accused. No doubt that is why principal attention was directed in argument, both in the Court of Criminal Appeal and in this Court, to ss 31 and 32.

The respondent's contentions

127 The respondent placed particular emphasis on s 31. The respondent submitted that s 31 applies to the "act, omission or event" of having "sexual intercourse with another person without the consent of the other person" and that an accused person is excused from criminal responsibility for that act, omission or event "unless it [intercourse without consent] was intended or foreseen by [the accused] as a possible consequence of [the accused's] conduct".

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170 (2002) 12 NTLR 176 at 184 [23].

171 *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981-982.

172 *Carter's Criminal Law of Queensland*, 14th ed (2004) at 233.

173 [1935] AC 462.

128 The respondent provided a draft of the directions that it was submitted would give effect to this operation of s 31. The directions contained three elements. First, it was said that the jury should be directed that the prosecution must prove beyond reasonable doubt that the accused knew that the complainant was not consenting, or realised that the complainant may not be consenting. It was said that it would then be necessary to give two further directions that would deal with the application of s 31(2) if the jury was not persuaded that the accused *realised* that the complainant may not be consenting. It was said that the jury should be told (as the second element of the directions) that, if persuaded only that the accused *believed* that the complainant may not be consenting, it was necessary to consider whether an ordinary person similarly circumstanced, and having such awareness, would not have proceeded with the intercourse. The respondent submitted that, if persuaded only that the accused believed that the complainant may not be consenting, the third element of the directions would require the jury to consider whether one of two additional elements had been established. Those additional elements were that the accused *did not believe* that the complainant was consenting, or that no ordinary person in the position of the accused *could* have believed that the complainant was consenting.

Section 31

129 The respondent's contentions about the application of s 31 to an offence under s 192(3) of the NT Code depended upon two critical steps. They were, first, that "act, omission or event" should be read as a portmanteau expression sufficient to encompass having sexual intercourse with a person without that person's consent. Secondly, the respondent's contentions depended upon identifying the absence of consent as a "possible consequence" of the accused's conduct that could be "foreseen". It is necessary to examine each of those steps in the respondent's argument.

130 It may be accepted that "act, omission or event" is an expression which, as a matter of ordinary language, might be apt to describe having sexual intercourse with a person without that person's consent. Difficulties in applying that phrase emerge, however, if account is taken of the definitions of "act" and "event" contained in s 1 of the NT Code. And much of the discussion in the reasons of the Court of Criminal Appeal was directed to the application of those terms: "act" and "event". As noted above, the NT Code defines "event" as "the result of an act or omission". That definition assumes that an "event" and an "act" are always capable of separate identification. "Act" in relation to an accused is defined as the "deed" alleged to have been done by the accused. That definition is then amplified in two respects. It is said that "it [that is, the 'act'] is not limited to bodily movement" and that it "includes the deed of another caused, induced or adopted by [the accused] or done pursuant to a common intention". But there is no definition or amplification of what is meant by "deed".

131 By defining "act" and "event" the NT Code differs from the State Criminal Codes. None of the *Criminal Codes* of Queensland, Tasmania or Western Australia gives a definition of those terms. Rather, in the provisions of those Codes dealing with accident, each draws a contrast between, on the one hand, an "act" that is "voluntary and intentional"[174] and on the other hand an "act or omission that occurs independently of the exercise of [the accused person's] will"[175], or "an event" which occurs by chance[176] or by accident[177]. This contrast has led to no little controversy about how to identify the relevant "act"[178].

"Act" in the State Criminal Codes

132 In *Kaporonovski v The Queen*, Gibbs J made two points[179] about the construction of the word "act" when used in s 23 of the *Criminal Code* (Q). First, he said[180] that it would depart from the ordinary meaning of the word to regard "act" as including all the ingredients of the crime other than the mental element. As his Honour pointed out, there are many cases in which the accused's *bodily acts* do not entail any criminal responsibility. It was in this context, and for this purpose, that Gibbs J introduced reference to consent as an "extrinsic circumstance" in rape[181]:

> "Putting aside cases where a specific intention is required, there are many offences which are constituted only if the act of the accused was accompanied by some extrinsic circumstance (e.g. absence of consent on a charge of rape or the age of the girl on a charge of unlawful carnal

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174 *Criminal Code* (Tas), s 13.

175 *Criminal Code* (Q), s 23(1). See also *The Criminal Code* (WA), s 23.

176 *Criminal Code* (Tas), s 13.

177 *Criminal Code* (Q), s 23(1); *The Criminal Code* (WA), s 23.

178 *Vallance v The Queen* (1961) 108 CLR 56; *Mamote-Kulang v The Queen* (1964) 111 CLR 62; *Timbu Kolian v The Queen* (1968) 119 CLR 47; *Kaporonovski v The Queen* (1973) 133 CLR 209; *R v Falconer* (1990) 171 CLR 30; *R v Van Den Bemd* (1994) 179 CLR 137; *Ugle v The Queen* (2002) 211 CLR 171; *Murray v The Queen* (2002) 211 CLR 193.

179 (1973) 133 CLR 209 at 230-231.

180 (1973) 133 CLR 209 at 230.

181 (1973) 133 CLR 209 at 231.

> knowledge) or had some particular consequence (e.g. the causing of grievous bodily harm, as in the present case)."

Secondly, by distinguishing between an "act" and its consequences, Gibbs J said[182] that s 23 of the *Criminal Code* (Q) shows that "act" is not intended to embrace the consequences as well as the action that produced them. Accordingly, so Gibbs J concluded[183]:

> "Section 23 is elliptical and when it speaks of criminal responsibility for an act or for an event it does not mean that the act or event per se would necessarily give rise to criminal responsibility, but rather refers to an act or event which is *one of the circumstances* alleged to render the accused person criminally responsible. It seems to me that this must be beyond argument in so far as the section refers to an event, for an event – the consequences of an act – alone could hardly give rise to criminal responsibility." (emphasis added)

It was on this basis that Gibbs J concluded[184] that the "act" to which the first part of s 23 of the *Criminal Code* (Q) refers "is some physical action, apart from its consequences – the firing of the rifle rather than the wounding in *Vallance v The Queen*[185] and the wielding of the stick, rather than the striking or the killing of the baby in *Timbu Kolian v The Queen*[186]".

133 It would be wrong to attempt to apply these statements to the NT Code without first identifying what effect that Code's definitions of "act" and "event" have on the operation of the relevant provisions. Nonetheless, it is important to notice that what does emerge from what was said in *Kaporonovski* is that, in the *Criminal Code* (Q), neither "act" nor "event" is to be understood as necessarily encompassing all the defining elements of an offence. In at least some cases, some elements of the offence may be neither an act nor an event. Nothing in subsequent decisions of this Court requires a contrary conclusion.

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182 (1973) 133 CLR 209 at 231.

183 (1973) 133 CLR 209 at 231.

184 (1973) 133 CLR 209 at 231.

185 (1961) 108 CLR 56.

186 (1968) 119 CLR 47.

"Act" and "event" in the NT Code

134 Examination of the applicable provisions of the NT Code leads to a conclusion similar to that reached in *Kaporonovski*. Neither the composite expression "act, omission or event", nor the separate integers of that expression, when used in ss 31 and 32, will, in every case, encompass all elements of the offence or (where there is a specific intention required) all elements of the offence other than that intention. Neither the composite expression, nor the separate integers, encompasses the absence of consent which s 192(3) requires to be established to demonstrate commission of that offence.

135 The words "act" and "event" are not used in ss 31 and 32, in the phrase "act, omission or event", with a meaning other than that provided for by their respective definitions in s 1. A contrary intention is not evident from the use of these words in the collocation "act, omission or event", and no other basis for deducing a contrary intention is to be discerned.

136 That does not deny that the use of the collocation "act, omission or event" is intended to require that the tests prescribed by s 31 are applied regardless of whether the subject of their application is properly classified as "act", "omission" or "event". It follows that, so long as it is clear that what is under consideration either is an "act" (or an omission) or is an "event", it will seldom be necessary to draw refined distinctions between the two. That is, it will seldom be necessary to distinguish between what is an "act" (or an omission) and what is an "event".

137 The decision in *Pregelj v Manison*[187] upon which the respondent placed reliance is to be understood in the light of that proposition. One question which arose in *Pregelj* was how ss 31 and 32 of the NT Code applied in a case where a man and woman were accused of engaging in offensive behaviour "in or within the ... view of any person in any ... public place"[188]. They had been observed having sexual intercourse in a bedroom of a house; they said in evidence that they did not know that they could be seen, as they were, from outside the bedroom and that they believed that they were out of sight. As Nader J rightly pointed out[189] in *Pregelj*, the "act" of each accused was "the act of sexual intercourse and the offence that might be suffered by an observer was something that eventuated from the act: an event". Section 31 excused the accused from criminal responsibility for that event unless they intended it or relevantly foresaw it. It by no means follows, however, whether from the words of s 31 or from

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187 (1987) 51 NTR 1.

188 Contrary to *Summary Offences Act* 1978 (NT), s 47.

189 (1987) 51 NTR 1 at 17.

what was decided in *Pregelj*, that the absence of consent which s 192(3) requires to be established is, or is part of, the relevant "act, omission or event".

138 Once it is accepted, as it must be, that s 192(3) makes no provision concerning the intention of the accused, the provisions of ss 31 and 32 are not to be given a strained or artificial meaning in order to introduce a requirement for proof of an intention similar to that developed through the use of concepts of mens rea. Rather, ss 31 and 32 are to be given their ordinary meaning as amplified by the definition of "act" and "event".

139 In particular (contrary to the respondent's submission) s 31 is not to be read as engaged in respect of every element of an offence. In the case of a prosecution for an offence under s 192(3), the absence of consent of the complainant is not itself an "act", an "omission", or an "event". (Attaching the label "extrinsic circumstance" to the absence of consent may be convenient, but the use of that label should not be permitted to distract attention from the operation of the relevant statutory terms.) The absence of consent is not "the deed alleged to have been done" by the accused.

140 For like reasons the physical act constituting the intercourse, taken together with the absence of consent (as "intercourse-without-consent"), is not the "deed" done by the accused. It is, therefore, not an "act" for the purposes of s 31.

141 Section 31 directs attention to what the accused did or did not do. What the accused did or did not do (the accused's "act" or "omission") may not have been intended. It may have been unwilled, as, for example, if done when unconscious. It may have been accidental, as, for example, when a loaded weapon is knocked over and discharges on impact with the ground. No doubt other examples could be given. The consequences of the act or omission (an "event") may not have been intended and, if not intended, may not have been foreseen. Again, many examples may be given. In all the cases mentioned, s 31 may have work to do.

142 In the case of an offence under s 192(3), s 31 will have work to do if there is a question whether the sexual intercourse was unwilled or accidental. But it could have work to do with respect to the presence or absence of the consent of the *complainant* only if the act of the *accused* were to be understood as extending beyond what he or she did. For the reasons given earlier, such a construction of s 31 finds no footing in decisions about the operation of similar, but not identical, provisions of the State Criminal Codes. Moreover, it finds no footing in the text. It finds no footing in the authorities because they reject the view that, in the State Criminal Codes, "act" must encompass all elements of the relevant offence. It finds no footing in the text because of the evident focus in s 31 on what the accused did or did not do (not what the complainant did) and because consent of the complainant could never be a *consequence* of the relevant conduct of the

accused (the act of intercourse). The first of those points (that s 31 evidently focuses on what the accused did or did not do) requires no elaboration. The second point (that consent is not a consequence) does.

143 If the "act" of the accused were to be understood as "intercourse-without-consent" rather than as simply the sexual intercourse, it may be possible to say that the accused's "act" was intended by him. But if, in a particular case, it is not demonstrated that the accused's "act" (of having intercourse-without-consent) was intended it would not be possible to apply s 31(2). The complexity of the respondent's draft direction on this aspect of the matter points towards the fundamental difficulty. That difficulty is that it cannot be said that intercourse-without-consent (whether that is properly described as an "act" or an "event") could be foreseen "as a possible *consequence* of [the accused's] conduct".

144 Accordingly, contrary to the assumptions reflected in the respondent's draft directions, s 31(2) could have no relevant operation if the act of the accused were to be identified as intercourse-without-consent. And the consequence of that would be that the sole question would be whether the accused intended intercourse-without-consent.

145 So to hold may bring the law of rape under the NT Code closer to the law in non-Code States, but it would represent a radical departure from what, for so long, has been the understanding of the provisions of the State Criminal Codes dealing with criminal responsibility and the identification, for the purposes of those Codes, of the relevant "act" of an accused. That step should not be taken. The "act" of a person accused of having sexual intercourse with a person without that person's consent should be identified as the act of intercourse, not intercourse-without-consent.

146 This construction of s 31, and of "act, omission or event", finds further support in s 32. That section treats "act, omission or event" as distinct from "any state of things". It excuses a person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things from any greater criminal responsibility than the person would have had if the real state of things had been such as that person believed to exist. Section 32 will have work to do in any prosecution under s 192(3) where there is an issue about the accused being mistaken as to the complainant's consent. If such an issue arises, the prosecution must prove beyond reasonable doubt that the accused was not under an honest and reasonable belief that the complainant was consenting (as that consent is defined by s 192(1) and (2)).

147 As is at least implicit in that last proposition, a mistaken belief *not* based on reasonable grounds will not excuse an accused from criminal responsibility even if the belief is honestly held. For that reason, the trial judge was wrong to direct the jury, as he did, that a mistaken belief does not have to be based on

reasonable grounds. The second question reserved for the consideration of the Court of Criminal Appeal asked whether the trial judge was right to give that direction. That question should have been answered, "No".

Conclusion and orders

148 Both of the questions reserved for the consideration of the Court of Criminal Appeal should have been answered, "No". I would order that the appeal to this Court be allowed, the orders of the Court of Criminal Appeal be set aside and in their place there be orders that each of the questions reserved for the consideration of that Court be answered, "No".