HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

STEPHEN GARRY BANDITT APPELLANT

AND

THE QUEEN RESPONDENT

Banditt v The Queen
[2005] HCA 80
15 December 2005
S216/2005

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

S J Odgers SC with A Francis for the appellant (instructed by Legal Aid Commission of New South Wales)

G E Smith SC with C McPherson for the respondent (instructed by Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Banditt v The Queen

Criminal law – Break and enter and commit serious indictable offence – Sexual assault – Recklessness as to consent – Appellant broke and entered complainant's house at night while complainant asleep – Complainant alleged appellant commenced intercourse while complainant asleep – Appellant claimed that complainant was awake and consented to intercourse and that appellant thought complainant was consenting – Complainant had rejected appellant's advances on a previous occasion – Whether trial judge erred in directing jury that appellant could have known complainant was not consenting because he was reckless as to consent – Whether recklessness requires more than advertence to possibility of lack of consent or requires determination to proceed with intercourse regardless of lack of consent – Whether appropriate to direct juries to apply an ordinary understanding of "recklessness".

Words and phrases – "reckless".

Crimes Act 1900 (NSW), ss 61I, 61R, 112(1).

1 GUMMOW, HAYNE AND HEYDON JJ. The term "reckless" has various uses as a criterion of legal liability. This appeal turns upon one such use of the term in the New South Wales criminal law, but it is convenient first to consider some aspects of the civil law.

2 When "reckless" is used in applying the principles of the tort of negligence, the yardstick is objective rather than subjective. On the other hand, to sustain an action in deceit, fraud is proved when it is shown "that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false"[1]. But (3) is but an instance of (2) because, as Lord Herschell put it in *Derry v Peek*[2]:

> "[O]ne who makes a statement under such circumstances can have no real belief in the truth of what he states."

This reasoning is akin to that which supports the evidentiary inference explained by Lord Esher MR as being that one who wilfully shuts his eyes to what would result from further inquiry may be found to know of that result[3].

3 To these expositions of the civil law by Lord Herschell and Lord Esher there may be added the following statement by Lord Edmund-Davies in his dissenting speech in *R v Caldwell*[4]:

> "So if a defendant says of a particular risk, 'It never crossed my mind,' a jury could not on those words alone properly convict him of recklessness simply because they considered that the risk *ought* to have crossed his mind, though his words might well lead to a finding of negligence. But a defendant's admission that he 'closed his mind' to a particular risk could prove fatal, for, 'A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that

---

1 The formulation is that of Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 374.

2 (1889) 14 App Cas 337 at 374.

3 *English and Scottish Mercantile Investment Company v Brunton* [1892] 2 QB 700 at 707-708.

4 [1982] AC 341 at 358. The majority decision in *Caldwell* was unanimously overruled in *R v G* [2004] 1 AC 1034.

there is a risk; and if he realises that there is a risk, that is the end of the matter'[5]." (original emphasis)

4 In *La Fontaine v The Queen*[6], Gibbs J discountenanced, in those States where legislation did not adopt terms such as "reckless" or "reckless indifference", their use in summing up at a trial on a murder count. His Honour said[7]:

> "To tell a jury that they may convict of murder when they are satisfied that the accused acted with recklessness or reckless indifference is to invite confusion between murder and manslaughter resulting from criminal negligence. In many, if not most, cases where the Crown alleges that the accused acted knowing that his act would probably cause death or grievous bodily harm it will also be alleged by the Crown, in the alternative, that the accused was guilty of criminal negligence. The expression 'reckless' is also used to describe that very high degree of negligence which, if it causes death, amounts to manslaughter[8]. It is not easy to explain to a jury the difference between the reckless indifference which, if it exists, may justify a conviction of murder and that recklessness which would warrant a conviction for manslaughter."

5 Particular questions about recklessness in murder and disputes about distinctions between probable and possible consequences, which were considered in *La Fontaine*, do not presently arise. However, it may be noted that in *R v Crabbe*[9] they were resolved consistently with the views of Gibbs J.

6 As Gibbs J noted in *La Fontaine*, criminal offences may be created by statute with a criterion of recklessness or reckless indifference. One such law is s 1(1) of the *Criminal Damage Act* 1971 (UK) which was considered by the House of Lords in *R v G*[10]. Section 1(1) states:

---

5 See Glanville Williams, *Textbook of Criminal Law*, (1978) at 79.

6 (1976) 136 CLR 62.

7 (1976) 136 CLR 62 at 76-77.

8 See *Andrews v Director of Public Prosecutions* [1937] AC 576 at 583; *Evgeniou v The Queen* (1964) 37 ALJR 508 at 509.

9 (1985) 156 CLR 464 at 468-469 per Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ.

10 [2004] 1 AC 1034.

> "A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence."

In *G*, the House of Lords held that foresight of consequences was an essential ingredient of recklessness in s 1(1) and that a formulation which made no allowance for a defendant's youth or lack of mental capacity when assessing obviousness of the risk of damage to property was erroneous.

7 In his speech in *G*, Lord Bingham of Cornhill rejected the proposition that the above construction of the statute would lead to the acquittal of those whom public policy would require to be convicted. His Lordship said[11]:

> "There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time. Similarly with recklessness: it is not to be supposed that the tribunal of fact will accept a defendant's assertion that he never thought of a certain risk when all the circumstances and probabilities and evidence of what he did and said at the time show that he did or must have done."

8 It is with the considerations canvassed in the above authorities in mind that the task of statutory construction upon which this appeal turns is to be undertaken. The foregoing demonstrates the general importance attached to the mental element for criminal culpability, but also the law's scepticism in accepting later assertions as to the existence or absence of a mental state which are at odds with practical experience of life. It should be added that, whereas in situations such as those in *La Fontaine* and *G*, the recklessness concerns the physical consequences of the acts in question, this appeal concerns recklessness as to the mental state of another.

9 We turn now to the instant case. On 10 September 2003, the appellant was convicted at a jury trial in the District Court of New South Wales of an offence under s 112(1) of the *Crimes Act* 1900 (NSW) ("the Act"). An appeal

---

11 [2004] 1 AC 1034 at 1057.

against conviction was dismissed by the New South Wales Court of Criminal Appeal (Bryson JA, James and Kirby JJ)[12].

10 The offence created by s 112(1) applies in various circumstances, which relevantly include breaking and entering any dwelling-house and committing therein "any serious indictable offence". That expression means "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more" (s 4(1)). Section 61I of the Act states:

> "Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years."

It follows that an offence under s 61I is a serious indictable offence within the meaning of s 112(1).

11 The offence of which the appellant was convicted occurred in the early hours of 6 October 2001 at Bellingen, a New South Wales country town. The appellant broke into and entered the two storey dwelling-house where the complainant was sleeping upstairs. The complainant was alone in the house. The appellant committed a serious indictable offence there, namely sexual intercourse with the complainant without her consent and knowing that she was not consenting. The appellant was then aged 27 and the complainant 25. The appellant was a cousin of the complainant whom she had known, but not well, for about 15 years. At the trial, both the complainant and the appellant gave evidence and were cross-examined.

12 The offence of which the appellant was convicted was not that for which he was indicted. The indictment alleged an aggravated offence under s 112(2) of the Act, namely knowledge of the appellant at the time of the breaking and entering that there was a person in the dwelling-house[13]. However, while the jury found the appellant not guilty of the aggravated offence charged in the indictment, it did, as permitted by s 115A of the Act, return a verdict of guilty of the offence under s 112(1).

---

12 *R v Banditt* (2004) 151 A Crim R 215.

13 Section 112(2) applies where an offence under s 112(1) is committed "in circumstances of aggravation", an expression defined in s 105A(1)(f) as including knowledge of the alleged offender that there is a person or that there are persons in the place where the offence is alleged to be committed.

13 The appeal to this Court does not turn upon any of these provisions relating to property offences. Rather, it turns upon the interrelation between the sexual assault provisions in s 61I and s 61R(1). For purposes which include those of s 61I, s 61R(1) states:

> "[A] person who has sexual intercourse with another person without the consent of the other person and *who is reckless as to whether the other person consents to the sexual intercourse* is to be taken to know that the other person does not consent to the sexual intercourse." (emphasis added)

14 In the course of his summing-up, the trial judge (Freeman DCJ) stated the substance of s 61R(1) and continued:

> "So if you just go ahead and do it willy-nilly, not even considering whether the person is consenting or not, you are reckless and the law says you are deemed to know that the person is not consenting."

No objection at trial was taken to that statement and none is taken now. Later in the summing-up, his Honour said:

> "Now, recklessness is a [failure] to advert to ... the question of whether the person is consenting or not. It does not have to be the product of conscious thought. If the offender does not even consider whether the woman is going to consent or not then that is reckless and he is deemed to know that she is not consenting. *If he is aware that there is a possibility that she is not consenting but he goes ahead anyway, that is recklessness*. But it is his state of mind that you are obliged to consider and includ[ed] in that is the concept I discussed with you yesterday about the fact that he had had something to drink, just how drunk he was, how much he had sobered up, how capable he was of making this decision and so on." (emphasis added)

The trial judge then went on to refer to the evidence of the complainant and continued:

> "So the Crown relies on her evidence to say that she was not consenting and the Crown suggests that you will be persuaded beyond reasonable doubt that he either knew, because he penetrated her before she woke up, or he was reckless in the sense that he did not even consider whether she was going to consent or not, *or at least he recognised that there was a possibility that she may not consent but he went ahead and did it anyway* and the accused['s] case is that he thought she had consented, and he had this belief." (emphasis added)

15 In this Court, as in the Court of Criminal Appeal, but not at the trial, the appellant complains of the italicised passages as involving a misdirection in law as to the operation of s 61I and s 61R(1). In particular, it is said that there should have been an additional direction that the appellant had to be "indifferent" about the risk or determined to have sexual intercourse whether consent was present or not. In oral submissions to this Court, counsel for the appellant submitted that "recklessness" cannot be satisfied by an awareness of a risk; it is satisfied by "a discrete mental state which is, 'Even if I knew, I would continue. It does not matter to me'."

16 The respondent counters that the appellant's submissions set up a false dichotomy between proceeding regardless of an awareness of a possibility of lack of consent and indifference as to whether there is consent. When used in the particular circumstances of the case, the term "reckless" may encompass various formulations, including "indifference as to whether or not there is consent", "determination to have intercourse with the person whether or not that person is consenting", and "awareness of the possibility of absence of consent and proceeding anyway". It will be necessary to return to that submission.

17 Two questions thus arise. The first concerns the correct construction of s 61R(1); the second is whether the Court of Criminal Appeal erred in its dismissal of the appeal.

18 Section 61R(1) has its provenance in s 61D(2) which was introduced into the Act by the *Crimes (Sexual Assault) Amendment Act* 1981 (NSW) ("the 1981 Act"). Before the 1981 Act, the Act had provided in s 63:

> "Whosoever commits the crime of rape shall be liable to penal servitude for life.
>
> The consent of the woman, if obtained by threats or terror, shall be no defence to a charge under this section."

The 1981 Act repealed that provision and substituted a provision:

> "The common law offences of rape and attempted rape are abolished."

The 1981 Act also created three new offences of sexual assault. In the Second Reading Speech to the Legislative Council on the Bill for the 1981 Act, the

Minister referred to the desirability of making the law "gender neutral" and went on[14]:

> "Though previously there was simply one offence of common law rape, with penalties ranging right up to penal servitude for life, under the new scheme a number of different levels of offences of sexual assault will be created, the maximum penalties reflecting the varying degrees of seriousness of each offence. The four categories will be, first, under proposed new section 61B, inflicting grievous bodily harm with intent to have sexual intercourse, for which the maximum penalty will be 20 years' penal servitude; second, inflicting actual bodily harm, or threatening to inflict such harm by means of an offensive weapon, with intent to have sexual intercourse, for which proposed new section 61C will provide a maximum penalty of 12 years' penal servitude. The third category of offence is under new section 61D(1), sexual intercourse without consent, for which the maximum penalty is 10 years' penal servitude when the victim is under 16 years of age. Proposed section 61E deals with the fourth category of offence, indecent assault, which carries the same penalties as now apply."

19 The provisions of the 1981 Act were recast by the *Crimes (Amendment) Act* 1989 (NSW) ("the 1989 Act"). The previous ss 61A-61G were repealed and there were added provisions including ss 61I and 61R.

20 A commentary on the 1981 Act titled *Sexual Assault Law Reforms in New South Wales* was issued by the Director of the Criminal Law Review Division of the Department of Attorney-General and of Justice, with a Foreword by the New South Wales Attorney-General. This, unlike the Second Reading Speech in the Legislative Council, did include a consideration of s 61D(2). It was said[15] that s 61D(2) was not an attempt to reintroduce a notion of "sexual assault by negligence" which might be thought to have been supported by *R v Sperotto*[16]. The commentary added[17]:

---

14 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 April 1981 at 5453-5454.

15 at 16.

16 [1970] SR (NSW) 334.

17 at 16.

"That section 61D(2) should be interpreted subjectively is supported by the statutory expression of the rule in *R v Morgan*[18] in section 1 of the UK *Sexual Offences (Amendment) Act*, 1976 ['the 1976 UK Act']:

> '... a man commits rape if –
>
> (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
>
> (b) at the time he knows that she does not consent to the intercourse *or he is reckless as to whether she consents to it*.'

The latter words were certainly intended to, and have been interpreted so as to, require proof of subjective foresight of the possibility of non-consent. There is every reason why section 61D(2) should be similarly interpreted." (original emphasis)

21 A similar provision to s 1 of the 1976 UK Act was introduced in South Australia in 1976 by amendment to the *Criminal Law Consolidation Act* 1935 (SA)[19]. Of the inclusion of the phrase "recklessly indifferent" in the law of South Australia, Bray CJ said in *R v Wozniak*[20] that it had its own difficulties to be met when they arise.

22 Section 1 of the 1976 UK Act was introduced following the recommendations in the *Report of the Advisory Group on the Law of Rape*[21] which had reported in December 1975. The Advisory Group, of which Dame Rose Heilbron was chairman ("the Heilbron Committee"), had had in its terms of reference consideration of whether any change in the law of rape was desirable as a result of the judgment in *Morgan*.

---

18 [1976] AC 182.

19 By the *Criminal Law Consolidation Act Amendment Act* 1976 (SA), s 4.

20 (1977) 16 SASR 67 at 73.

21 Cmnd 6352.

23 The Heilbron Committee noted that in England there had been no attempt at statutory definition of the common law offence of rape. They added[22]:

> "22. The *actus reus* in rape, which the prosecution must establish for a conviction consists of (a) unlawful sexual intercourse and (b) absence of the woman's consent.
>
> 23. The mental element, which the prosecution must additionally establish is an intention by the defendant to have sexual intercourse with a woman either knowing that she does not consent, or recklessly not caring whether she consents or not. (Hereafter in the report we will refer to recklessness in this sense.) Although this was probably always the law, as we shall see, this alternative of recklessness as an aspect of the guilty mind in the crime of rape does not appear to have been emphasised before the decision in *Morgan*.
>
> 24. One further point needs explanation. If the defence contend in a rape case (as has always been possible and as they did in *Morgan*) that the accused genuinely believed, albeit wrongly, that the woman consented to sexual intercourse, this is commonly called the 'defence' of mistake or mistaken belief[23]. But strictly speaking in this type of case the accused is not putting forward a positive defence – he is arguing that the prosecution has not proved one of the essential elements in the offence, namely that he acted with the required guilty intention."

24 Under the heading "**Recklessness**", the Heilbron Committee observed[24]:

> "77. It seems to us that the most important aspect of the *Morgan* judgment, and one which has been almost wholly overlooked in comment on it, is that *for the first time it has been stated clearly and unambiguously that recklessness as to whether the woman was consenting or not was sufficient* mens rea *for a conviction*. This was a matter of very considerable significance, not only in strengthening the law relating to the crime of rape, but also in having very important wider implications for the criminal law as a whole, particularly in regard to crimes of personal violence. We believe that the emphasis on recklessness will in future

---

22 at 3-4.

23 See, for example, the remarks respecting *Morgan* by Lord Steyn in *R v G*: [2004] 1 AC 1034 at 1062.

24 at 12-13.

> cover a considerable range of cases. For example where a burglar has sexual intercourse with an occupant against her will, and the claim of belief in consent is raised, a direction as to recklessness in regard to the lack of consent will no doubt be included in the summing-up." (emphasis added)

25 What is said in the emphasised portion of par 77 should be read in Australia so as to accommodate what had been said by the Victorian Full Court in *R v Daly*[25]. Although not using the term "reckless", their Honours had said that, to establish that it was the intention of the accused to have intercourse without the woman's consent[26]:

> "the Crown must establish beyond reasonable doubt that the accused either was aware that the woman was not consenting, or else realized she might not be, and determined to have intercourse with her whether she was consenting or not".

It will be apparent that between this formulation and the remarks by the trial judge to which the appellant objects there is little, if any, difference in substance.

26 Under the heading "**Recommendations for declaratory legislation**", the Heilbron Committee stated[27]:

> "81. Notwithstanding our conclusions that *Morgan's* case is right in principle, we nevertheless feel that legislation is required to clarify the law governing intention in rape cases, as it is now settled. We think this for two principal reasons. The first is that it would be possible in future cases to argue that the question of recklessness did not directly arise for decision in *Morgan's* case, in view of the form of the question certified: to avoid possible doubts the ruling on recklessness needs to be put in statutory form[28].

---

25 [1968] VR 257.

26 [1968] VR 257 at 258-259. See also *R v Flannery* [1969] VR 31 at 33-34 and cf *R v Wozniak* (1977) 16 SASR 67 at 74.

27 at 14.

28 The point of law certified under s 33(2) of the *Criminal Appeal Act* 1968 (UK) was "[w]hether in rape a defendant can properly be convicted notwithstanding that he in fact believed the woman consented, if such belief was not based on reasonable grounds": *R v Morgan* [1976] AC 182 at 192.

> 82. Secondly, it will be unfortunate if a tendency were to arise to say to the jury 'that a belief, however unreasonable, that the woman consented, entitled the accused to acquittal'. Such a phrase might tend to give an undue or misleading emphasis to one aspect only and the law, therefore, should be statutorily restated in a fuller form that would obviate the use of those words."

27 In *Morgan*, the House of Lords used various expressions when describing the requisite mental element of the offence. Lord Cross of Chelsea said that to his mind rape imported "at least indifference as to the woman's consent"[29]. Lord Hailsham of St Marylebone identified the mental element of the offence as an intention to commit the act or "the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no"[30]. His Lordship also said[31] that an intention to have intercourse "recklessly and not caring whether the victim be a consenting party or not" was "equivalent on ordinary principles to an intent to do the prohibited act without the consent of the victim". Lord Edmund-Davies also said that the man would have the necessary mens rea[32]:

> "if he set about having intercourse *either* against the woman's will *or* recklessly, without caring whether or not she was a consenting party".

28 The Heilbron Committee recommended legislation in terms of s 1 of the 1976 UK Act with the phrase "reckless as to whether she consents to it", on the footing that this restated the effect of *Morgan*. Thus, the Committee is to be taken as having accepted that the various expressions used by their Lordships could be within the scope of that statutory formulation.

29 The subsequent decisions in England construing the phrase in s 1 of the 1976 UK Act "reckless as to whether she consents to it" have reflected some tension between what Lord Rodger of Earlsferry recently in *G*[33] identified as conflicting legal policies. The first, associated particularly with the speech of Lord Diplock in *Caldwell*[34] is that, if the criminal law is to operate with the

---

29 [1976] AC 182 at 203.

30 [1976] AC 182 at 215.

31 [1976] AC 182 at 209.

32 [1976] AC 182 at 225.

33 [2004] 1 AC 1034 at 1065.

34 [1982] AC 341.

concept of recklessness it may properly treat as reckless "the man who acts without even troubling to give his mind to a risk that would have been obvious to him if he had thought about it"[35]. The opposing view is that "only advertent risk taking should ever be included within the concept of recklessness in criminal law"[36] and that the first view diminishes the significance of the mental element in criminal culpability.

30 In *Satnam S and Kewal S*[37], the English Court of Criminal Appeal, when construing the 1976 UK Act, put *Caldwell* to one side. In the present case, the respondent does not seek to apply reasoning associated with *Caldwell* to the construction of the New South Wales statute. In England, a different situation now applies since the enactment of s 1 of the *Sexual Offences Act* 2003 (UK). This poses the question whether "A does not reasonably believe that B consents" and provides that whether such a belief is reasonable "is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents". This provision has been said to be designed to reverse the common law position established in *Morgan* and implemented in the 1976 UK Act[38].

31 But in this appeal the question remains as to what degree or extent of advertence in the state of mind of the complainant will answer the statutory criterion of recklessness found in s 61R(1) of the Act. That sub-section is a deeming provision which extends what otherwise might be the limited denotation of the phrase "does not consent" in s 61I. A person who is reckless as to whether the other person consents to the sexual intercourse "is to be taken to know" of a critical matter for s 61I, namely, that the other person does not consent to the sexual intercourse.

32 A starting point for further analysis of the legislation is that it was strongly influenced by developments in England, including *Morgan* and s 1 of the 1976 UK Act, and that those developments were not at odds with what was previously

---

35 [2004] 1 AC 1034 at 1065; cf *R v Kitchener* (1993) 29 NSWLR 696 at 703.

36 [2004] 1 AC 1034 at 1065.

37 (1983) 78 Cr App Rep 149 at 154.

38 *Rook and Ward on Sexual Offences Law and Practice*, 3rd ed (2004) at 55.

understood in Australian common law jurisdictions, as exemplified in *R v Daly*[39]. Different considerations may apply in the Code jurisdictions[40].

33 Secondly, it may be possible, as is the case elsewhere in the law, to construe the term "reckless" as involving measurement against an objective criterion. But, it is evident from the formulations in *Morgan* that there is a need here to accommodate the term to the requisite mental element. This, as stated in s 61I, is knowledge of absence of consent and s 61R(1) is appendant, albeit explanatory, of s 61I.

34 Thirdly, as Gibbs J emphasised in *La Fontaine*[41]:

> "The purpose of a summing up is not to endeavour to apprise the jury of fine legal distinctions but to explain to them as simply as possible so much of the law as they need to know in order to decide the case before them."

35 Fourthly, the following words of Professor Sir John Smith respecting s 1 of the 1976 UK Act are in point in construing s 61R(1)[42]:

> "If D is aware that there is any possibility that P is not consenting and proceeds to have intercourse, he does so recklessly. Lord Hailsham in *Morgan* required an 'intention of having intercourse, willy-nilly, not caring whether the victim consents or [no]'.[43] Another way of putting it is to ask, 'Was D's attitude one of "I could not care less whether she is consenting or not, I am going to have intercourse with her regardless."'[44] What, however, of the man who knows that the woman may not be consenting but hopes, desperately, that she is? He could care much less; but is he not reckless?"

---

39 [1968] VR 257.

40 See *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43.

41 (1976) 136 CLR 62 at 77. See also *Green v The Queen* (1971) 126 CLR 28 at 32-33 per Barwick CJ, McTiernan and Owen JJ.

42 Smith and Hogan, *Criminal Law*, 10th ed (2002) at 471.

43 [1976] AC 182 at 215.

44 *Taylor* (1984) 80 Cr App Rep 327; *Haughian* (1985) 80 Cr App Rep 334.

36 It may well be said that "reckless" is an ordinary term and one the meaning of which is not necessarily controlled by particular legal doctrines. However, in its ordinary use, "reckless" may indicate conduct which is negligent or careless, as well as that which is rash or incautious as to consequences; the former has an "objective", the latter a "subjective", hue. These considerations make it inappropriate for charges to juries to do no more than invite the application of an ordinary understanding of "reckless" when applying s 61R(1).

37 A direction that "reckless" has the meaning to be given by the jury in the particular circumstances of the case would be erroneous, and the respondent does not contend otherwise[45]. In the present case, the trial judge properly emphasised that it was not the reaction of some notional reasonable man but the state of mind of the appellant which the jury was obliged to consider and that this was to be undertaken with regard to the surrounding circumstances, including the past relationship of the parties.

38 The respondent's submission, recorded earlier in these reasons, is to the effect that in a particular case one or more of the expressions used in *Morgan* and by Professor Smith, as well as those recorded in the respondent's submission, may properly be used in explaining what is required by s 61R(1). That submission, as explained below, should be accepted.

39 The appellant's submission that proceeding with an awareness of a risk of non-consent cannot suffice without the "discrete mental state" described as "Even if I know, I would continue. It does not matter to me", should not be accepted.

40 The present case illustrates the point. The evidence of the complainant was that she was asleep and woke to find the appellant on top of her and then, for a few moments, "being half asleep", she was not sure who it was until she felt the appellant's head, realised who it was and pushed him off. The appellant's case was that the complainant was awake, she consented to intercourse and the appellant thought she was consenting.

41 With respect to the past relationship of the parties, the trial judge directed the jury:

> "The Crown is entitled to argue as it does, that even if there had been some earlier act of sexual intercourse, although [the complainant] denies that there had been any such act and the accused said there had, but even if there had, the Crown is entitled to argue, the last time there was

---

45 cf *Green v The Queen* (1971) 126 CLR 28 at 32-33.

> any attempted intimacy between the two of them was this attempted kiss a few weeks before and she had rebuffed him. That, he says, the accused says in evidence, 'Well that doesn't mean that she was rejecting me for all time', but you might think, so the Crown is entitled to put, that it at least put him on notice that she might not be willing to have intercourse with him on 6 October. And that is important from this point of view, the Crown suggested to you late in the piece in his closing address, that even on the accused's point of view, you might find that he knew she was not consenting, because he was reckless."

42 In this setting, as it will be in many other cases, it was proper for the trial judge to have gone on to direct the jury in the terms which the appellant challenges.

43 The Court of Criminal Appeal did not err in dismissing the appeal and the further appeal to this Court should be dismissed.

44 CALLINAN J. The appellant was convicted in the New South Wales District Court of breaking and entering a dwelling house, and committing the serious indictable offence of sexual intercourse with the complainant knowingly without her consent. He unsuccessfully appealed to the Court of Criminal Appeal on the ground that the trial judge's direction to the jury with respect to absence of consent was defective. It is against the dismissal of that appeal that he now appeals to this Court.

45 The issue which the appeal raises is the proper construction of s 61R(1) of the *Crimes Act* 1900 (NSW), and in particular the meaning and effect to be given to the word "reckless" used in it.

Facts and previous proceedings

The Crown case

46 The appellant was the complainant's cousin. They had been friends as well as relatives. On one occasion about two months before the alleged offence, the complainant had rejected the appellant when he had tried to kiss her. She had some difficulty in persuading him to leave her alone. The complainant told her mother about the appellant's advances.

47 Some weeks afterwards the appellant visited the complainant's house late at night and "banged" on her door. He did not gain entry. When a neighbour told the appellant in coarse language to leave he did.

48 On the night of the offences the complainant spent some time at a local tavern with friends. The appellant was also present with some of his family, including Mr and Mrs Sheridan, his uncle and aunt, the owners of the tavern. The complainant approached the appellant there, and complained to him about his conduct in coming to her house late at night and knocking loudly on her door. The complainant left the tavern at about 8:30 pm and went to an hotel which she left at about 10:00 pm. After spending about an hour at a friend's house she returned to her home.

49 Before retiring for the evening she checked that the house was secure. She placed rods behind the sliding windows to prevent them from being opened from outside. The complainant's children were staying at their grandmother's house that evening and she was accordingly alone. It was her practice to sleep naked and she did so on that night. She fell asleep with the television in her room playing.

50 The complainant recalled "waking up with somebody on top of me and not knowing who it was". That person was attempting to have vaginal intercourse with her. He effected penetration. The darkness prevented the

complainant from seeing who it was. The television set had been turned off. Her evidence, of recognition, continued:

> "I realised who it was … when I'd sort of reached up and touched his head and realised that he had a bald head … I asked him how could he do this to me. I told him to get off and to get out."

51 She said she could feel that the appellant was naked. She pushed him away and told him to leave. Only a few seconds passed between her awakening and his leaving the bed. The appellant stood up and dressed as the complainant continued to demand that he leave.

52 After the appellant's departure the complainant found one of his pay slips at the end of her bed, and his glasses on the top of the television set. The window of a room downstairs was open. The complainant showered and went to the house of a neighbour to complain about what had happened to her.

53 The next morning the complainant noticed that there was a chair outside the downstairs room, a window of which had been opened the previous evening. She also saw a can of alcohol on the top of her garbage bin. She told a male friend and her mother about the intrusion and intercourse. Her next step was to make a complaint to the police. The police arranged for her to be physically examined.

54 Cross-examination of the complainant: Under cross-examination the complainant agreed that about three months previously she had seen the appellant at the tavern and had kissed him on the cheek. She denied suggestions that on other occasions she had told him that he could stay the night at her house if it was difficult for him to return to where he was living (which was several kilometres outside the town). She also denied that on a Friday night about six weeks before 6 October, she had invited the appellant to stay at her house, and that consensual sexual intercourse had then taken place.

55 She gave evidence that about four weeks before making the complaint, the appellant had come to her house with some beer and that while he was there he had tried to kiss her, an advance which she rejected. She said that she had convinced him to leave.

56 The complainant was closely cross-examined about the immediate events:

> "Q. You said that when you woke up you felt someone on top of you?
>
> A. Mm mm.
>
> Q. That he was trying to push his penis into you?
>
> A. Mm mm.

Q. And kiss you? And then he did push it in? So do you recall having any – having a dream or anything like that, immediately before you woke up?

A. It was – that was like a dream, cause I was half asleep.

Q. Was there sort of a waking period where you weren't sure whether you were awake, or asleep?

A. Yes.

Q. And I suppose you wouldn't know how long that went on for?

A. It was only a matter of seconds.

Q. But you don't know that do you, if you were half asleep?

A. Well I, something made me wake up, very quickly.

Q. So do you say – let's be clear about this, do you say that you were awake when his penis was placed inside your vagina?

A. No I believe I was in like a half-asleep-dream sort of state. Still coming out of –

Q. You wouldn't say you were asleep though?

A. I was, no. I was in that half-asleep sort of stage."

57 She also repeated that when she woke she believed that a person other than the appellant was engaged in intercourse with her: it was not until she reached up and touched his bald head that she realised that it was the appellant.

58 *Other Crown witnesses*: The neighbour to whom the complainant first complained gave evidence that the complainant knocked on her door "late in the evening or in the early morning" looking extremely distressed. She said the complainant told her that her "cousin raped me, they [sic] climbed into my bed, I didn't know or didn't realise who it was".

59 The complainant's mother also gave evidence which included that, "about six to eight weeks before the incident … [the complainant] told me that [the appellant] had tried to kiss her and she wondered why, because he was her cousin, she was upset about that". The complainant's mother said that the complainant was crying as she spoke. The complainant's mother said that on the morning after the intrusion she had gone to the complainant's house to drop off the children. Upon her arrival the complainant was "visibly upset". The complainant said to her mother "I had sex with [the appellant]. I didn't know it was him. When I realised it was him I pushed him off. I'm sick about it".

60 Her mother gave further evidence that a few days later she had spoken on the telephone to the appellant. He said then that he "didn't do anything. He did say that [the complainant] had invited him to stay at her house on a couch, if he needed a place to sleep … I said to him, 'You were there weren't you?' and he said 'Yes I was'".

61 Police officers gave evidence at the trial. The appellant admitted to one of them that he had visited the complainant's house: "I went around there, tried the windows and doors, no one answered. I went and stayed at a mate's place".

62 Constable Pearce conducted an electronically recorded interview of the appellant in the presence of his uncle Mr Sheridan at 7:45 pm on 6 October. The appellant said that he had met the complainant at the tavern, that he had spent several hours there and then gone to another hotel and a private party. He had later gone to the complainant's house to see if he could stay the night there. He knocked on the windows and doors but there was no answer. The back door of the house was unlocked and he went inside. He called out to the complainant. He went upstairs and found her asleep in her bedroom. He spoke to the complainant. She woke. He asked if he could stay the night. She said that he had better leave and this he did.

63 On 6 October a detective inspected the complainant's house. He found a shoe print on the chair which had been placed outside the window which the complainant had found open on the morning of the intrusion. The imprint corresponded with the soles of the shoes the appellant had been wearing.

64 Evidence was given that DNA testing of a stain on the appellant's underpants matched the respective DNA profiles of the complainant and the appellant.

65 Fingerprint evidence established that palm prints taken at various places in the complainant's house were identical with those of the appellant. The positions of the palm prints were consistent with entry by the appellant through the window that was found to be open by the complainant the next morning.

66 The evidence of the examining doctor was that the complainant was uninjured although there was some redness around the genital area not inconsistent with consensual sexual intercourse.

67 A transcript of the proceedings in which the appellant was first arraigned and pleaded guilty before Hosking DCJ on 26 March 2003 was also admitted into evidence. On that occasion, the plea was rejected and a plea of not guilty entered. The appellant was subsequently tried by Freeman DCJ and a jury. That transcript disclosed that the appellant had given evidence that he saw the complainant once or twice a week at the tavern. They were on friendly terms.

The complainant would usually greet him with a hug and a kiss. She had offered her townhouse to him if he needed somewhere to stay.

68 He said in evidence at the trial that they had engaged in consensual sexual intercourse a few weeks after their first meeting at the tavern. He had gone to the complainant's house to find the front door unlocked. When he entered he saw that the complainant was asleep on a lounge downstairs. He assisted her upstairs. In the bedroom they hugged and kissed before sexual intercourse.

69 Thereafter the appellant and the complainant saw each other regularly at the tavern. Each time the complainant greeted the appellant with a hug and a kiss.

70 A couple of weeks after the consensual intercourse the appellant went to the complainant's house where he knocked on the front door. There was no answer. A neighbour came out and told the appellant to leave. Approximately a week later the appellant went again to the complainant's house with some beer. The complainant invited him into the house. He accepted that the complainant rejected his advances on this occasion.

71 The appellant denied the disagreeable exchange at the tavern of which the complainant gave evidence. He said that after leaving a party he went to the complainant's house to take up her earlier offer to stay there. He knocked on the windows and doors, but there was no answer. He entered the house through a downstairs window using a chair to reach it. He saw no rod behind the window.

72 Inside, he turned on some lights and called out to the complainant. There was no response. He went upstairs and saw the complainant in her bed asleep. He called her name and shook her leg to wake her. "She woke up a little bit – like she was a bit groggy". He asked her what she had done after she left the tavern. The complainant said that she had gone home. The appellant lay down beside the complainant on the bed. He asked the complainant where the children were. She said that they were at her mother's house. The following extract of the appellant's evidence should be reproduced:

> "Then I put my arm around her and we kissed again and hugged each other and then we were like stroking each other's upper bodies – like we were kissing.
>
> …
>
> Then like [the complainant] when stroking me she lifted my shirt up a bit and then we were still kissing and then I've stopped kissing her and then we've pulled my shirt off and then I took my shoes and pants off while I was laying down beside her and hopped under the blankets with her.

...

Some more kissing and hugging and then I hopped on top of her and we were engaged in – well getting to engage in having sex with her and then she's – minute or so later, she's pushed me and said 'No, stop'."

The appellant agreed that penetration had occurred before the complainant pushed him away. The following questioning then took place:

"Q. And did – did you do anything when she told you to stop?

A. Yeah, I stopped having sex with her and sort of leant back and got off the bed and asked her what was – what was the problem, you know what's wrong.

Q. Did she answer that?

A. No she just told me to leave. Told me to leave and get out and go – go home.

Q. And what did you do then?

A. Me, I got my clothes and went out – oh I got dressed, went out the bedroom and down the stairs and out through the front door.

Q. Where did you go?

A. I went to a friend's place just down the road a little bit further towards [the country town] and stayed at his house."

73 To that exchange should be added these questions and answers:

"Q. I suggest to you that you were conceding that this lady hadn't woken up and she hadn't given any consent?

A. No, that's not correct sir.

Q. So you were, in effect, in a situation I suggest, where you had intercourse with this lady when she initially was asleep and then woke up?

A. No sir.

Q. And that you didn't get any consent from her at all?

A. No sir.

Q. Do you think, at any stage, it might have been wise to have sort of made sure that she was a consenting party to this?

A. That I what?

Q. Do you think it might have been wise to have made sure, by asking her, whether she was a consensual partner?

A. I was aware that – at the time she was awake.

Q. I'm not asking you that, What I'm saying to you is, don't you think it would have been wise to have at least found out whether she was consenting or not?

A. How do you do that sir?

Q. I'd suggest to you that by waiting until she wakes up might be a way?

A. No, I was in the belief she was sir.

Q. You've said, on a previous occasion, 'that she was vaguely awake'?

A. Well I did, I did, yeah.

Q. And if she was vaguely awake how would she give her consent to what you did?

A. She was awake enough to have a brief conversation with me and rubbing my body, so –

Q. I'd suggest that there wasn't any rubbing of the body at all?

A. Yes there was.

Q. You came into that bedroom, in the darkness, turned the television off so that she would not recognise you, took your clothes off and got onto the bed with her, didn't you?

A. No sir.

Q. And you then started to have intercourse with her while she was asleep?

A. No sir.

Q. And then she woke up and as soon as she realised what was happening she told you to stop and get off?

A. That's what happened".

74 The appellant's explanation for his earlier, different version of the evening was that he had been too embarrassed to admit the true facts in the presence of his uncle, Mr Sheridan.

75 Counsel for the appellant submitted in his final address to the jury that, even if they were satisfied that the complainant did not consent to sexual intercourse with the appellant, they would not be satisfied that the appellant knew that she was not consenting. He referred to evidence of the appellant that he was affected by alcohol, and that "he thought she was consenting, he'd spoke[n] to her, he was of the genuine belief that she knew who he was, and that she was consenting to have sex with him because she was stroking him, she was putting her arm up under his shirt and he was stoking her and one thing led to another". Counsel also referred to the appellant's evidence that he "stopped as soon as he was told to". This compliance, it was submitted, was consistent with an honest belief that the complainant was consenting. Later, counsel referred to the appellant's claim of an earlier occasion of consensual intercourse, when the appellant had been invited to stay at the complainant's house and when both of them were intoxicated.

The statutory provisions

76 The only point taken on appeal to the Court of Criminal Appeal, and here, is that the trial judge erred in his directions in respect of s 61I and particularly s 61R of the *Crimes Act*, both of which should be set out:

"**61I Sexual assault**

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years."

Section 61R states:

"**61R Consent**

(1) For the purposes of sections 61I, 61J and 61JA, a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse is to be taken to know that the other person does not consent to the sexual intercourse.

(2) For the purposes of sections 61I, 61J and 61JA and without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated:

(a) a person who consents to sexual intercourse with another person:

(i) under a mistaken belief as to the identity of the other person, or

(ii) under a mistaken belief that the other person is married to the person,

is to be taken not to consent to the sexual intercourse, and

(a1) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes (or any other mistaken belief about the nature of the act induced by fraudulent means) is taken not to consent to the sexual intercourse, and

(b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) or (a1) is to be taken to know that the other person does not consent to the sexual intercourse, and

(c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse, and

(d) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse".

The summing up

77 In summing up, the trial judge explained that on the Crown case the appellant had penetrated the complainant "when she was asleep and consequently no consent can arise." His Honour put the alternative Crown case based on s 61R(2)(a)(i), that if the jury thought that there was a period during which the complainant was in a waking state but not fully conscious, and appeared to be, but was not, consenting to intercourse with the appellant, although she may have been prepared to have intercourse with another person whom she believed the appellant to be, there could be no valid consent.

78 Next, his Honour explained the element of knowledge of absence of consent as it related to this case: that if the complainant's evidence were accepted, the appellant must be taken to have known that the complainant was not consenting, because he had penetrated the complainant before she had woken up.

79 The trial judge then reviewed some of the arguments put by the Crown and counsel for the appellant on the issue of whether it was reasonably possible that there had been an absence of knowledge that the complainant was not consenting. One of those arguments was that, even on the appellant's own evidence, on the last occasion before 6 October on which he had attempted intimacy with the complainant, she had rejected his advance. The trial judge said:

> "… the Crown suggested to you late in the piece in his closing address, that even on the accused's point of view, you might find that he knew she was not consenting, because he was reckless.
>
> The law says, a person who has sexual intercourse with another, without the consent of that other person and who is reckless as to whether that other person consents or not, is to be taken to know that the other person is not consenting. So if you just go ahead and do it willy-nilly, not even considering whether the person is consenting or not, you are reckless and the law says you are deemed to know that the person is not consenting.
>
> It is in that context that the Crown argues, as I understand it, that even on his own version of things, the last attempt at intimacy, he had been rebuffed. He had no right to assume that she was going to consent on this night; it was after all half past 2 in the morning, she was asleep when he got there. There had been no prior arrangement between them. She was only, in his terminology, 'vaguely awake' and he had no right to consider that she was likely to be consenting, indeed he was reckless as to whether she did or not express consent. Or he may not have even thought about it.
>
> If you do not think about it of course, that is reckless in the extreme. What you have to concentrate on is what was in his mind. It is not a question of deciding whether you would have acted in the same way or whether the notional reasonable man would have acted in the same way in the situation in which the accused found himself. You have to consider what was in his mind. Did he have any basis for a belief that she was consenting or has the Crown persuaded you that he had in fact no basis for any such belief, either because he had penetrated her before she woke up and because there had been no prior sexual act between them and it is relevant to consider, as [counsel for the appellant] said to you yesterday, that he had, in fact, taken alcohol that night, because if he is intoxicated, that certainly does have an effect, to a greater or lesser extent, upon his capacity to form judgments about whether this is a reasonable thing to do and so on, as to whether it is appropriate to believe that she is consenting."

80 The judge then referred to the submissions of both parties. In relation to the Crown case his Honour said:

> "… the more likely scenario being that which the Crown sketched, with him entering the house, not making his presence known at all, but penetrating her before she was awake or fully awake and indeed on that basis he suggests to you that at the very least, you would find that he had been reckless and then the law would require you to find that he knew, because a person who is reckless about whether there is consent or not is deemed to know there is not consent."

In relation to the appellant's case his Honour said:

> "… he had this belief that she was consenting, because of their prior experience [of sexual intercourse], because of the way in which she was physically reacting [on the night of 6 October, according to the appellant's evidence] and so on".

81 Following the summing-up the jury asked some questions of the judge, of no present relevance. The following exchange occurred after his Honour had answered them:

> "Foreman: One of the jury members has asked us to ask this on their behalf, they want advice if a person in a partly awake partly asleep state gives non-verbal bodily response indications, can that be taken as being consent to sex.
>
> His Honour: No.
>
> Foreman: Thank you.
>
> His Honour: It cannot be taken as consent because that person is not making a conscious, willing acceptance of the act. The relevance of that question, I daresay, is whether the other party can have a reasonable belief that it represents consent. Do you understand the distinction? Now, I may need to say more to you about that when I listen to counsel because it is not, I am not satisfied that I have answered that completely fully until I have had the chance to talk to them about it. So would you like to retire and I will bring you back and give you a complete answer in a moment."

82 The trial judge invited submissions from counsel. Each sought a redirection. Counsel for the appellant submitted:

> "And I think, your Honour, when you spoke to them about it, sorry in your summing-up earlier on, when talking about that aspect, your Honour put in some words based, I think you used the word 'based on' – if he had a belief based on reasonable grounds, in the context of the element of him knowing that she wasn't consenting. I think you said if he had a belief based on reasonable grounds that she was consenting then obviously

they'd find him not guilty. It's my submission that because it's really only a subjective issue that it, in my submission it doesn't have to be based on anything. The fact is if they're not satisfied that he didn't have a genuine belief that she was consenting then they should find him not guilty even if that belief or the possibility that he did believe that she was consenting, wasn't, in their view, based on reasonable grounds".

83 The trial judge then gave the following further directions to the jury:

"Right, now the question you asked was whether it could be construed as consent if a woman, in a sort of half awake condition, non-verbally reacted in such a way as to appear to accommodate sexual intercourse, or words to that I think, and I said 'no, that's not consent'. That's not consent for two reasons: it's not a conscious decision, willingly, to co-operate in an act of sexual intercourse and or, perhaps these are alternatives, it may be a co-operative state brought about by a belief, for example, that the sexual partner is somebody else. You'll remember the evidence about dream states and her belief that, for at least a little while, that it was in fact somebody else. A mistake about the identity of the person with whom one is engaged in sex vitiates consent. There can be no consent to sex with the actual person if the apparent consent is brought about by this misunderstanding. So that's why it's not consent. The question that you framed.

But the other question that I adverted to is really whether that may give rise to a belief on the part of the accused in this case that there was consent. There are two answers to that as well; or two reasons for the answer. You will remember that I told you that knowing that a person is not consenting can consist of actually knowing – I mean you may have asked and they have said 'no' so you know perfectly well that they are not consenting or it may consist of being reckless. Remember the law that I told you was that if a person has sexual intercourse with another without the consent of that person and if the offender is reckless as to whether that other person consents or not then they are taken to know that the person is not consenting. Now, recklessness is a factor to advert to in the question of whether the person is consenting or not. It does not have to be the product of conscious thought. If the offender does not even consider whether the woman is going to consent or not, then that is reckless and he is deemed to know that she is not consenting. If he is aware that there is a possibility that she is not consenting but he goes ahead anyway, that is recklessness. But it is his state of mind that you are obliged to consider and including in that is the concept I discussed with you yesterday about the fact that he had had something to drink, just how drunk he was, how much he had sobered up, how capable he was of making this decision and so on.

> In the end the Crown has to prove to you beyond reasonable doubt (a) that she was not consenting – and it relies on her evidence for that, that she did not consent to sex with this accused. There may have been a time when she was under a misapprehension that she was consenting to sex with somebody else or having sex with somebody else, a sort of dream state, but that is not consent, as I have already explained to you. So the Crown relies on her evidence to say that she was not consenting and the Crown suggests that you will be persuaded beyond reasonable doubt that he either knew, because he penetrated her before she woke up, or he was reckless in the sense that he did not even consider whether she was going to consent or not, or at least he recognised that there was a possibility that she may not consent but he went ahead and did it anyway and the accused case is that he thought she had consented, and he had this belief."

84 Following these directions the trial judge asked counsel whether any further ones were required. Neither sought any.

85 The appellant was convicted and sentenced to a term of imprisonment of five years with a non-parole period of three years.

The Court of Criminal Appeal

86 The Court of Criminal Appeal of New South Wales (Bryson JA, James and Kirby JJ) dismissed the appellant's appeal[46]. James J, with whom Bryson JA and Kirby J agreed, said this[47]:

> "I accept counsel for the appellant's submission that recklessness was a real issue at the trial of the appellant and that it was necessary that the directions which the trial judge gave concerning recklessness and knowledge of absence of consent should have been correct. Even if recklessness had not been a real issue at the trial, the trial judge gave directions about recklessness and, those directions being given, it was important that those directions should have been correct. In *Tolmie*[48] Kirby P observed that, having regard to the issues at the trial in that case, the direction the trial judge had given about recklessness was unnecessary and it would have been preferable if it had not been given. However, his Honour continued:

---

46 *R v Banditt* (2004) 151 A Crim R 215.

47 (2004) 151 A Crim R 215 at 228-229 [76]-[79].

48 *R v Tolmie* (1995) 37 NSWLR 660 at 665.

'However, once given it was necessary that the direction should be made in accordance with the law, in case the jury might have acted upon it and been misled'

The Crown can, of course, prove the element of an offence under s 61I, that the accused knew that the complainant did not consent to the sexual intercourse, by proving that the accused had that knowledge. However, s 61R of the *Crimes Act* provides that a person who is reckless as to whether the other person consents to the sexual intercourse is to be taken to know that the other person does not consent to the sexual intercourse.

It is now well settled 'that, where the accused has not considered the question of consent and a risk that the complainant was not consenting to sexual intercourse would have been obvious to someone with the accused's mental capacity, if they had turned their mind to it, the accused is to be taken to have satisfied the requisite mens rea referred to by the word 'reckless' in s 61R of the *Crimes Act 1900*'[49]. Although it is necessary to be cautious in using labels, such a form of recklessness can be described as 'non-advertent' recklessness. In the present trial the trial judge gave directions about non-advertent recklessness. The trial judge told the jury that a person who does not even consider whether the other person is consenting or not to sexual intercourse is reckless as to whether the other person is consenting to sexual intercourse. No complaint was made on this appeal about the directions the trial judge gave about non-advertent recklessness.

Apart from non-advertent recklessness, it is clear that a person can be taken to know that the other person is not consenting to sexual intercourse by virtue of a kind of recklessness in which the first person has actually adverted to whether the other person is consenting to sexual intercourse. In my opinion, it is sufficient to constitute this kind of recklessness that the first person realises that the second person might not be consenting and, notwithstanding that realisation, decides to proceed to have sexual intercourse with her and has such sexual intercourse, without there being some additional, independent requirement that he is determined to have sexual intercourse with her, whether or not she is consenting."

87 Later his Honour said this[50]:

---

49 *R v Tolmie* (1995) 37 NSWLR 660 at 672 per Kirby P citing *inter alia R v Henning*, unreported, New South Wales Court of Criminal Appeal, 11 May 1990; *Hemsley* (1988) 36 A Crim R 334 and *R v Kitchener* (1993) 29 NSWLR 696.

50 (2004) 151 A Crim R 215 at 232-233 [93]-[94].

"As I have already indicated, it was common ground on the hearing of the appeal that, if it was reasonably possible that the accused believed that the complainant was consenting, the accused would have to be acquitted, whether or not there were any reasonable grounds for such a belief[51]. I accept that some of the expressions the trial judge used [in] the summing-up had the potential to be misleading, that it would have been prudent for the trial judge to have given the direction he was asked by counsel to give and that the trial judge did not in his further directions give such a direction. However, I have concluded that the directions the trial judge did give were sufficient to ensure that the jury had a correct understanding that it was not necessary that any belief the appellant had that the complainant was consenting should be based on reasonable grounds. The trial judge in his earlier directions did not in fact go so far as to say, as was suggested by counsel for the appellant ... that it was necessary that any belief that the complainant was consenting be based on reasonable grounds. The trial judge would, of course, have been entitled to tell the jury that, in determining whether in fact the appellant had believed or might reasonably possibly have believed that the complainant was consenting, the jury could examine whether there would have been any grounds for such a belief. [In] the summing-up the trial judge, correctly, stressed that what the jury had to concentrate on was what was in the appellant's mind and not what might have been in the mind of the notional reasonable man. The trial judge further directed the jury that it would be relevant to take into account the extent to which the appellant was intoxicated and this direction would have reinforced the earlier direction that what the jury had to determine was the actual state of mind of the appellant.

In ... further directions ... the trial judge again told the jury that 'it is his state of mind that you are obliged to consider' and again referred to the possible effect of intoxication on the mental capacity of the appellant. The trial judge concluded the further directions by saying that 'the accused's case is that he thought she had consented and he had this belief'. In these further directions the trial judge did not say anything which would have suggested that a belief that the complainant was consenting would have to be based on reasonable grounds. At the conclusion of these further directions the trial judge asked counsel whether any other direction was sought and counsel for the appellant replied in the negative."

---

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

The appeal to this Court

88 The respondent submits that the questions for this Court are, whether, on the one hand, in order for a person to be convicted of (reckless) rape it must be shown that the accused was aware that the complainant might not be consenting, and, indifference on the part of the accused to that risk, or a determination to have intercourse regardless of consent or not. On the other hand, can it be said, he asked, that the true question is whether recklessness consists of persistence in intercourse absent a belief in consent, or, is that a concept which is the same as either, "indifference to whether or not there is consent", "determination to have intercourse whether or not the complainant is consenting", or, "awareness of the possibility that the complainant is not consenting and proceeding anyway". It is a further question, he submitted, whether in any event, any of the formulations used are different in substance from one another.

89 A consideration of recent developments of the law of rape should begin with the speeches in the House of Lords in *R v Morgan*[52]. The trial judge in that case had told the jury that if they came to the conclusion that the complainant had not consented to the intercourse in question, but that, the defendants believed, or may have believed, that she was consenting, they must nevertheless find the defendants guilty of rape if they were satisfied that they had no reasonable grounds for so believing. Lord Cross of Chelsea in his speech said that the point in dispute was as to the quality of belief entitling a defendant to be acquitted and the evidential burden of proof with regard to it[53].

90 After discussing a number of the authorities his Lordship said this[54]:

> "But, as I have said, section 1 of the Act of 1956 does not say that a man who has sexual intercourse with a woman who does not consent to it commits an offence; it says that a man who rapes a woman commits an offence. Rape is not a word in the use of which lawyers have a monopoly and the first question to be answered in this case, as I see it, is whether according to the ordinary use of the English language a man can be said to have committed rape if he believed that the woman was consenting to the intercourse and would not have attempted to have it but for this belief, whatever his grounds for so believing. I do not think that he can. Rape, to my mind, imports at least indifference as to the woman's consent."

---

52 [1976] AC 182.

53 [1976] AC 182 at 200.

54 [1976] AC 182 at 203.

91 A little later his Lordship pointed out that recent cases in New South Wales and Victoria, with one exception, *R v Daly*[55], made no reference to the fact that to include in the definition of the offence an intention to have intercourse whether or not the woman consents, and to say that a reasonable mistake with regard to consent is an available defence to a charge of rape, are two incompatible alternatives which cannot be combined in a single direction to a jury[56]. As the direction to the jury in *Morgan* failed to resolve that incompatibility, his Lordship concluded that the summing up contained a misdirection. It was only because his Lordship thought that the jury must have regarded the defendants' stories as a "pack of lies", that he applied the proviso and dismissed the appeal.

92 After an extensive review of the authorities, Lord Hailsham of St Marylebone, said this[57]:

> "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. In the former case it succeeds, and in the latter if fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held, and it matters not whether, to quote Bridge J in the passage cited above, 'the definition of a crime includes no specific element beyond the prohibited act'. If the mental element be primarily an intention and not a state of belief it comes within his second proposition and not his third. Any other view, as for insertion of the word 'reasonable' can only have the effect of saying that a man intends something which he does not."

93 Lord Simon of Glaisdale said this of recklessness[58]:

> "To say that, to establish a charge of rape, the Crown must show on the part of the accused 'an intention to have sexual intercourse with a

---

55 [1968] VR 257.

56 [1976] AC 182 at 203-204.

57 [1976] AC 182 at 214.

58 [1976] AC 182 at 216.

> woman without her consent' is ambiguous. It can denote either, first, an intention to have sexual intercourse with a woman who is not, in fact, consenting to it. This was the contention advanced on behalf of the Director of Public Prosecutions before your Lordships; but, for the reasons given by my noble and learned friends, I do not think that it is acceptable. Or, secondly, it can mean an intention to have sexual intercourse with a woman with knowledge that she is not consenting to it (or reckless as to whether or not she is consenting). I believe that this second meaning indicates what it is that the prosecution must prove."

94 Lord Edmund-Davies (with whom Lord Simon of Glaisdale agreed on this point) said this[59]:

> "... the conclusion I have come to is that the necessary course is to uphold, as being in accordance with established law, the direction given in this case by the learned trial judge as to the necessity for the mistake of fact urged to be based on reasonable grounds. The approach which I should have preferred must, I think, wait until the legislature reforms this part of the law, just as it did in relation to the former presumption of intending the reasonable consequence of one's actions by section 8 of the Criminal Justice Act 1967. The proponents of such reform will doubtless have regard to the observations of Lord Reid in *Sweet v Parsley*[60]. On the other hand, those who oppose the notion that honest belief should per se suffice, on the ground that it facilitates the raising of bogus defences, should bear in mind the observations of Dixon J in *Thomas v The King*[61] cited with approval by Lord Reid in *Reg v Warner*[62]. But, the law being as it now is and for a long time has been, I find myself obliged to say that the certified point of law should be answered in the affirmative."

95 Lord Fraser of Tullybelton was of the same opinion as Lord Cross of Chelsea and Lord Hailsham of St Marylebone in saying this[63]:

> "That second direction, although not without precedent, is in my opinion impossible to reconcile with the first. If the defendant believed (even on unreasonable grounds) that the woman was consenting to intercourse then

---

59 [1976] AC 182 at 235.

60 [1970] AC 132 at 150.

61 (1937) 59 CLR 279 at 309.

62 [1969] 2 AC 256 at 274.

63 [1976] AC 182 at 237.

he cannot have been carrying out an intention to have intercourse without her consent."

96 These matters have to be kept in mind in considering *Morgan*. Each of their Lordships who discussed recklessness or like concepts used similar but far from identical language in describing or defining it. Furthermore, it was not the particular point in issue in that case. It follows that assertions that statements of their Lordships were templates for subsequent legislation, should be treated with caution, a matter to which I will refer again.

97 In this Court the respondent adopted as part of his submissions a commentary by Dr G D Woods, a former director of the Criminal Law Review Division of the Department of Attorney-General and of Justice of New South Wales on the *Crimes (Sexual Assault) Amendment Act* 1981 (NSW), and cognate Act, which introduced the precursors to the two sections under particular consideration here, and relevantly used much the same language. In his commentary, Dr Woods said this[64]:

> "The proposition that recklessness as to consent suffices as the required mental element of rape is made quite clear in these decisions, and accordingly section 61D(2) is not a novelty. It is emphasized that recklessness for the purpose of that subsection is intended to mean, and clearly does mean, *subjective* recklessness. The erroneous use of the term 'recklessness' as synonymous with 'gross negligence' is unfortunate and to be avoided. It confuses the important distinction between a mental element requiring the jury to make an assessment as to the state of mind of the accused himself at the relevant time, and a mental element requiring the jury to determine what would have been the state of mind of a reasonable person transposed into the particular situation at the relevant time.
>
> The proper use of the term 'recklessness' in relation to the law of rape is in terms of a subjective requirement: the decisions in Morgan, Maes, Brown and McEwan make this clear. Section 61D(2) does not attempt to introduce into New South Wales law the notion of sexual assault by negligence, even though it could perhaps be argued that for the period of years while *R v Sperotto*[65] was followed in New South Wales, we did have a law of rape by negligence. That decision is no longer law

---

64 Woods, "Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act, 1981, and Cognate Act", (1981) at 16-17.

65 [1970] SR(NSW) 334.

in New South Wales. Section 61D(2) is not an attempt to reintroduce its effect.

That section 61D(2) should be interpreted subjectively is supported by the statutory expression of the rule in *R v Morgan* in section 1 of the UK *Sexual Offences (Amendment) Act*, 1976:

> '... a man commits rape if –
>
> (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
>
> (b) at the time he knows that she does not consent to the intercourse *or he is reckless as to whether she consents to it.*'

The latter words were certainly intended to, and have been interpreted so as to, require proof of subjective foresight of the possibility of non-consent. There is every reason why section 61D should be similarly interpreted.

Both in England and New South Wales it is a defence to a charge of rape if the accused honestly believed at the relevant time that the other person consented to the sexual act alleged. More accurately, the Crown must prove that the accused, at the relevant time, foresaw at least the possibility of non-consent, but went ahead regardless. Any reasonable possibility that at the relevant time the accused held an honest belief that the other person did consent, must be eliminated by the prosecution.

It follows from the definition of the offence established in section 61D that the so-called 'defence of honest mistake as to consent' which applies in relation to rape will also apply in relation to the new offence. Some criminal jurists take the view that the use of the term 'defence' in this context is misleading, because the Crown must affirmatively prove that there was no such honest belief, reasonable or otherwise, even if the accused sits mute and unrepresented through his trial. But in the realistic sense that a 'defence' means whatever forensic tactics the accused adopts in order to escape liability, it is correct to speak of the 'defence' of honest mistake as to consent."

98 In my opinion, it is less than clear that either the *Sexual Offences (Amendment) Act* 1976 (UK), the *Crimes (Sexual Assault) Amendment Act* 1981 (NSW) or the current sections of the *Crimes Act* with which the Court is concerned here are an attempt at a statutory expression of the rule in *Morgan*. If they are, two questions arise. First, whose statement of the rule in *Morgan* was enacted? The formulations of each of their Lordships were not identical. Secondly, why was not language in exactly the same form as stated by one of their Lordships adopted in the relevant Acts? In particular, why did the

legislators omit such additional words as, for example, "not caring whether the victim be a consenting party or not" or "without caring whether or not she was a consenting party", which were used by Lord Hailsham of St Marylebone[66] and Lord Edmund-Davies[67] respectively, to qualify or amplify the meaning of "recklessly"? Whether the defendants in *Morgan* had been reckless, as I have already indicated, was not the way the principal issue was put. It was, rather, whether an honest belief as to consent had also to be a reasonable one. It cannot however be doubted that *Morgan* did provide the stimulus for the legislation to which Dr Woods referred, and which was introduced into the United Kingdom in the next year following the Report of the Advisory Group on the Law of Rape pursuant to the Parliament of the United Kingdom in December 1975 ("the Heilbron Report").

99 It is not surprising in my opinion, that the speeches in *Morgan* and the ensuing legislation generated, so far as "recklessness" in rape is concerned, a plethora of academic writings and uncertainty[68].

100 In *R v Pigg*[69] the English Court of Appeal (Lord Lane CJ, Talbot and McCowan JJ), by reference to *R v Caldwell*[70] and *R v Lawrence*[71], two cases on

---

66 [1976] AC 182 at 209, his Lordship said that:

> "[I]f the intention of the accused is to have intercourse nolens volens, that is recklessly and not caring whether the victim be a consenting party or not, that is equivalent on ordinary principles to an intent to do the prohibited act without the consent of the victim."

67 [1976] AC 182 at 225, his Lordship said that:

> "[T]he man would have the necessary mens rea if he set about having intercourse *either* against the woman's will *or* recklessly, without caring whether or not she was a consenting party."

68 See for example Yell, "'Recklessness' in the criminal law", (1981) 145 *Justice of the Peace* 243; McEwan and Robilliard, "Recklessness: the House of Lords and the criminal law", (1981) 1 *Legal Studies* 267; Williams, "Divergent Interpretations of Recklessness – 1", (1982) 132 *New Law Journal* 289; Williams, "Divergent Interpretations of Recklessness – 2", (1982) 132 *New Law Journal* 313; Williams, "Divergent Interpretations of Recklessness – 3", (1982) 132 *New Law Journal* 336; Ferguson, "Reasonable belief in rape and assault", (1985) 49 *Journal of Criminal Law* 156; Williams, "The unresolved problem of recklessness", (1988) 8 *Legal Studies* 74.

69 [1982] 1 WLR 762; [1982] 2 All ER 591.

70 [1982] AC 341.

the new statutory definition which included recklessness, and which reached the House of Lords, said that a man is reckless if[72]:

> "... either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not, or, that he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not."

101 *Morgan* had earlier been referred to in Australia by Bray CJ in the Supreme Court of South Australia (in Banco) in *R v Wozniak*[73]. His Honour there endorsed this passage from the trial judge's summing up[74]:

> "[An accused] cannot be convicted if he honestly believed that the female consented to the act of sexual intercourse. The Crown bears the onus of proving that the accused had unlawful sexual intercourse with the female concerned, without her consent, knowing that she was not consenting, or without any genuine belief on his part that she was consenting. Or that he went on and had intercourse with her, realizing that she might not be consenting, and with a determination to have intercourse with her, whether she was consenting or not."

In that case the Court rejected an argument that it was not enough "for the accused to have realized the girl might not be consenting ... the jury had to be satisfied that he realized that she was probably not consenting"[75]. Bray CJ was of the opinion that the tests of recklessness adopted by the House of Lords in *Morgan* would not fail to be satisfied because the accused "thinks that there is only a 49 per cent chance that she is not consenting"[76]. The Chief Justice did not express a view as to "whatever degree of possibility is involved in the word 'might'". His Honour did say this however[77]:

---

71 [1982] AC 510.

72 [1982] 1 WLR 762 at 772 ; [1982] 2 All ER 591 at 599.

73 (1977) 16 SASR 67.

74 (1977) 16 SASR 67 at 69.

75 (1977) 16 SASR 67 at 69.

76 (1977) 16 SASR 67 at 74.

77 (1977) 16 SASR 67 at 74.

> "No doubt fantastic or remote possibilities of non-consent would not normally enter a man's mind in such a situation, nor do I think they would be regarded by a jury as fairly falling within the word 'might'. And a belief in consent is not inconsistent with preliminary doubt resolved after deliberation."

102 The appellant's principal submission is that s 61R(1) should be construed as imposing the same mental element as is required for a conviction for rape under the common law as he submits it to be, that is, as requiring of an offender that he be indifferent about the risk, or determined to engage, in intercourse whether the complainant consented or not. Awareness of a risk would not suffice he submitted. He advances several reasons for this. The first is that his submission gives effect to the dictionary definitions of recklessness[78]. The second is that the absence of a statutory definition of recklessness implies a legislative intention to adopt the relevant common criminal law as propounded in *Morgan* which he takes as requiring the elements to which he referred. The appellant notes that in *Satnam S and Kewal S*[79], the English Court of Appeal said that the analogue there of s 61R(1) was based on the recommendations of the Heilbron Report and was intended to be "declaratory of the existing law as stated in *DPP v Morgan*"[80].

103 The appellant provided examples of situations in which, he submitted, an accused might be aware of a possibility (or a "real" possibility) that consent is absent, but should not be regarded as reckless unless it could be concluded that he was indifferent to whether consent was not being given. It is unnecessary to repeat them. I did not find the examples helpful. They were in my view situations in which it would have been open to a jury to find recklessness on any reasonably arguable definition.

104 The appellant further submitted that the approach of the Court of Criminal Appeal in this case requires the drawing of very fine distinctions between levels of possibility or probability in the mind of an accused. Recklessness would not be established if the accused were aware that there was "a slight possibility" of absence of consent but would be, if there were awareness of "a real possibility" of absence of consent. He argued that a man would be unlikely to engage in such

---

78 The *Shorter Oxford English Dictionary*, 3rd ed (1978), defines "Reckless" as "1. Of persons: Careless of the consequences of one's actions; heedless (*of* something); lacking in prudence or caution. 2. Of actions, conduct, things etc. Characterized or distinguished by (carelessness or) heedless rashness."

79 (1983) 78 Cr App R 149.

80 (1983) 78 Cr App R 149 at 154.

fine levels of analysis in a sexual context. In contrast, it was contended, directions based on the judgment of the House of Lords in *Morgan* need not make any reference at all to awareness of possibilities or probabilities. A direction that the prosecution must prove that the accused did not believe that consent had been given, and simply did not care whether the complainant consented or not, would be sufficient. That test avoids, it was urged, a problematic distinction between "advertent" and "inadvertent" or "non-advertent" recklessness.

105 The appellant helpfully drew attention to the position in other Australian jurisdictions. Western Australia[81], Queensland[82] and Tasmania[83] impose objective tests, so that an honest belief in consent will not negate criminal responsibility unless it be reasonably held. Victoria adopts a statutory test of awareness that the other person "is not consenting or might not be consenting"[84]. South Australia has enacted a statutory formulation as to the mental element of rape similar to s 61R(1). Section 48 of the *Criminal Law Consolidation Act* 1935 (SA) as amended by Act No 83 of 1976, provides that the offence is made out by establishing knowledge of absence of consent, or reckless indifference as to whether the other person consents to sexual intercourse with him. In *Egan*[85], White J (with whom Zelling and Mohr JJ agreed) said[86]:

> "Once it is clearly proved that she might not be consenting, then the man is recklessly indifferent if he presses on with intercourse without clearing up that difficulty of possible non-consent. ...
>
> Upon receiving notice of the possibility of her non-consent, he is put upon inquiry before he proceeds to intercourse."

106 It may be noted that the law relating to sexual offences was changed in the United Kingdom by the *Sexual Offences Act* 2003, which replaced recklessness

---

81 *Criminal Code* (WA), ss 24, 319(2).

82 *Criminal Code* (Q), ss 24, 348.

83 *Criminal Code* (Tas), ss 2A, 14.

84 *Crimes Act* 1958 (Vic), s 38.

85 (1985) 15 A Crim R 20.

86 (1985) 15 A Crim R 20 at 24-25.

by a test of "[If the accused] does not reasonably believe [the complainant] consents"[87].

107 The appellant submits in summary that the trial judge's direction that recklessness would be established if the appellant were aware there was a possibility that the complainant was not consenting to sexual intercourse with him, was wrong: there should have been an additional direction that the appellant had to be shown to be "indifferent" about the risk, or determined to have sexual intercourse whether consent was present or not.

108 The fact that competing submissions can plausibly be made, the plethora of articles, and the different judicial and legislative formulations advanced or enacted, demonstrate only one matter clearly, that attempts to define "recklessness" are bound to give rise to, and have given rise to unnecessary uncertainty. "Reckless" is an old and well understood English word. It has been said that there are no true synonyms in the English language[88]. The search for a truly synonymous phrase or expression will equally, frequently be likely to be futile. It is true as Gummow, Hayne and Heydon JJ point out[89] that in different branches of the law and different enactments recklessness may have different elements. It is equally true that on occasions in the law a word will need explanation, elaboration, or definition, but that need tends to arise most often by reason of an uncertain or ill-expressed context of which it forms part. Section 61R is not such a context. The clause "who is reckless as to whether the other person consents to the sexual intercourse" is a perfectly simple one. I do not accept that it is beyond the capacity of a jury to understand and give effect to it, without judicial exegesis, particularly in modern times when juries are composed indiscriminately of the sexes.

---

87 *Sexual Offences Act* 2003 (UK), s 1(1)(c). This provision was intended to reverse the decision in *R v Morgan* (see Temkin and Ashworth, "The Sexual Offences Act 2003", (2004) *Criminal Law Review* 328 at 340).

88 Fowler, *A Dictionary of Modern English Usage*, 2nd ed (1965) at 611-612 states:

> "Whether any such perfect synonyms exist is doubtful, except perhaps when more than one name is given to the same physical object or condition ... But if it is a fact that one is much more often used than the other, or prevails in a different geographical or social region, then exchange between them does alter the effect on competent hearers, and the synonymity is not perfect. At any rate, perfect synonyms are extremely rare."

89 See reasons of Gummow, Hayne and Heydon JJ at [2]-[7].

109 The authors of the Heilbron Report to which I have referred said this[90]:

> "However, the crime of rape does raise particular difficulties and this for a number of reasons. It involves an act – sexual intercourse – which is not in itself either criminal or unlawful, and can, indeed, be both desirable and pleasurable.
>
> Whether it is criminal depends on complex considerations, since the mental states of both parties and the influence of each upon the other as well as their physical interaction have to be considered and are sometimes difficult to interpret – all the more so since normally the act takes place in private.
>
> There can be many ambiguous situations in sexual relationships; hence however precisely the law may be stated, it cannot always adequately resolve these problems. In the first place there may well be circumstances where each party interprets the situation differently, and it may be quite impossible to determine with any confidence which interpretation is right."

110 I do not doubt the accuracy of those statements. Whether in the ambiguous situations to which the authors refer, and having regard to the complexity of the considerations, the mental states of both parties, and the influence of each upon the other, one has been reckless as to the willingness of the other, strikes me as quintessentially a jury question, the answer to which a dozen or a thousand words of elaboration can add nothing, except perhaps uncertainty. "Reckless" means reckless, just as "beyond reasonable doubt" means exactly that, a matter only finally fully recognized and universally acknowledged after years of unhelpful judicial attempts at simplification and explanation in *Green v The Queen*[91].

111 It can have been no accident that the legislature enacted s 61R in the form that it did, simply using the word "reckless" alone, and in consequence eschewing all of the various judicial elaborations or explanations attempted over the years.

112 In this case, the trial judge's formulation of "recklessness" reasonably approximated what had been said in a number of the cases. It was a reasonable approximation, although an unnecessary one, of the dictionary meaning, and the common understanding of recklessness. For that reason, and these further

---

90 Great Britain, *Report of the Advisory Group on the Law of Rape*, (1975) Cmnd 6352 at 2.

91 (1971) 126 CLR 28.

reasons, I would dismiss the appeal. The case of intercourse knowingly without consent against the appellant was a very strong one. His breaking into the complainant's house, his advances, his false denials, his unsatisfactory subsequent explanation, and his surreptitious entry into the complainant's bed are powerful indications of this. The case on recklessness was in the nature of an unfortunate side-wind. The jury on any view must have rejected the appellant as a credible witness. The extended reference to recklessness by the trial judge, although unnecessary, was a sufficient approximation of the meaning of the word in the circumstances of the case, and not such as to cause any miscarriage of justice.

113 The appeal should be dismissed.