



HIGH COURT OF AUSTRALIA

Public Information Officer

15 December 2005

STEPHEN GARRY BANDITT v THE QUEEN

Directions by a New South Wales District Court judge to a jury on the meaning of “reckless” in relation to consent to sexual intercourse were appropriate, the High Court of Australia said today.

Mr Banditt was convicted of breaking and entering into a house and having sexual intercourse with a 25-year-old woman without her consent early on 6 October 2001 at Bellingen in central NSW. He was jailed for five years with a three-year non-parole period. The woman, alone in her house, awoke to find Mr Banditt having sex with her. Within seconds she pushed him off and he left, leaving behind his glasses and a payslip. The woman had previously rebuffed his advances and earlier on the same night at the local tavern had complained to him about his coming around to her house late at night and banging on her door. Mr Banditt said they had slept together six weeks earlier but she denied that.

Section 61R(1) of the NSW *Crimes Act* provides that a person who has sexual intercourse with another and who is reckless as to whether the other person consents is to be taken to know that the other person does not consent. Judge David Freeman’s explanation of recklessness to the jury included that if an offender is aware that there is a possibility that the woman is not consenting but he goes ahead anyway, then that is recklessness. Mr Banditt objected to Judge Freeman’s directions, arguing there should have been an additional direction that he had to be indifferent about the risk or determined to have sexual intercourse whether consent was present or not, but the NSW Court of Appeal dismissed an appeal. He appealed to the High Court, where he also argued that recklessness cannot be satisfied by an awareness of a risk, but is satisfied by a mental state that, “Even if I knew, I would continue”.

The High Court unanimously dismissed the appeal. It held that Judge Freeman's direction to the jury did not misstate the concept of recklessness in section 61R(1). The Court further held that Judge Freeman properly emphasised that the jury was to consider Mr Banditt’s state of mind, not the reaction of some notional reasonable man, and that this was to be undertaken with regard to the surrounding circumstances, including the past relationship between Mr Banditt and the woman. It was proper for Judge Freeman to have directed the jury in the terms he did.

- *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.*