



HIGH COURT OF AUSTRALIA

Public Information Officer

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CTM v THE QUEEN

Honest and reasonable mistake of fact about the age of a girl was a potential ground of exculpation in a charge of sexual assault of a girl under 16, the High Court of Australia held today. The Court also held that CTM had not discharged the evidential burden of raising that ground at his trial.

In October 2004, in Coffs Harbour, the complainant had been out drinking with two friends and they ended up at CTM's flat where he was also drinking with four other males. The girl fell asleep and was taken to a bedroom and her friends left. CTM, a co-accused and another male whom the girl could not positively identify, allegedly sexually assaulted her. CTM and the girl had become friends that year through attending the same high school. CTM was aged 17 and in year 11. He told police he thought the girl was in year 10 and that she had told him some time before that she was 16, but she was 15 and in year nine. He also denied having sex with the girl.

CTM was charged with sexual intercourse with the girl, knowing she was not consenting. In the NSW District Court, he was acquitted of this charge, but was found guilty of the alternative charge of sexual intercourse with a person aged between 14 and 16, contrary to section 66C(3) of the NSW *Crimes Act*, which carries a penalty of 10 years' imprisonment. He was given a suspended 18-month sentence. Before the Act was amended in 2003 it provided a defence to heterosexual acts with under-age people if the offender reasonably believed that the child to whom the charge related was aged at least 16, and provided that the child was at least 14 and had consented to the sexual activity. After the 2003 amendments, the Act said nothing expressly about mistake as to age. CTM appealed to the Court of Criminal Appeal against both his conviction and his sentence. The CCA upheld the conviction but held that the District Court had made errors in sentencing and remitted the case to the District Court. CTM appealed to the High Court in relation to his conviction.

The Court, by a 6-1 majority, dismissed the appeal. The majority held that the ground of exculpation applied, but that in the circumstances of the trial CTM could not rely on it. The Court held that the NSW Parliament had not excluded the principle of criminal responsibility that a person who does an act under an honest and reasonable, but mistaken, belief was not criminally responsible to any greater extent than if their belief had been correct. An honest and reasonable belief that the girl was aged 16 was an answer to a charge under section 66C(3). The evidential onus of raising such a ground of exculpation for consideration lay with the accused. If it were raised the prosecution then had the onus of proving beyond reasonable doubt that the accused did not honestly believe on reasonable grounds that the other person was consenting and was at least 16. In CTM's case, he did not give evidence at his trial and it was not put to the girl in cross-examination that she had said anything to CTM about her age.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*