HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, BELL, GAGELER AND KEANE JJ

MICHAEL ALAN GILLARD APPELLANT

AND

THE QUEEN RESPONDENT

Gillard v The Queen
[2014] HCA 16
14 May 2014
C20/2013

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 18 April 2013 and, in its place, order that:*

   (a) the appeal be allowed in part;

   (b) the appellant's convictions on counts 13, 14, 16 and 18 of the indictment be quashed; and

   (c) a new trial on counts 13, 14, 16 and 18 be had.

On appeal from the Supreme Court of the Australian Capital Territory

Representation

T A Game SC with J L Roy for the appellant (instructed by Kamy Saeedi Lawyers)

H J Dhanji SC with M A Jones for the respondent (instructed by Director of Public Prosecutions (ACT))

CATCHWORDS

Gillard v The Queen

Criminal law – Appeal – Appeal against conviction – Sexual offences – Sexual intercourse without consent – Act of indecency without consent – Whether jury misdirected on mental element of offences – Whether jury misdirected on mental element of offences where statute negates consent.

Statutes – Interpretation – Whether prosecution must prove accused had knowledge that consent was caused by *Crimes Act* 1900 (ACT) s 67(1) circumstance – Whether recklessness as to *Crimes Act* 1900 (ACT) s 67(1) circumstance sufficient to establish mental element of offence.

Words and phrases – "consent", "recklessness".

Crimes Act 1900 (ACT), ss 54, 60, 67.

1 FRENCH CJ, CRENNAN, BELL, GAGELER AND KEANE JJ. The appellant was convicted following a trial before Higgins CJ and a jury in the Supreme Court of the Australian Capital Territory of a number of sexual offences under the *Crimes Act* 1900 (ACT) ("the Crimes Act"). Three of the counts on which he was convicted alleged that the appellant had sexual intercourse with DD, without DD's consent, knowing that DD was not consenting or being reckless as to DD's consent. These counts charged offences under s 92D of the Crimes Act (counts 13, 16 and 18). The appellant was also convicted on one count of committing an act of indecency in the presence of JL, without JL's consent, knowing that JL was not consenting or being reckless as to JL's consent. This count charged an offence under s 92J of the Crimes Act (count 14). The sexual offence provisions of the Crimes Act were renumbered in 2001[1]. Section 92D became s 54(1). Section 92J became s 60(1). In these reasons, the provisions will be referred to by their present numbers in the form in which each provision stood at the date of the renumbering[2].

2 The complainants, DD and JL, are sisters. DD was born in May 1981 and JL was born in December 1982. The appellant was a friend of their father, GM. The two men had met while serving in the Army. At material times the appellant was aged in his mid-forties. He had a close relationship with DD, whom he had known since she was a young child. From 1993 until 2000, DD and JL spent some part of each January school holiday staying with the appellant at his Canberra home. The purpose of these visits was to enable DD and JL to see their brother, who was physically disabled and living in a residential care facility in Canberra. The appellant understood that DD and JL had been entrusted to his care during these visits.

3 The indictment charged the appellant with a number of sexual offences against DD which required proof as an element of liability that DD was aged less than 16 years at the date of their commission. DD's consent was not an issue on the trial of these counts. The appellant was convicted on three of these counts and acquitted on the remaining counts. DD's evidence of the dates on which some of the offences occurred was uncertain. One explanation for the differing

---

1 *Crimes Legislation Amendment Act* 2001 (ACT), s 43.

2 Section 54(1) was amended by Sched 1 Pt 1.5 of the *Justice and Community Safety Legislation Amendment Act* 2008 (No 3) (ACT); s 60(1) was amended by s 5 of the *Crimes Legislation Amendment Act* 2011 (ACT).

verdicts is that the prosecution was unable to prove that the acts charged in counts five to 12 occurred before DD turned 16.

4 The appeal is confined to the appellant's convictions for the four offences that were alleged to have occurred when DD and JL were aged 16 years or more, in which the prosecution was required to prove that sexual intercourse, or the commission of the act of indecency, was without the consent of DD or JL, as the case may be.

5 Section 67(1) of the Crimes Act states circumstances which may negate a complainant's consent to specified sexual offences, including ss 54(1) and 60(1) offences. Relevantly, s 67(1)(h) negates consent to sexual intercourse, or an act of indecency, where that consent is caused by the abuse of a person's position of authority over, or professional or other trust in relation to, the complainant. The appeal is concerned with the relationship between s 67 and the offences created by ss 54(1) and 60(1).

6 The prosecution case on the four counts that are the subject of the appeal was left for the jury's consideration on alternative bases: that DD and JL did not consent to sexual intercourse or the commission of the act of indecency; or that DD's and JL's consent to sexual intercourse or the act of indecency was negated because it was caused by the appellant's abuse of his position of authority over DD and JL. Satisfaction of the mental element of each offence was the subject of directions on both knowledge of non-consent and recklessness as to consent. Section 67(3) provides that if a person knows that the consent of another person has been caused by one of the s 67(1) circumstances, the person is deemed to know that the other person does not consent to the sexual intercourse or the act of indecency. Section 67(3) is silent respecting proof of recklessness as to consent. The particular issue raised by this appeal is whether, in a case in which s 67(1)(h) is engaged to negate consent, the mental element of the offence may be established by proof that the accused was reckless as to the circumstance described in that paragraph.

7 The appellant appealed to the Court of Appeal of the Supreme Court of the Australian Capital Territory (Refshauge, Penfold and North JJ) against his convictions on a number of grounds. Only one ground is relevant to the appeal in this Court. That ground concerned the prosecution's alternative case based on abuse of the appellant's position of authority under s 67(1)(h). It was contended that the prosecution was required to prove that the appellant knew that the complainant's consent had been obtained by the abuse of his position of trust or

authority and that recklessness as to whether her consent had been so obtained would not suffice[3]. The Court of Appeal rejected the ground, holding that the trial judge had been right to leave the possibility that any consent given by DD to the acts charged in counts 13 to 18 was caused by the appellant's abuse of his position of authority over, or other trust in relation to, DD, or that the appellant was reckless as to whether DD was consenting at all[4].

8 On 8 November 2013, Hayne and Gageler JJ granted the appellant special leave to appeal from the order of the Court of Appeal dismissing the appeal against the convictions on counts 13, 14, 16 and 18. The appeal is brought on three grounds. In summary those grounds contend: first, that it was an error to direct the jury that it could convict if it was satisfied that the complainant's consent was caused by the appellant's abuse of his position of authority over the complainant and he was reckless as to that circumstance; second, that where s 67(1)(h) is relied upon to negate consent, the mental element of the offence is knowledge by virtue of s 67(3); and third, that the Court of Appeal erred in holding that consent was only an issue in respect of count 13. For the reasons to be given, the first and third grounds should be upheld and it follows that the appeal must be allowed, the appellant's convictions on counts 13, 14, 16 and 18 set aside, and a new trial had on those counts.

The evidence

9 It is sufficient to refer to the evidence of the offences charged in the four counts and an uncharged incident that is said to have occurred after DD turned 16 but before the incident charged in counts 13 and 14. Evidence of the uncharged incident was admitted to put DD's evidence of the incident charged in count 13 in context. DD gave evidence that the uncharged incident occurred on an occasion when the appellant was staying with her family in Wodonga. She and the appellant were alone in his car. The appellant demanded that DD demonstrate that she loved him, threatening that otherwise he would "start loving JL". DD was protective of JL and did not wish the appellant to turn his attentions to her, so she reassured him that she loved him. The appellant exposed his penis and forced DD to fellate him.

10 The incident charged in counts 13 and 14 occurred in January 1999 in the lounge room of the appellant's Canberra home. DD was 17 years old and JL was

---

3 *Gillard v The Queen* (2013) 275 FLR 416 at 438 [83(c)].

4 *Gillard v The Queen* (2013) 275 FLR 416 at 444 [109].

16 years old. DD said that the appellant offered to prove to JL that he and DD had "a relationship" and that DD would do whatever he wanted her to do. He instructed DD to give him a "head job". He stood up and guided DD down onto her knees. He pulled his pants down and took hold of the back of her head, pushing it forward and forcing her to fellate him. He maintained his grip so that she was unable to pull away despite her efforts to do so. The episode lasted about 30 seconds until DD was able to extricate herself (count 13).

11 JL's account of the incident was broadly consistent with DD's account save that JL said that the appellant's hands were by his side when DD placed her mouth over the appellant's penis. JL said that she had not been asked if she was "okay" about the performance of a sexual act in her presence (count 14) and she had been shocked by it.

12 The offences charged in counts 16 and 18 (count 17 charged an alternative offence to count 16) occurred on the one occasion in January 2000 in a bedroom at the appellant's Canberra home. DD said that the appellant had pushed her down onto the bed and inserted two of his fingers into her vagina (count 16). She protested, telling him not to touch her. The appellant proceeded to lick her vagina (count 18). DD said that she had tried to push him away but he had pinned her down with his left arm. Ultimately, DD succeeded in pushing the appellant away. He asked her if she still loved him. DD was afraid that if she said "no" the appellant would turn his attentions to JL and so she said that she loved him, before getting up and walking away.

13 In evidence at trial, the appellant said that the only time he had sexual contact with DD was the occasion of the fellatio charged in count 13. He said that this contact had been consensual. On his account DD and he had kissed. After a time, DD had removed her clothing and he had said something along the lines of "it would be nice if you went down". DD had knelt down and performed fellatio on him. He had not told her what to do nor had he guided her in any way. He had not held the back of her head. The episode lasted for 15 to 30 seconds. He realised that "for some reason it was wrong. It just wasn't right". He put his hands on DD's shoulder and pushed her back. She looked up and he just nodded "no". The appellant agreed that the incident occurred in the lounge room on an occasion when JL was present; however, he said that JL was facing the computer and had not been in a position to see the sexual activity.

14 DD and JL had been entrusted to the appellant's care during school holidays spent at his home from when they were in their early teenage years. On DD's account, the appellant had dealt with her sexually from when she was a child. Notwithstanding that DD was 17 years old at the date of the offence

charged in count 13, and 18 years old at the date of the offences charged in counts 16 and 18, it was open to find that the appellant was in a position of authority over DD at the time of the acts charged in those counts. So, too, was it open to find that the appellant was in a position of authority over JL on the occasion charged in count 14. The appellant does not submit to the contrary in this Court, nor does he maintain that the conduct charged in the four counts was not capable, without more, of constituting an abuse of that position[5].

The offences

15 At the time, s 54(1) provided:

"A person who engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years."

16 And s 60(1) provided:

"A person who commits an act of indecency upon, or in the presence of, another person without the consent of that person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years."

17 The full terms of s 67 should be set out:

"(1) For sections 54, 55(3)(b), 60 and 61(3)(b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—

(a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or

(b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or

---

5 *Gillard v The Queen* (2013) 275 FLR 416 at 439 [88].

(c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or

(d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or

(e) by the effect of intoxicating liquor, a drug or an anaesthetic; or

(f) by a mistaken belief as to the identity of that other person; or

(g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or

(h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or

(i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or

(j) by the unlawful detention of the person.

(2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

(3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1)(a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be."

The Court of Appeal

18 The indictment charged the appellant in counts 13, 14, 16 and 18, consistently with the terms of the statute, with "knowing that [the complainant] did not consent or being reckless as to whether she consented". In the Court of Appeal the appellant submitted that, when s 67 is invoked, the prosecution must particularise the charge in relation to the accused's state of mind by alleging that

the accused knew that the complainant did not consent. It could not charge only that the accused was reckless as to consent[6]. It would appear that his argument was that s 67(3) operates to confine the prosecution to proof of knowledge of non-consent in any case in which s 67 is invoked[7]. The Court of Appeal rejected this argument, observing that consent is relevant in two respects: the elements of a relevant offence include both absence of consent as a matter of fact and, with respect to the state of mind of the accused, either knowledge of the absence of consent or recklessness as to consent[8]. Sub-sections (1) and (2) of s 67 apply to the determination of the former and could sensibly stand alone without s 67(3)[9].

19 The Court of Appeal said that there was no reason to assume that s 67(3) is intended to exclude the application of s 67(1) and (2) to cases not covered by s 67(3)[10]. Applying the test of recklessness found in *R v Tolmie*[11], their Honours saw no need for an equivalent to s 67(3) dealing with recklessness[12]. They observed that in a case in which it is contended that the accused has not given consideration to whether the complainant is consenting, it is unnecessary to try to "expand or narrow the particular kinds of consent issues that he or she has not considered"[13]. And in a case in which it is contended that the accused recognised the possibility that the complainant was not consenting and went ahead regardless, it did not seem to matter whether his or her recognition of that possibility included recognition of the reason for the non-consent[14].

---

6 *Gillard v The Queen* (2013) 275 FLR 416 at 440 [94].

7 *Gillard v The Queen* (2013) 275 FLR 416 at 442-443 [98]-[103].

8 *Gillard v The Queen* (2013) 275 FLR 416 at 443 [102].

9 *Gillard v The Queen* (2013) 275 FLR 416 at 443 [102].

10 *Gillard v The Queen* (2013) 275 FLR 416 at 443 [103].

11 (1995) 37 NSWLR 660.

12 *Gillard v The Queen* (2013) 275 FLR 416 at 443-444 [105]-[106].

13 *Gillard v The Queen* (2013) 275 FLR 416 at 443-444 [106].

14 *Gillard v The Queen* (2013) 275 FLR 416 at 444 [107].

20 The Court of Appeal noted that if "s 67 only applies to cases involving knowledge and not to those involving recklessness" the trial judge's directions to the jury were flawed, with the consequence that the appellant "could be said to have [been] deprived ... of a chance of acquittal"[15]. It was not necessary for the Court of Appeal to give further consideration to this consequence given the rejection of the premise for the appellant's argument.

The appellant's submissions on the construction issue

21 The appellant's argument in this Court is narrower than the argument put below. He does not submit that recklessness as to consent can never supply the mental element of liability in a trial at which the prosecution adduces evidence of a s 67(1) circumstance. His challenge is to recklessness as to the s 67(1) circumstance supplying the mental element of liability. The appellant's analysis proceeds from the starting point that consent is to be understood as consent freely given. He acknowledges that proof of one or more s 67(1) circumstances may affect the determination of whether the complainant in fact consents to sexual intercourse, or the commission of an act of indecency, and that, in such a case, the mental element of the offence may be established by proof of either knowledge or recklessness. Correctly understood, he submits that s 67(1) is not engaged in a case in which consent is not freely given. The purpose of the provision is said to be the extension of liability to a case in which the complainant in fact consents to sexual intercourse, or the commission of an act of indecency, by making provision for consent to be negated in specified circumstances.

22 The next step in the appellant's argument is the submission that where "actual consent" is negated by s 67(1), the mental element of the offence is not the element stated in the offence-creating provision: a person cannot know that another is not consenting to sexual intercourse or an act of indecency, when that other is, in fact, consenting. Nor can a person be reckless as to the absence of consent in such a case. Hence, the function of s 67(3) is to provide a "workable mental element" in a case of negated consent under s 67(1).

The relation of s 67 to ss 54(1) and 60(1)

23 The idea that s 67(1) extends liability (with the consequence that the mental element of the offence ceases to be found in the offence-creating

---

15 *Gillard v The Queen* (2013) 275 FLR 416 at 442-443 [99].

provision) is sourced in the common law understanding of circumstances that vitiate consent to sexual conduct. To observe that proof of some s 67(1) circumstances operates to negative consent at common law and that proof of other s 67(1) circumstances does not[16], fails to assist in understanding the relationship in this statutory scheme between s 67 and the offences to which it applies.

24 Relevantly, ss 54(1) and 60(1) proscribe sexual intercourse, or the commission of an act of indecency, "without the consent of [the complainant]". Section 67(1) states some circumstances in which consent to sexual intercourse, or to the commission of an act of indecency, is negated. A consent that is negated is no consent. Section 67(1) is a non-exhaustive statement of circumstances in which, subject to proof of the causal relation, sexual intercourse, or the commission of an act of indecency, is without the consent of the complainant. The causal relation required by s 67(1) is important. The unintended consequences of the application of s 67(1) contemplated by the ACT Law Reform Commission in its *Report on the Laws Relating to Sexual Assault*[17] may be avoided if it is understood that the causal connection between the circumstance and the complainant's consent must be sufficiently substantial to warrant the attribution of criminal responsibility[18].

25 Section 67 facilitates proof of the offences to which it applies. The elements of those offences are contained in the offence-creating provisions and do not differ in a case in which s 67(1) is engaged. The appellant's insistence on locating the mental element of the offence in s 67(3) in a case in which s 67(1) is engaged is apt to obscure the force of his essential point, which is that recklessness as to a s 67(1) circumstance does not establish the mental element of

---

16 *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 258-259; [1957] HCA 74.

17 ACT Law Reform Commission, *Report on the Laws Relating to Sexual Assault*, Report No 18, (2001) at 67. The authors of the Report at 69, applying a "but for" test of causation, posit the consent of a rock star to sexual intercourse with a 15 year old girl as negated in circumstances in which the girl assures the rock star that she is aged 16 (s 67(1)(g)), with the result that the 15 year old is exposed to liability for a s 54(1) offence.

18 *Timbu Kolian v The Queen* (1968) 119 CLR 47 at 68-69 per Windeyer J; [1968] HCA 66; *Royall v The Queen* (1991) 172 CLR 378 at 398 per Brennan J, 411-412 per Deane and Dawson JJ, 423 per Toohey and Gaudron JJ, 441 per McHugh J; [1991] HCA 27.

liability for the offences to which it applies. To explain why that is so requires consideration of what it means to be reckless as to consent.

26 The Crimes Act does not define "reckless" for the purposes of ss 54(1) and 60(1)[19]. Those offences and s 67 were introduced into the Crimes Act by the Crimes (Amendment) Ordinance (No 5) 1985 (ACT). These provisions reflected the sexual offence reforms that had been introduced in New South Wales by the *Crimes (Sexual Assault) Amendment Act* 1981 (NSW) and recommendations of the Law Reform Commission of Tasmania[20]. As explained in *Banditt v The Queen*[21], the New South Wales reforms were influenced by the decision of the House of Lords in *Director of Public Prosecutions v Morgan*[22] and the subsequent enactment of s 1 of the *Sexual Offences (Amendment) Act* 1976 (UK). *Morgan* clarified that the mens rea of the common law offence of rape is constituted either by the accused's awareness that the woman is not consenting or by his recklessness respecting her consent. Their Lordships variously formulated the concept of recklessness as a state of mind of "at least indifference as to the woman's consent"[23], or "the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no"[24] and "without caring whether or not she was a consenting party"[25]. The joint reasons in *Banditt* approved each of these formulations as an appropriate means of explaining the concept of

---

19 The definition of recklessness contained in s 20 of the *Criminal Code* 2002 (ACT) ("the Code") does not apply to ss 54(1) and 60(1). Each is a non-excluded pre-2003 offence for the purpose of s 8 and neither is an immediately applied provision within s 10 of the Code.

20 Law Reform Commission of Tasmania, *Report and Recommendations on Rape and Sexual Offences*, Report No 31, (1982).

21 (2005) 224 CLR 262; [2005] HCA 80.

22 [1976] AC 182.

23 *Director of Public Prosecutions v Morgan* [1976] AC 182 at 203 per Lord Cross of Chelsea.

24 *Director of Public Prosecutions v Morgan* [1976] AC 182 at 215 per Lord Hailsham of St Marylebone.

25 *Director of Public Prosecutions v Morgan* [1976] AC 182 at 225 per Lord Edmund-Davies.

recklessness to a jury for the purposes of s 61R(1) of the *Crimes Act* 1900 (NSW)[26]. That observation is equally apt to proof of recklessness for the purposes of ss 54(1) and 60(1) of the Crimes Act. Whether, as the Court of Appeal assumed[27], recklessness extends to a state of mind of inadvertence to consent in the way explained in *R v Tolmie*, is not a question raised by the appeal. It is sufficient in order to address the issues raised by the appeal to observe that recklessness is a mental state captured by the concept of indifference to the complainant's consent, as explained in the joint reasons in *Banditt*.

27 Regardless of how the prosecution proves the non-consent of the complainant, the mental element of the offences is satisfied by proof of the accused's knowledge that the complainant was not consenting or proof that the accused was reckless as to the complainant's consent. Proof that a person was reckless, in the sense that he or she was heedless of the risk of the existence of a s 67(1) circumstance, or of the risk that the circumstance may have caused the complainant's consent, would not of itself establish that the person's state of mind was of indifference to consent. This is not to say that proof of a s 67(1) circumstance may not support an inference that the person had that state of mind.

28 At a trial in which the prosecution relies on the causal relation between a s 67(1) circumstance and the complainant's consent to sexual intercourse, or the act of indecency, to establish the absence of consent, the mental element of the offence is likely to be proved by establishing that the accused had the knowledge stated in s 67(3). Putting to one side the redundant "who" in the first line, s 67(3) deems knowledge that the consent of the complainant has been caused by a s 67(1) circumstance to be knowledge that the complainant did not consent to sexual intercourse or the act of indecency. Strictly, s 67(3) is declaratory. As s 67(1) negates consent where a specified circumstance is the cause of the complainant's consent, knowledge of the causal relation between the circumstance and the complainant's consent is knowledge that the sexual intercourse or act of indecency was without consent. Section 67(3) serves to

---

26 (2005) 224 CLR 262 at 276 [38] per Gummow, Hayne and Heydon JJ.

27 *Gillard v The Queen* (2013) 275 FLR 416 at 443 [105] citing (1995) 37 NSWLR 660.

remove any doubt that the knowledge of which it speaks is inconsistent with a belief that the complainant was consenting[28].

29 Proof that the appellant was heedless of the risk that he was abusing his position of authority over DD or JL and that this may have caused DD's consent to sexual intercourse or JL's consent to the commission of an act of indecency in her presence, did not establish that the appellant was reckless as to DD's or JL's consent. The respondent does not submit otherwise.

30 The critical issue in this Court is whether, as the appellant submits, the trial judge left it open to the jury to convict if it was satisfied that the complainant's consent was caused by the appellant's abuse of his position of authority and the appellant was reckless as to that risk.

The directions

31 The jury was instructed that:

> "After a person turns 16 they may lawfully consent to an act that's of a sexual nature and the act of a sexual nature is not a crime unless there is no consent and there are other conditions too. There's knowledge of consent but I'll come to that in just a moment. But consent has its ordinary meaning and a state of mind that agrees with acquiescence in the act in question. That's what consent is."

32 Next his Honour explained that apparent consent or acquiescence may not constitute "real consent" by reason of the presence of a vitiating circumstance, instancing the use or threat of force. His Honour continued:

> "There is a question of what is said to be a position of authority or trust occupied by the accused in respect of DD. Now, whether there was such a position is a matter for you. When the evidence is reviewed, that matter

---

28 The Explanatory Statement to the Crimes (Amendment) Ordinance (No 5) 1985 (ACT) stated at 7:

> "Sub-section (3) provides that where the Crown has proven that the person charged knew at the relevant time that the consent of the victim was caused by any of the means set out in sub-section (1) then the first-mentioned person cannot be held to have an honest belief in the consent of the victim to the act of sexual intercourse or act of indecency."

> may become clear or less clear as the case may be but that is the accusation there. So, for example, if a person who had authority such as, I suppose, a commanding officer, commanded a subordinate to submit to something it may be that that would be an abuse of the position of authority and it may be that the apparent consent would be vitiated."

33 His Honour next directed the jury of knowledge of lack of consent. He continued:

> "There is however another alternative and that is that the accused might be reckless as to whether there is consent or not and that may be constituted in one of two ways. That is the accused might be aware that there is a risk that consent is absent but proceeds nevertheless. Now, that corresponds, no doubt, with what you might well think recklessness is. That is taking an unjustified risk. There is also another category of recklessness which again might well accord with your own view of it. That is where an accused has no positive reason to assume that there is consent but proceeds without turning his mind to the question at all. An obvious example of that might be if the accused person came across a sleeping woman and proceeded to have sex with her without bothering to turn his mind to whether she might agree or not agree to that. That would be reckless."

34 Following these directions, in the absence of the jury, defence counsel sought a direction by reference to s 67(3). After the jury returned, the trial judge gave this further direction:

> "However, if the accused does not know or you're not satisfied that he did know that there was no consent you would have to, by virtue of the directions I gave you concerning the onus of proof, proceed on the basis that the accused did not know there was consent because you're not satisfied beyond reasonable doubt that he did know that there was no consent. I'd say the next question's recklessness and you might be satisfied the accused was reckless *or you might be satisfied that the accused knew that the apparent consent which he perceived was a result of a breach of trust or a breach of his position of authority if there was one*. Now, he must, in that consequence, in that circumstance, know that the apparent consent is so procured." (emphasis added)

35 The direction is not a model of clarity. Nonetheless, the respondent submits that it correctly distinguishes recklessness from deemed knowledge of non-consent under s 67(3). The submission attributes no small degree of

discernment to the jury hearing the direction for the first, and only, time. It assumes that the jurors would have understood that the conjunction "or" at the start of the emphasised passage was introducing a third question for their determination and not that everything following the words "I'd say the next question's recklessness" was an explanation of the concept of recklessness. In the context of the conduct of the trial, the direction is likely to have been understood as confirming the availability of a pathway to proof of guilt relied upon by the prosecutor in her closing submissions:

> "There is also recklessness. That is sufficient, that the accused may have been reckless as to the cause of any apparent consent on the part of DD, if he was reckless to the fact that that's why she was consenting because of that position of authority."

36 The trial judge did not correct the prosecutor's statement. Indeed, his Honour commended the prosecutor's statement of the law as one that "I think you'll probably find I've virtually agreed with".

37 The respondent submits that any error in the directions respecting recklessness only affects the conviction on count 13. This is because the conduct the subject of counts 14, 16 and 18 was denied and no issue of recklessness is said to have arisen.

38 It may be doubted that recklessness should have been left for the jury's consideration on any of the counts. However, directions on recklessness were given. Those directions did not confine proof of recklessness to the offence charged in count 13. To the contrary, in summarising the evidence of the offences charged in counts 16 and 18, the trial judge said:

> "And I just remind you it has to be without consent, the accused knowing it was without consent or at least be reckless as to whether there is consent. And in considering apparent consent you also consider whether any coercion of the kind I've mentioned was used and is breach of position of authority [sic]."

39 There can be no real question that the directions left open that the jury might reason to guilt on each of the counts in which consent was an issue upon satisfaction that the appellant was reckless as to the risk that DD's or JL's consent was occasioned by the abuse of his position of authority over her. This was a material misdirection affecting each of the counts that are the subject of the appeal. The respondent did not submit that in the event that the appellant's first and third grounds were upheld the appeal should be dismissed under s 37O(3) of

the *Supreme Court Act* 1933 (ACT)[29]. The appellant did not submit that there should be a consequential order other than for a new trial[30].

Orders

40 The following orders should be made:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 18 April 2013 and, in its place, order that:

   (a) the appeal be allowed in part;

   (b) the appellant's convictions on counts 13, 14, 16 and 18 of the indictment be quashed; and

   (c) a new trial on counts 13, 14, 16 and 18 be had.

---

29 Section 37O(3) provides that the Court of Appeal may dismiss an appeal against conviction if it considers that the point raised by the appeal might be decided in favour of the appellant but no substantial miscarriage of justice has occurred.

30 *Supreme Court Act* 1933 (ACT), s 37O(1)(e).