IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE
OF THE REGISTRY **No. 139 of 2011**

BETWEEN:

THE QUEEN

Appellant

-and-

TOMAS GETACHEW

Respondent

REDACTED RESPONDENT'S SUBMISSIONS (ANNOTATED)

PART I – CERTIFICATION THAT THE SUBMISSIONS ARE IN A FORM SUITABLE FOR PUBLICATION.

1.1 The respondent certifies that these submissions are in a form suitable for publication in the Internet.

PART II – CONCISE STATEMENT OF ISSUES PRESENTED.

2.1 This appeal concerns the following issues:

(a) was the Court of Appeal correct in holding that the trial judge erred in his directions as to the *mens rea* for rape (Ground 2A)?; and,

(b) was the Court of Appeal correct in holding that there was evidence capable of founding an inference that the respondent believed the complainant was consenting (Ground 2B)?

PART III – CERTIFICATION REGARDING NOTICE IN COMPLIANCE WITH SECTION 78B OF THE *JUDICIARY ACT* 1903 (Cth.).

3.1 The respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth.). The respondent certifies that no such notice should be given.

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PART IV – STATEMENT OF MATERIAL FACTS.

4.1 The respondent does not take issue with the appellant's statement of material facts but adds:

(a) the complainant was aged 23 and the respondent 24;

(b) the complainant and the respondent met for the first time that night[1];

(c) further to paragraph 7 of the appellant's submissions, the respondent had also consumed alcohol in company with the complainant, Bothin and Mary prior to travelling to Bothin's bungalow[2];

(d) further to paragraph 7 of the appellant's submissions, the complainant and the respondent had danced at The Bond Bar[3];

(e) further to paragraph 8 of the appellant's submissions, Bothin invited Mary, the complainant and the respondent to stay at his house in Warrandyte[4];

(f) further to paragraph 8 of the appellant's submissions, the respondent had planned on leaving and decided to go but the complainant "...called him back..."[5];

(g) further to paragraph 10 of the appellant's submissions, Bothin and Mary were having consensual sex in the double bed while the complainant and the respondent were on the mattress on the floor of the same room[6];

(h) further to paragraph 11 of the appellant's submissions, it was a single bed mattress that Bothin placed at the foot of his bed[7]; and,

PART V – STATEMENT OF APPLICABLE LEGISLATION ETC.

5.1 The appellant's statement of applicable legislation is accepted.

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[1] T at 81(6). (AB 14)
[2] T 82(21) & 117(30). (AB 15, 17)
[3] T at 82(1). (AB 15)
[4] T at 129(25). (AB 59)
[5] T at 129(25). T at 118(9). (AB 48)
[6] T at 124(13) & 120. (AB 54 & 50)
[7] T 119.28; Exhibit A, book of photographs. (AB 49, 132-136)

PART VI – RESPONDENT'S ARGUMENT.

The case at trial.

6.1 The respondent fought the case on the issue of penetration. He did not concede that if the jury found penetration proven, he was thereby guilty of rape. He took issue by his plea with all elements of the offence of rape.

Ground 2A.

The ground of appeal in the Court below.

6.2 The relevant ground of appeal taken by the respondent in the Court of Appeal was expressed in the following terms:

> **The learned trial judge erred in his directions to the jury on the mental element required for proof of the offence of rape and in particular the learned trial judge erred by directing that such element would be established, if the accused was aware that the complainant might be asleep.**[8]

The impugned direction.

6.3 Section 36 of the *Crimes Act* defines consent to mean "free agreement" and lists circumstances in which a complainant is deemed not freely to agree to an act of sexual penetration.

6.4 One such circumstance is where the complainant is asleep: see section 36(d).

6.5 The trial judge directed on the third element of rape – the question of consent. He told the jury:

> **The law identifies a number of circumstances where the complainant is deemed not to have freely agreed or consented to sexual penetration. These circumstances include where the person is asleep...**
>
> **If you are satisfied beyond reasonable doubt that one of these circumstances existed: that is, that... [the complainant] was asleep... then you must find that she was not consenting.**[9]

6.6 The judge, having reminded the jury that the defence took no issue with consent, directed upon the fourth element of the offence of rape – the *mens rea*. The judge said as follows:

> **The fourth element relates to the accused's state of mind. You remember that it is whether or not he was aware that she was not consenting or aware that she might not be consenting. *I have already directed you about some of the circumstances the law deems to be circumstances in which the complainant did not freely agree or consent. Applying those directions to this fourth element, this element will be satisfied if the prosecution can***

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[8] *Tomas Getachew v The Queen* [2011] VSCA 164 ("*Getachew*") at paragraph [13]. (AB 240)

[9] T at 173(14)-(29). (AB 163)

> ***prove beyond reasonable doubt that Mr Getachew 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 those states.***[10] (emphasis added)

The decision of the Court below.

6.7 The Court below upheld the respondent's submission that the direction set out above at paragraph 6.6 erroneously conflated the third element (lack of consent) with the fourth element (*mens rea*).

6.8 All members of the Court below held that the impugned direction was in error.[11]

The ground in this Court.

6.9 Ground 2A in the appellant's Notice of Appeal is expressed in the following terms:

> **The Court of Appeal erred in holding that His Honour's direction that if the jury was satisfied beyond reasonable doubt that the respondent was aware that the complainant was either asleep or might be asleep, that would be sufficient to establish to establish that the complainant was not or might not be consenting were wrong at law.**

6.10 It is assumed that the appellant wishes to impugn the Court of Appeal's decision to uphold the ground set out in paragraph 6.2 above.

Mens rea for the offence of rape in Victoria.

6.11 The offence of rape is set out in section 38 of the *Crimes Act* 1958 (Vic.) ("*Crimes Act*"). Section 38 is found in Subdivision (8A) of Division 1 of Part 1 of the *Crimes Act*. Relevantly, section 38 states that:

> **A person commits rape if... he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting.**[12]

6.12 Accordingly, if it is reasonably possible that an accused was not aware that a complainant might not be consenting to an act of sexual penetration, then the accused is entitled to an acquittal of the offence of rape.

6.13 Section 37(1)(c) (since amended) of the *Crimes Act* provided that:

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[10] T at 174(26)-175(7). (AB 164-165)

[11] *Getachew* at [17]-[26] per Buchanan JA, at [33]-[34] per Bongiorno AJA and at [36] per Lasry AJA. (AB 241-243, 245) The Court of Appeal has since confirmed that a direction in these terms is erroneous in *R v Wilson* [2011] VSCA 328 at [125]-[130].

[12] This statutory definition, introduced by Act 81 of 1991 codified the common law understanding of *mens rea*: *Worsnop v The Queen* (2010) 204 A Crim R 38 ("*Worsnop*") at [23]-[24] & [28]. See: *R v Hornbuckle* [1945] VLR 281 at 287; *R v Daly* [1968] VR 257 at 258-259 and *R v Flannery & Prendergast* [1969] VR 31 at 33-34. The Victorian law was referred to by this Court in *Banditt v The Queen* (2005) 224 CLR 262 ("*Banditt*") at 272[25].

(I)n considering the accused's alleged belief that the complainant was consenting to the sexual act,... [the jury]... must take into account whether that belief was reasonable in all the relevant circumstances...

6.14 The Victorian law of rape[13] has reflected the House of Lords decision in *DPP v Morgan* [1976] AC 182. This decision established that an honest belief in consent, however unreasonable, prevents an accused from possessing the necessary *mens rea* for the crime of rape. The absence of reasonable grounds for the belief could be relevant in deciding whether the accused held the relevant honest belief.[14] This has been the position in Victoria for many years.[15]

6.15 The "general provisions" that relate to "sexual offences" are contained within Subdivision 8 of Division 1 of Part 1 of the *Crimes Act*.

6.16 There have been legislative amendments to Subdivision 8. For instance, Act 57 of 2007 (the *Crimes Amendment (Rape) Act* 2007 (Vic.)) introduced sections 37AAA and 37AA into this subdivision. Act 57 stipulated that these sections apply to an offence committed earlier than the sections' commencement date.

6.17 By operation of section 37AA, if evidence is led that an accused believed that the complainant was consenting to an act of sexual penetration, the trial judge must direct the jury that in considering whether the prosecution has excluded a reasonable possibility that an accused was not aware that a complainant might not be consenting to that act, the jury must consider, *inter alia*:

(a) any evidence of the accused's belief; and,

(b) whether that belief was reasonable in all the relevant circumstances having regard to, in the case of a proceeding in which the jury finds that a circumstance specified in section 36 of the *Crimes Act* exists in relation to a complainant, whether the accused was aware that the section 36 circumstance existed in relation to the complainant.

6.18 Act 57 did not alter the orthodox proposition, however, that an honest but unreasonable belief in a complainant's consent would lead to a failure on the prosecution's part to prove the *mens rea* for the offence of rape.[16]

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[13] Unlike in Western Australia, Tasmania and Queensland where the relevant criminal codes impose objective tests, so that an honest belief in consent will not negate criminal responsibility unless it be reasonably held: see *Banditt*, op cit., n 13, at 296[105].

[14] See the Victorian Law Reform Commission, Sexual Offences, Final Report 2004, Chapter 8 at 407[8.2].

[15] See *R v Munday* (2003) 7 VR 423 at 440[47], *R v Zilm* (2006) 14 VR 11 at 13[2]-14[4], *R v Gose* [2009] VSCA 66 at [64] & *R v Wilson* [2011] VSCA 328 at 50[145]-55[156].

[16] See *Worsnop* at [34] per Ashley JA, at [1] per Buchanan JA, and at [87] per Beach AJA. *Worsnop* concerned a different error relating to directions on the *mens rea* of the offence of rape. The impugned direction in *Worsnop* can be found at paragraph [20] of Ashley JA's judgment in the italicized portion of the trial judge's directions quoted therein.

6.19 Section 37AA stipulated only that in assessing the reasonableness of a belief in consent, the jury is to have regard to whether an accused was aware that a circumstance specified in section 36 existed in relation to the complainant.

6.20 Thus, an accused's awareness that a section 36 circumstance exists in relation to a complainant bears only upon the reasonableness of the accused's belief. A belief that is unreasonable by dint of awareness of a section 36 circumstance may still be a belief that precludes proof of *mens rea*. The test for *mens rea* remained that the prosecution were required to prove that an accused was aware that the complainant was or might not be consenting to an act of sexual penetration. Act 57 intended no wholesale change in this regard.[17]

Appellant's argument is in error.

6.21 The submission made by the appellant that once an accused is aware of a section 36 circumstance the prosecution will have established *mens rea* as a matter of law must, therefore, be rejected.[18] This argument was not advanced in the Court below.[19] Act 57 did not alter the common law. It is in error for a jury to be directed that awareness of a section 36 circumstances will, as a matter of law, lead to proof of *mens rea*.

6.22 If it is error for a jury to be directed that an accused's awareness of a section 36 circumstances leads, as a matter of law, to proof of *mens rea*, the same must hold for a direction that tells a jury of such a consequence in respect of awareness of a *possible* section 36 circumstance.

Proviso – division in the Court below.

6.23 Error having been established,[20] the question for the Court of Appeal became whether the proviso should be applied.[21] Two members of the Court of Appeal (Buchanan & Bongiorno JJA) determined not to apply the proviso. A third member of the Court of Appeal (Lasry AJA) applied the proviso.

6.24 The application of the proviso was examined by this Court in *Weiss v The Queen* (2005) 224 CLR 300 ("*Weiss*") at [31]-[47]. In particular, this Court said that in deciding whether the prosecution has established that there was no substantial miscarriage of justice:

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[17] *Worsnop* at [32]-[34].

[18] See the Appellant's Submissions at paragraph 47.

[19] The argument below by the respondent centred on whether *mens rea* was in issue at trial: see *Getachew* at [19]-[21] & [24]. (AB 242, 243)

[20] A "wrong decision of any question of law" as per section 568(1) of the *Crimes Act* as it then stood. See now section 276(1)(b) of the *Criminal Procedure Act* 2009 (Vic.).

[21] The Court of Appeal had power to dismiss the appeal notwithstanding that it was of the opinion that the point raised in the appeal might be decided in favour of the appellant if it considered that "no substantial miscarriage of justice has actually occurred.": *Crimes Act*, section 568(1) as then applied.

The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.[22]

6.25 The task confronting an appellate court in applying the proviso is "not to be undertaken by attempting to predict what a jury (whether the jury at trial or some future hypothetical future jury) would or might do"[23] although this approach might, it appears, be of some limited assistance.[24]

6.26 A majority of the Court of Appeal were not persuaded that there was no substantial miscarriage of justice. The majority were not persuaded proceeding on the record (with its natural limitations) that the respondent was proven beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. As it happened, the majority concluded that the error could have made a difference to the jury's conclusion at trial. The jury were asked the wrong question.

6.27 The jury must have been persuaded of penetration. However, on the strength of the evidence of the complainant summarised by Buchanan JA at paragraph [25], examined in the context of all the evidence adduced in the trial, the jury, given the question that they were asked, might have been convinced (or considered it a reasonable possibility) that the respondent positively believed that the complainant was awake and thus consenting at the point of penetration. To the extent that the respondent was aware that the complainant might have been *asleep*, the jury may have thought that the respondent considered this a theoretical possibility only. Awareness of the theoretical possibility that another might be asleep is not synonymous with awareness that the other might not be consenting to an act of sexual penetration sufficient for proof of the offence of rape.[25]

6.28 Further, a reasonable possibility that an accused entertains a positive belief in consent will preclude the existence of *mens rea*: see *Worsnop* at [35], fn 13.

Ground 2B

Pemble.

6.29 This Court in *Pemble v The Queen* (1971) 124 CLR 107 ("*Pemble*") and in later cases, confirmed the obligation of trial judges to instruct the jury as to matters

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[22] *Weiss* at 316[41].

[23] *Weiss* at 314[35].

[24] *Weiss* at 317[43].

[25] *R v Wozniak* (1977) 16 SASR 67 at 74 per Bray CJ; *R v Costa* [1996] VSC 27; *Report of the Advisory Group on the Law of Rape* (1975) Cmnd 6352, p. 2, *Banditt* op. cit. at 298[109] per Callinan J & Smith D, *Reckless Rape in Victoria* (2008) 32(3) MULR 1007.

(issues, defences and lesser-included offences) about which the evidence adduced at a trial might permit a finding for the accused in circumstances where those matters had not been relied upon by the defence, including where such matters had been expressly abandoned by the defence.[26]

This case.

6.30 Unlike in *Pemble*, however, the error in this case concerned no question of an abandoned issue, defence or lesser-included offence. Rather, the error related to the description of an element of the offence with which the respondent had been charged - an element that had been put in issue by the respondent by virtue of his plea of not guilty. The onus of proving this element lay on the prosecution. The respondent was not required to raise a defence of honest and reasonable mistake of fact. It was not incumbent on counsel for the respondent expressly to raise the question of the respondent's awareness.[27]

6.31 The judge's obligation to give the jury correct directions on *mens rea* did not, therefore, arise by virtue of this Court's decision in *Pemble*.[28] The principle in *Pemble* does not arise in the present case. Nor did that principle fall for consideration in the Court of Appeal. Indeed, had *Pemble* applied in this case, there would have been no reason for Lasry AJA in the Court of Appeal, although in dissent as to the outcome of the appeal, to have found error.

6.32 The appellant's apparent contention that Victorian rape law requires that a mistaken belief in consent be reasonable appears to lead it to characterise an innocent state of mind on the part of an accused as constituting a "defence": see paragraphs 36 & 38 of the Appellant's Submissions. This is not so. Indeed, the appellant's approach appears, *inter alia*, to invert the applicable onus. An honest albeit unreasonable belief in consent will prevent proof of *mens rea*.

The evidence.

6.33 An accused is entitled to rely, in exculpation, upon evidence adduced in the prosecution case. The respondent carried no evidential burden.

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[26] See, for example, *Varley v R* (1976) 12 ALR 347 at 351, *Van Den Hoek v R* (1986) 161 CLR 158 at 161, *Gilbert v The Queen* (2000) 201 CLR 414 at [8] per Gleeson CJ and Gummow J, *Gillard v The Queen* (2000) 201 CLR 414 at [106] per Hayne J, *CTM v The Queen* (2008) 236 CLR 440 at [112]-[117] per Kirby J (*in diss*) at 495[192] per Hayne J & *Fingleton v R* (2005) 227 CLR 166 at [83] per McHugh J.

[27] *Getachew* at [22] per Buchanan JA.

[28] The importance of *mens rea* is long-standing and, to an extent, trite: see, for instance, *R v Tolson* (1889) 23 QBD 168 per Stephen J, *Woolmington v Director of Public Prosecutions* [1935] AC 462, *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386 at 407 per Viscount Kilmuir, *Thomas v R* (1939) 57 CLR 279 at 309 per Dixon J.

6.34 A majority of the Court of Appeal found that in this case there was evidence given by the complainant that was capable of founding an inference that the respondent believed that the complainant was consenting.[29]

6.35 This evidence was not "purely speculative" as asserted at paragraph 60 of the Appellant's Submissions. Rather, the facts described by the majority are an accurate description of the complainant's evidence.

6.36 Further, the facts identified at *Getachew* at paragraph [25] are to be seen in the context of all the evidence adduced at trial, including the additional facts identified at paragraph 4.1 above.

Conclusion

6.37 The appeal should be dismissed.

Dated the 17th day of November 2011

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[29] *Getachew* at [25] per Buchanan JA & at [33] per Bongiorno AJA. (AB 243, 245)