IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C20 of 2013

BETWEEN:

MICHAEL ALAN GILLARD
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: This Reply is in a form suitable for publication on the internet.

Part II: Reply

Construction

1 Contrary to the respondent's submission at [58], the legislative history and extrinsic materials do not support the respondent's construction. The Explanatory Statement states that s 67(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*" (RWS [66]). It would only be necessary to deem that knowledge of the cause of consent is to be treated as knowledge of lack of consent in order to overcome "honest belief" (where negation of consent is relied upon), if there is, in the first place, actual consent. In such a case, without a deeming provision the accused's belief would be both honest and accurate. A deeming provision in respect of the requisite mental element is the logical outcome of the legislative drafter thinking through the consequence of deeming lack of consent in scenarios where there was, in fact, consent.

2 If the respondent's construction is correct and the s 67(1)(a)-(j) factors mean there is no actual consent, a person who knows that what appears to be consent is actually the result of a s 67(1)(a)-(j) factor thereby knows that there is no consent. The Tribunal in *Jones v Chief of Navy* [2012] ADFDAT 2 appears to have reached the same conclusion at [73]. On this construction, the deeming provision is unnecessary. It does not "remove any doubt on the issue" (RWS [69]); to the contrary, its reference only to knowledge raises a question as to whether a person could also be convicted if they were reckless as to the cause of apparent consent.

3 The Tasmanian Law Reform Commission Report relied upon by the respondent recognised that the effect of the provisions "*in the area of fraud ... threats of public humiliation and extortion ... and exploitation of authority or position*" was not to remove doubt, but to "*extend*" the law "*where it has not [previously] gone far enough*" (TLRC, *Report and recommendations on rape and sexual offences,* Report 31 (1982); RWS [60]). The purpose of s 67(3) is to enable that extension of criminal liability (AWS [61]-[63]). Without s 67(3), cases that rely upon s 67(1) for the negation of consent, as opposed to the common law test of full and free consent, would fall at the

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point of proving the mental element. In so extending liability, s 67 could have deemed that recklessness as to the cause of consent satisfies the requisite mental element, as well as knowledge. It does not.

4 Further, contrary to the respondent's submissions at [57], the use of "consent" and "negated" (not "negatived") is unique to the *Crimes Act* 1900 (ACT) ("**ACT Act**"). The title "Negation of consent" in ss 61HA(4)-(6) of the *Crimes Act* 1900 (NSW) ("**NSW Act**"), does not, as the respondent implies, form part of the section: s 35(2) *Interpretation Act* 1987 (NSW). There are also significant structural differences between ss 61HA(4)-(6) of the NSW Act and s 67 of the ACT Act. The NSW Act distinguishes between cases in which a person "does not consent" because they do not, for example, have the cognitive capacity, are asleep, or have been threatened with force (s 61HA(4)); cases in which the person "consents" under a mistaken belief, in which circumstance they are deemed to "not consent" (s 61HA(5)), and cases in which "it may be established" that a person does not consent to sexual intercourse, including when the person "has sexual intercourse because of the abuse of a position of authority or trust" (s 61HA(6)). In this way, the NSW Act avoids the conflation of circumstances in which it would typically be supposed there was no consent (i.e. threats of violence) and cases in which it would typically be supposed there was consent but "*the legal effect of that consent may be in some way impugned by reference to the nature of the relationship which had existed between those concerned.*"

5 The latter is the ACT Law Reform Commission's description of the effect of s 67(1)(h), made in its highly critical review of the ACT consent provisions (ACTLRC, *Report on the Laws Relating to Sexual Assault*, no 18 ("**ACTLRC Report**") at p 67, cited, *inter alia*, in *R v Schippani* [2012] ACTSC 108 at [83]-[86]). That review continued (at p 69):

"Some of the other factors listed in subsection (1) are so inadequately delineated that findings of guilt could be obtained in wholly inappropriate cases and absurdity could be avoided only by the absence of complaint or the exercise of prosecutorial discretion. For example, if consent is negated if caused by 'a fraudulent misrepresentation of any fact', then the consent of a rock star who has sexual intercourse with a 15 year old may be negated if she assured him that she was over 16. In that event she could be taken to have raped him. [...]

Subsection [67(3)] is, of course largely dependent upon subsection (1). It also gives rise to further and obviously unintended complication. Sections [54] and [60] prescribe alternative mental elements of knowledge or recklessness as to consent but the deeming provision in this subsection applies only to knowledge. This may suggest that an accused could be convicted if he had known that her consent had been due to a belief that he was another person but could not be convicted if he had been reckless as to whether she had consented for that reason. This is a further instance of the incongruity and confusion that seems to characterise this section.

In short, the section lacks the precision and clarity necessary to enable a trial judge to explain the elements of an offence in a manner that will be sufficiently comprehensible to enable jurors to determine an appropriate verdict. When conviction and imprisonment may follow a decision that the conduct of the accused falls on one side of a conceptual line rather than the other it is of critical importance that the line be drawn clearly and that verdicts are not influenced by confusion."

6 The appellant maintains that the result of the unique structure of s 67, in particular the collection of negated consent scenarios into a single provision under the words "*the*

consent of a person ... is negated if that consent is caused:", is that each of ss 67(1)(a)-(j) describe circumstances in which actual consent is negated. Where there is no actual consent, including in circumstances similar to those described in ss 67(1)(a)-(c), recourse to s 67 is unnecessary because the element of "*without the consent of the other person*" is satisfied on the face of the offence provisions (ss 54 and 60). Section 67 only becomes necessary if a doubt as to whether there may have been actual consent is raised on the facts. Contrary to the respondent's submission at [55], the phrase "*without limiting the grounds upon which it may be established that consent is negated*" in s 67(1) does not alter the necessity of a deeming provision in respect of the mental element where s 67(1) is relied upon to show that "*consent is caused*" by one of the factors listed.

7 One aspect of the NSW provisions relied upon by the respondent is similar to the ACT Act. Subsection 61HA(5), which provides that "*a person who consents to sexual intercourse*" because of certain mistaken beliefs "*does not consent*", also includes a deeming provision in relation to knowledge: "*the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.*" Subsection 61HA(5) does appear to deem instances of actual consent to be no consent. However, in so doing it becomes necessary to provide a deeming provision in respect of the mental element, and subsection (5) is thus the only s 66HA provision to include one.

8 An earlier version of s 66HA(5) (s 61R(2)(b)) was considered by the NSW Court of Criminal Appeal in *Bochkov v R* [2009] NSWCCA 166. It was assumed (without being expressly decided) by the trial judge and the Court of Criminal Appeal that recklessness was not available as the requisite mental element if the jury found consent was caused by the complainant's mistake as to the appellant's identity. In those circumstances the requisite mental element was knowledge. The Crown case was put to the jury in "*two alternative positions regarding consent*": the first that the complainant only consented because she was mistaken as to the appellant's identity, the second that the complainant did not consent (at [64]). The jury was clearly directed that "*the concept of recklessness does not apply to the Crown's first position*" (at [76]). Indeed, it was described as "*odd*" by Giles JA that, at one point, the trial advocate referred to recklessness "*in the part of the address apparently intended to put to the jury absence of consent under the first scenario*" ([55]), but no complaint had been taken in respect of that error.

9 Finally, even if the appellant's construction is not accepted and the respondent is correct to submit that some of the s 67(1) circumstances cannot be considered actual consent, s 67(1)(h) remains a case in which actual consent is negated (ACTLRC Report p 67). If the respondent's construction is accepted, it may be that the s 67(1) scenarios which describe instances of no actual consent, such as violence or the threat of violence, are listed in s 67(1) simply to "*remove any doubt*" on the subject. It may also be that the words "*without limiting the grounds upon which it may be established that consent is negated*" in s 67(1) simply refer to other cases in which the facts are such that there was no free consent under the common law definition. However, even accepting this construction, it cannot be that s 67(3) is also in the Act only to "*remove any doubt*" (RWS [69]). If every s 67(1) scenario described a case in which there was no actual consent, there would be no need to state that knowledge of the cause of a person's consent "*shall be taken*" to be knowledge that the person did not consent. It is necessary to deem knowledge only if at least some of the s 67(1) scenarios describe cases in which

actual consent is present, of which, at the least, s 67(1)(h) is an example. The respondent's construction gives s 67(3) no work to do.

Path taken by the jury

10 The respondent appears to concede that the Crown misstated the effect of s 67(3) in its opening address, put recklessness as an available mental element in respect of the s 67(1)(h) scenario in its closing address, and that this is relevant to the extent that it was endorsed by the trial judge (RWS [27]-[28]). In summing up the trial judge said, "*[the prosecutor] of course pointed out some matters of law that I think you'll probably find I've virtually agreed with*" (T546.34). The judge did not express any points of distinction between his view of the law and that of the prosecutor's. In these circumstances, and given the other conflicting summaries of law made by the Crown and trial judge (AWS [46]), the jury were left with the option of convicting the appellant if they were satisfied that the complainants only consented because the appellant abused his position of authority, and that he was reckless as to whether they only consented for that reason.

11 In respect of counts 14, 16 and 18 in particular, consent was put in issue by the Crown or trial judge in each (T492.11-.31, 541.5). Even if a direction in this respect was unnecessary, "*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*": *R v Tolmie* (1995) 37 NSWLR 660 at 665 per Kirby J.

12 A "*jury is entitled to refuse to accept the cases of the parties and 'work out for themselves a view of the case which did not exactly represent what either party said'*" (*Stevens v R* (2005) 227 CLR 319 at [29] per McHugh J, citing *Williams v Smith* (1960) 103 CLR 539 at 545). The jury's failure to convict in respect of all charged incidents indicates that they rejected some of DD's evidence, at least in relation to her age. If, as the respondent submits, the verdicts are explicable because the jury accepted that DD was not under the age of 16 at the time some of the charged incidents occurred, it convicted the appellant on the basis that DD was 15 years old in relation to the first alleged sexual contact, the subject of counts 2-4. The appellant's evidence in respect of DD's consent in relation to count 13, JL's conflicting evidence of the incident (from that of DD's, see AWS [11]-[13]), the history of the appellant's relationship with both complainants, DD's evidence that the appellant told JL that he and DD "*had a relationship*" and that she didn't want him to "*tell her sister*" (T101.44-.47), JL's evidence that the appellant spoke of his "*special bond*" with DD (T210.5), and the revelation during the trial that DD was years older than originally alleged in relation to the first sexual contact between her and the appellant, left open an intermediate version of events that members of the jury may have accepted in reaching a verdict.

13 For example, members of the jury may have believed that DD, who first had sexual contact with the appellant at age 15, did consent to the act the subject of count 13 when she was 17, but that she only did so because the appellant had been abusing his position of trust in respect of her, and that the appellant was reckless as to why she was consenting. Having found the appellant guilty of count 13 by reason of his recklessness as to the reason for her consent, members of the jury may not have thought it necessary to decide whether DD's account of the acts the subject of counts 16 and 18 occurred in the way she said they did, or even whether or not she actually consented. Instead, they may simply have reached the point of accepting that the counts 16 and 18 acts occurred

(particularly given that the appellant admitted that at least the act the subject of counts 13 and 14), that *if* she consented it was only because of his abuse of position of trust in respect of her, and that he was at the least reckless as to whether she only consented because he was abusing this position. The same may be said of count 14. Assuming members of the jury decided the appellant was at the least reckless as to why JL was consenting, they would only have to be satisfied that *if* she consented, it was because he was abusing his position of authority. The summing up left this path open to the jury. They may never have decided whether or not DD and JL consented in respect of counts 13-18, provided they accepted that *if* they consented, it was because the appellant abused his position of authority and that he was at the least reckless as to whether they may have been consenting because he was abusing his position.

14 The appellant also maintains that the judge misstated the evidence DD gave of the threat said to have been made about JL, in relation to count 13. In response to the question "*In the incident you've just described where you gave him a head job and JL was there, did that conversation take place there?*" DD replied, "*The – the conversation about him saying that he loved me and if I loved him I'd give him a head job, and if I didn't love him he'd go to JL, that happened when JL wasn't with us...*" (T102.44-103.1). In response to the question "*Where did that conversation take place?*" she said, "*We had that conversation a couple of times. A couple of times in Canberra and there was a time up in Woodonga.*" She did not give the evidence (as underlined) summarised by the judge as: "*If didn't love him he'd love [JL] [sic]. That was before [JL] came into the room*" (T540.6). DD's evidence was ambiguous as to whether the conversation occurred about the same time as the charged acts (see T102.44-103.18). Whether members of the jury believed the threat occurred immediately prior to the act or in the week or years previously could have influenced the path they took to satisfy themselves that the appellant had the requisite mental element in respect of count 13.

15 The appellant accepts that the trial judge explained negated consent to the jury when first explaining consent. The appellant's submission at [26] should have stated that the trial judge initially explained the mental element relating to lack of consent without reference to how it operated in the context of negated consent. This error does not affect the substance of the appellant's submissions.

16 Finally, contrary to the respondent's submission at [38], the Court of Appeal was asked to decide whether "*even if it could be shown that DD's will had been overborne by the abuse of the appellant's position of trust or authority, it also had to be shown that the appellant knew that DD's 'consent' has been obtained because of the overbearing of her will by that abuse (recklessness as to consent would not be sufficient)*" (*Gillard v R* [2013] ACTCA 17; (2013) 275 FCR 416 at [83]). Although rephrased, this captures the essential submission of the appellant that where abuse of the appellant's position is relied upon in relation to the element of lack of consent, the relevant mental element becomes knowledge that the consent was so caused.

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