HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

THE QUEEN APPELLANT

AND

TOMAS GETACHEW RESPONDENT

The Queen v Getachew
[2012] HCA 10
28 March 2012
M139/2011
ORDER

1. *Appeal allowed.*

2. *Set aside orders 2, 3 and 4 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 2 June 2011 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Victoria

Representation

T Gyorffy SC and E H Ruddle for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

C B Boyce with L C Carter for the respondent (instructed by Leanne Warren & Associates)

CATCHWORDS

The Queen v Getachew

Criminal law – Rape – Mens rea – Directions to jury – Complainant penetrated anally while asleep – No evidence and no assertion that accused believed complainant consenting – Trial judge directed jury that mental element of offence in s 38(2)(a)(i) of *Crimes Act* 1958 (Vic) established if accused aware complainant was or might be asleep – Court of Appeal held trial judge's direction precluded jury from considering possibility that accused believed complainant was awake and consenting to intercourse – Whether open on evidence for jury to conclude that accused may have believed complainant to be awake – Whether trial judge permitted or required to direct jury about accused's belief in consent if no evidence or assertion that accused believed in consent.

Words and phrases – "aware", "believed", "if evidence is led or an assertion is made".

Crimes Act 1958 (Vic), ss 36-38.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ. The respondent to this appeal ("the accused") was presented, in the County Court of Victoria, on a presentment alleging one count of rape. The presentment alleged that the accused had intentionally sexually penetrated the complainant without her consent while being aware that she was not consenting or might not be consenting.

2 The complainant gave evidence at the trial that, after a night of drinking in the City of Melbourne with three others (of whom one was the accused), she was "getting very drunk". In the early hours of the morning, the four left the city and went to a house in the suburbs. The complainant and the accused lay on a mattress on the floor; the other two shared a bed in the same room.

3 The complainant said in her evidence that as she was going to sleep the accused started touching her leg and she told him to go away. After a time the accused again touched her and she told him that, if he did not stop touching her, she would sleep in the car. According to the complainant, the accused responded by offering to sleep elsewhere but she told him: "Don't worry about it, just don't touch me and let me sleep." The complainant then went to sleep. The complainant gave evidence that she awoke with the accused lying behind her, her clothing disarranged and the accused "thrusting his penis into [her] anus".

4 The accused gave no evidence at his trial. His case at trial was that he had not penetrated the complainant. The trial judge told the jury that the element of the offence now at issue – "while being aware that [the complainant] was not consenting or might not be consenting" –

> "will be satisfied if ... [the accused] was aware that [the complainant] was either asleep, or unconscious, or so affected by alcohol as to be incapable of freely agreeing, or aware that she might be in one of these states. This element will also be satisfied if the prosecution can prove, on any other basis arising from the evidence, that the accused was aware that the complainant was not or might not be consenting or freely agreeing to the sexual penetration."

5 There was no dispute in this Court that the trial judge had been right to tell the jury, as he did, that the accused had not raised, as an issue at the trial, that he had thought or believed that the complainant was consenting to penetration.

6 The accused was convicted. He sought leave to appeal to the Court of Appeal of the Supreme Court of Victoria against his conviction. The determinative issue in both the appeal to the Court of Appeal and the

prosecution's appeal to this Court is: was any question of law wrongly decided, or a miscarriage of justice on any other ground occasioned[1], because the trial judge did not tell the jury that the prosecution had to prove, beyond reasonable doubt, that the accused held no belief (even an unreasonable belief) that the complainant consented to penetration?

7 The Court of Appeal (Buchanan and Bongiorno JJA and Lasry AJA) accepted[2] the accused's submission that the trial judge's directions to the jury had "conflated the complainant's lack of consent with mens rea"[3]. More particularly, the Court of Appeal accepted[4] that the jury should have been directed that "the prosecution might fail to prove the mental element of the offence of rape even though a belief [in the] consent [of the complainant] on the part of the accused was unreasonable because the accused was aware that the complainant might be asleep".

8 All members of the Court of Appeal having decided that the trial judge should have directed the jury to consider the possibility just described, a majority of the Court (Buchanan and Bongiorno JJA) concluded[5] that leave to appeal should be granted, the appeal allowed, the conviction set aside and a new trial had. Lasry AJA would have dismissed[6] the appeal (on the footing that no substantial miscarriage of justice had actually occurred) because "a correct direction from the trial judge would have made no difference to the verdict".

9 By special leave, the prosecution now appeals to this Court.

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1 *Crimes Act* 1958 (Vic), s 568(1). The Court of Appeal gave its judgment in this matter in June 2011 but, the accused having been sentenced on 27 November 2009, the appeal provisions in Div 1 of Pt 6.3 of the *Criminal Procedure Act* 2009 (Vic) were not engaged.

2 *Getachew v The Queen* [2011] VSCA 164.

3 [2011] VSCA 164 at [17] per Buchanan JA (Bongiorno JA and Lasry AJA agreeing); see also at [23].

4 [2011] VSCA 164 at [17] per Buchanan JA; see also at [25].

5 [2011] VSCA 164 at [32], [35].

6 [2011] VSCA 164 at [39].

10 Whether there was a misdirection of the kind found by the Court of Appeal turns upon two considerations. First, what is the proper construction of the relevant general provisions relating to sexual offences set out in subdiv (8) of Div 1 of Pt I (ss 35-37B) of the *Crimes Act* 1958 (Vic) ("the Crimes Act") in their application to s 38 of the Crimes Act, which defines the offence of rape? Second, what were the real issues[7] at the trial of the accused?

Rape – a statutory offence in Victoria

11 Since the enactment of the *Crimes (Rape) Act* 1991 (Vic) ("the 1991 Act"), the elements of the offence of rape – including that most important of elements, the absence of consent – have been statutorily defined. Consideration of any question about the law of rape in Victoria *must*[8] begin and end in consideration of the relevant statutory provisions. Reference to decisions about the common law of rape (whether those decisions were made before or after the

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7 *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3.

8 See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and Callinan JJ, 89 [46] per Kirby J; [2001] HCA 49; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11] per Gleeson CJ, Gummow, Hayne and Callinan JJ, 545 [63] per Kirby J; [2001] HCA 53; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 111-112 [249] per Kirby J; [2001] HCA 56; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2003] HCA 59; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 206 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 240-241 [167]-[168] per Kirby J; [2005] HCA 58; *Weiss v The Queen* (2005) 224 CLR 300 at 312-313 [31] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2005] HCA 81; *Stingel v Clark* (2006) 226 CLR 442 at 458 [26] per Gleeson CJ, Callinan, Heydon and Crennan JJ, 462 [43] per Gummow J, 481 [117] per Kirby J, 485 [132] per Hayne J; [2006] HCA 37; *Carr v Western Australia* (2007) 232 CLR 138 at 143 [6] per Gleeson CJ; [2007] HCA 47; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Australian Education Union v Department of Education and Children's Services* (2012) 86 ALJR 217 at 224 [26]-[28] per French CJ, Hayne, Kiefel and Bell JJ; [2012] HCA 3.

enactment of the 1991 Act) is useful *only* if such reference assists in construing the applicable statutory provisions.

12 In order to identify the issues of statutory construction that must be considered, it is necessary to say something about the 1991 Act. The 1991 Act was enacted to give effect[9] to recommendations made by the Victorian Law Reform Commission in its report *Rape: Reform of Law and Procedure*[10]. Contrary to a central submission of the accused in this Court, the 1991 Act did not "codify" the common law of rape. And to the extent to which the Court of Appeal held in *Worsnop v The Queen*[11] that the 1991 Act should be so understood, *Worsnop* should not be followed.

13 As the Law Reform Commission report recorded[12]:

> "Although the Commission considered that 'lack of consent' should be retained as an element of rape and indecent assault, the *interim report* acknowledged that there was confusion about what this concept entailed, and considerable concern about how it was being applied in specific cases. The report therefore proposed that 'lack of consent' should be legislatively defined."

And after further consultation[13], the Commission proposed[14] the enactment of provisions substantially the same as those enacted by the 1991 Act. It follows that, whatever may have been the (uncertain) state of the common law about lack of consent, the 1991 Act sought to prescribe the law that governed this question.

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9 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 1991 at 1998.

10 Report No 43, (1991).

11 (2010) 28 VR 187 at 194 [28].

12 Victoria, Law Reform Commission, *Rape: Reform of Law and Procedure*, Report No 43, (1991) at 6 [12].

13 Victoria, Law Reform Commission, *Rape: Reform of Law and Procedure*, Report No 43, (1991) at 6 [13].

14 Victoria, Law Reform Commission, *Rape: Reform of Law and Procedure*, Report No 43, (1991) at 33-36.

14 The 1991 Act did this by defining the offence of rape in a new s 38 located in subdiv (8A) and defining consent in a new s 36. Relevantly, the new s 38 defined rape as intentional penetration without the complainant's consent while being aware that the complainant is not consenting or *might not* be consenting. The definition of consent in the new s 36 was "free agreement", but particular circumstances were identified as negativing "free agreement", including (of present relevance) the complainant being asleep. Thus, the new s 36 provided:

> "For the purposes of Subdivisions (8A) to (8D) 'consent' means free agreement. Circumstances in which a person does not freely agree to an act include the following:
>
> (a) the person submits because of force or the fear of force to that person or someone else;
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> (b) the person submits because of the fear of harm of any type to that person or someone else;
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> (c) the person submits because she or he is unlawfully detained;
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> (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
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> (e) the person is incapable of understanding the sexual nature of the act;
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> (f) the person is mistaken about the sexual nature of the act or the identity of the person;
>
> (g) the person mistakenly believes that the act is for medical or hygienic purposes."

15 The 1991 Act also made provision (in a new s 37) for some directions that were to be given to the jury about consent:

> "In a relevant case the judge must direct the jury that –
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> (a) the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement;

(b) a person is not to be regarded as having freely agreed to a sexual act just because –

(i) she or he did not protest or physically resist; or

(ii) she or he did not sustain physical injury; or

(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person;

(c) in considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances."

Amendments after the 1991 Act

16 The relevant provisions of the 1991 Act were subsequently amended in 1997[15], 2006[16] and 2007[17] and it is necessary to notice some of those changes. In particular, following a further report by the Victorian Law Reform Commission[18] in 2004, the fault element of rape was amended by the *Crimes Amendment (Rape) Act* 2007 (Vic) ("the 2007 Act"). As amended, s 38(2) of the Crimes Act relevantly provided that:

"A person commits rape if –

(a) he or she intentionally sexually penetrates another person without that person's consent –

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15 *Crimes (Amendment) Act* 1997 (Vic).

16 *Crimes (Sexual Offences) Act* 2006 (Vic).

17 *Crimes Amendment (Rape) Act* 2007 (Vic).

18 Victoria, Victorian Law Reform Commission, *Sexual Offences: Final Report*, Report No 5, (2004).

(i) while being aware that the person is not consenting or might not be consenting; or

(ii) while not giving any thought to whether the person is not consenting or might not be consenting".

No longer was it necessary for the prosecution to show an accused's awareness of the absence or possible absence of consent; demonstrating that an accused did not give thought to whether the complainant was not or might not be consenting would suffice to establish rape (if the other elements were demonstrated).

17 The 2007 Act made other important changes to the law which took account of the recommendations made by the 2004 Victorian Law Reform Commission report. But not all of the recommendations made by that report were reflected in amendments made after the report was published. In particular, neither the 2007 Act nor any of the earlier amendments gave effect to the recommendation[19] that what was called "[t]he defence of honest belief in consent" not be available "where ... one or more of the circumstances listed in section 36(a)-(g) existed and the accused was aware of the existence of such circumstances". Instead, the accused's awareness of the existence of such a circumstance was treated, in the amendments made by the 2007 Act, as a matter about which a trial judge was required to direct the jury. The required direction was that the jury should consider the accused's awareness of the s 36 circumstance in deciding whether the prosecution established beyond reasonable doubt that the accused was aware that the complainant was not or might not be consenting to the sexual act.

18 The 2007 Act inserted three new provisions (a new s 37 and ss 37AAA and 37AA) about the directions to be given to a jury.

19 Relevantly, the new s 37 provided:

"(1) If relevant to the facts in issue in a proceeding the judge must direct the jury on the matters set out in sections 37AAA and 37AA.

(2) A judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding."

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19 Victoria, Victorian Law Reform Commission, *Sexual Offences: Final Report*, Report No 5, (2004) at 422 (Recommendation 174).

The new s 37AAA set out "the matters relating to consent on which the judge must direct the jury". They included three matters of present relevance: the meaning of consent set out in s 36[20], that the law *deems* a circumstance specified in s 36 to be a circumstance in which the complainant did not consent[21], and:

> "that if the jury is satisfied beyond reasonable doubt that a circumstance specified in section 36 exists in relation to the complainant, the jury *must* find that the complainant was not consenting"[22]. (emphasis added)

20 The new s 37AA dealt with the relationship between an accused's asserted *belief* that the complainant was consenting and the accused's *awareness* that the complainant was not or might not be consenting. Section 37AA provided for the directions to be given to a jury "if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act". In such a case a judge was obliged to give directions that the jury *must* consider certain matters "in considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting". The matters identified were "any evidence of that belief"[23] (namely, that the accused believed that the complainant was consenting to the sexual act) and "whether that belief was reasonable in all the relevant circumstances"[24] having regard to:

> "(i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
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> (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and

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20 s 37AAA(a).

21 s 37AAA(b).

22 s 37AAA(c).

23 s 37AA(a).

24 s 37AA(b).

(iii) any other relevant matters."

Section 37AA – application and effect

21 For present purposes, there are two critical observations to make about s 37AA. First, the directions about awareness for which the section provided were to be given "if evidence is led or an assertion is made" at the trial that the accused *believed* that the complainant was consenting. Second, s 37AA was expressed to be "[f]or the purposes of section 37". Thus, s 37(1) *required* the giving of the directions s 37AA set out "[i]f relevant to the facts in issue in a proceeding" – that is, if evidence was led or an assertion made of the identified kind – and s 37(2) *prohibited* the giving of a direction of the kind referred to in s 37AA "if the direction is not relevant to the facts in issue in the proceeding" – that is, the criterion for engaging s 37AA was *not* met.

22 It follows that an accused's *belief* in consent is relevant at a trial for rape only "if evidence is led or an assertion is made" that the accused did believe that the complainant was consenting to the sexual act. The reference to "an assertion" being made is important. It would encompass the case in which an accused's out of court statement (commonly in a record of interview with police) is tendered in evidence and contains an assertion that the accused believed that the complainant was consenting. And of course there are other ways in which the issue may be enlivened at trial, whether by evidence or by assertion.

23 In considering any question about an accused's asserted belief in consent it is necessary to keep at the forefront of consideration that s 38(2) prescribed the relevant mental element for the offence of rape as awareness that the complainant was not or might not be consenting or, after the 2007 Act, not giving any thought to whether the complainant was not or might not be consenting. Belief in consent is not the controlling concept. It is relevant only so far as it sheds light on the accused's awareness that the complainant was not or might not be consenting.

24 If evidence is led or an assertion is made that the accused believed that the complainant was consenting, the directions required by s 37AA would oblige the jury to consider whether the belief was reasonable (and any evidence of that belief). But neither s 37AA nor any other relevant provision of the Crimes Act provided that an accused *must* be taken to be aware that the complainant might not be consenting unless the accused *reasonably* believed that the complainant

was consenting. Rather, consideration of whether an accused's belief in consent was reasonable would bear upon whether the accused in fact held the belief[25].

25 It by no means follows from this last observation, however, that the relevant provisions of the Crimes Act are to be read as requiring the judge (in a case where no evidence has been led and no assertion made that the accused believed the complainant was consenting) to direct the jury that the prosecution must prove beyond reasonable doubt that the accused had no belief in consent. Rather, when s 37AA is read in the light of s 37, it is apparent that a jury is to be given directions about an accused's belief in consent (and the bearing that this belief may have on awareness of the lack of consent) *only* if the possibility that the accused held such a belief has been raised at the trial (whether because evidence was led that the accused had such a belief or an assertion was made that the accused had such a belief).

Belief and awareness

26 Reference to an accused holding the belief that the complainant was consenting invites close attention to what was the accused's state of mind. It was said[26] in the Explanatory Memorandum accompanying the Bill for the 2007 Act that "belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive". So much may be accepted if "belief in consent" is treated as encompassing a state of mind where the accused accepts that it is possible that the complainant might not be consenting. Whether such a state of mind is properly described as a "belief in consent" need not be explored. On the face of it, evidence of a state of mind that did *not* exclude the possibility that the complainant might not be consenting appears not to engage at all with, let alone negate, the central statutory requirement that the accused was aware that the complainant was not or might not be consenting.

27 For present purposes, it is enough to notice that, if an accused asserted, or gave evidence at trial, that he or she thought or "believed" the complainant was consenting, the prosecution may yet demonstrate to the requisite standard either that the accused was aware that the complainant might not be consenting or that the asserted belief was not held. It is to be recalled that, since the 2007 Act, the

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25 cf *Director of Public Prosecutions v Morgan* [1976] AC 182; *R v Flannery* [1969] VR 31 at 33-34; *R v Saragozza* [1984] VR 187 at 193-196.

26 Victoria, Legislative Assembly, Crimes Amendment (Rape) Bill 2007, Explanatory Memorandum at 4.

fault element of rape has been identified as the accused being aware that the complainant was not or might not be consenting or the accused not giving any thought to whether the complainant was not or might not be consenting. The reference to an accused's awareness that the complainant *might not be* consenting is, of course, important. An accused's belief that the complainant *may* have been consenting, even *probably was* consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting.

28 One further and important observation must be made about s 37AA. Section 37AA(b)(i) dealt with the case of a proceeding in which the jury find that a circumstance specified in s 36 (such as the complainant being asleep) existed in relation to the complainant. Section 37AA required the judge to direct the jury to consider whether the accused's asserted belief that the complainant was consenting was reasonable having regard to "whether the accused was aware that that circumstance existed in relation to the complainant"[27], "whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps"[28] and "any other relevant matters"[29]. But neither s 37AA nor any other relevant provision of the Crimes Act required that an accused who asserted a belief in consent nonetheless *must* be taken to have been aware that the complainant was not or might not be consenting if the accused was aware that the relevant s 36 circumstance – here, the complainant being asleep – did exist or might exist. If evidence was led or an assertion was made that the accused *believed* that the complainant was consenting, demonstration that the accused knew that the complainant was or might be asleep did not require the conclusion that the accused was aware that the complainant was not or might not be consenting. In such a case, s 37AA required the judge to direct the jury to take account of the asserted belief of the accused in deciding whether the accused was aware that the complainant was not or might not be consenting.

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27 s 37AA(b)(i).

28 s 37AA(b)(ii).

29 s 37AA(b)(iii).

The directions at the trial

29 The directions to be given to a jury on a trial for rape are to be moulded in the light of the proper construction of the relevant provisions of the Crimes Act and, no less importantly, having regard to the real issues in the trial. As this Court has repeatedly pointed out[30], the judge in a criminal trial must accept the responsibility of deciding what are the real issues in the case, must tell the jury what those issues are, and must instruct the jury on so much of the law as the jury need to know to decide those issues.

30 In a case where s 37AA is engaged, the directions required by that section must be given. In a case where s 37AA is not engaged, those directions must *not* be given.

31 The Court of Appeal found[31] that, because the complainant had not protested while her clothing was disarranged, it would have been open to the jury to conclude "that it was a reasonable possibility that the [accused] believed that she had finally consented" to the sexual act. But the accused had never sought to make such a case. At no time did he assert that he thought or believed that the

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30 *Alford v Magee* (1952) 85 CLR 437 at 466. See also, for example, *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [143]; [1999] HCA 32; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; [2000] HCA 3; *Zoneff v The Queen* (2000) 200 CLR 234 at 256-257 [56]; [2000] HCA 28; *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49]; [2001] HCA 25; *KRM v The Queen* (2001) 206 CLR 221 at 259 [114]; [2001] HCA 11; *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115]; [2001] HCA 46; *Jenkins v The Queen* (2004) 79 ALJR 252 at 257 [28]; 211 ALR 116 at 122-123; [2004] HCA 57; *De Gruchy v The Queen* (2002) 211 CLR 85 at 96 [44]; [2002] HCA 33; *Nicholls v The Queen* (2005) 219 CLR 196 at 321-322 [372]; [2005] HCA 1; *Stevens v The Queen* (2005) 227 CLR 319 at 326-327 [18]; [2005] HCA 65; *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [24]; 231 ALR 500 at 506; [2006] HCA 58; *Tully v The Queen* (2006) 230 CLR 234 at 248-249 [44], 256-257 [75]-[77]; [2006] HCA 56; *Libke v The Queen* (2007) 230 CLR 559 at 590 [86]; [2007] HCA 30; *HML v The Queen* (2008) 235 CLR 334 at 386-387 [121]; [2008] HCA 16; *R v Keenan* (2009) 236 CLR 397 at 425 [91], 436-437 [133]; [2009] HCA 1; *Pollock v The Queen* (2010) 242 CLR 233 at 251-252 [67]; [2010] HCA 35; *Hargraves v The Queen* (2011) 85 ALJR 1254 at 1262 [42]; 282 ALR 214 at 224; [2011] HCA 44.

31 [2011] VSCA 164 at [25].

complainant was consenting. He did not submit, at his trial, on appeal to the Court of Appeal or in this Court, that a s 37AA direction should have been given.

32 The Court of Appeal's reasoning – that the accused may have believed that the complainant had finally consented because she had not protested when her clothing was disarranged – depended upon it being open on the evidence to conclude that the accused may have believed that the complainant was woken by her clothes being removed (or was sufficiently alert to realise what was happening when this occurred). Only if the accused believed that she was aware when these things were done could he have thought that she was consenting.

33 But the complainant's evidence was that she was asleep until awoken by the accused's penetrating her. Her evidence was that she was asleep while the accused disarranged her clothing, and that she only awoke when he "thrust[ed] into" her. It was not suggested to her that she had been woken by her underpants being pulled down or by her clothing otherwise being disarranged. And the accused did not assert that he thought he had woken the complainant, whether by his pulling at her clothing or otherwise. In the absence of any evidence from the accused to this effect and in the absence of the matter having been put to the complainant in cross-examination, there was no basis on which the jury, or the Court of Appeal, could have concluded that the complainant was awake when her clothing was disarranged. The Court of Appeal was therefore wrong to conclude that the evidence to which it pointed was evidence that raised any question about the accused's belief in consent.

34 In the present case the complainant did not consent to the sexual act if, as she asserted, she was asleep when penetrated. Because there was no evidence led at trial and no assertion made that the accused believed that the complainant was consenting, demonstration beyond reasonable doubt (1) that the complainant was asleep at the time of penetration and (2) that the accused was aware that the complainant was then asleep or might then have been asleep would, without more, demonstrate in this case that the accused was aware that the complainant was not or might not be consenting to the sexual act.

35 Only if it had been asserted or evidence had been led at the trial that the accused believed that the complainant consented to the penetration would any further question about the accused's belief as to consent arise. For absent such an assertion or such evidence, demonstration that the accused knew that the complainant was or might be asleep necessarily demonstrated that he was aware that she might not be consenting. No other possibility was open. That is, absent an assertion or evidence that the accused believed that the complainant had in fact consented to the act of penetration, there was no other possibility – that the

accused may have positively believed that the complainant *was* in fact consenting – open and raised for consideration by the evidence. The jury were not required to exclude a possibility of that kind before returning a verdict of guilt.

36 There was therefore no occasion to give a direction of the kind which the Court of Appeal held should have been given about the accused's state of mind.

37 The appeal to this Court should be allowed. Orders 2, 3 and 4 of the orders of the Court of Appeal made on 2 June 2011 should be set aside. In their place there should be an order that the appeal to the Court of Appeal is dismissed.