HIGH COURT OF AUSTRALIA

28 March 2012

THE QUEEN v TOMAS GETACHEW

[2012] HCA 10

Today the High Court allowed an appeal from the Court of Appeal of the Supreme Court of Victoria, which had allowed an appeal by Tomas Getachew ("the accused") against his conviction of one count of rape. The Court of Appeal had allowed the accused's appeal on the ground that the trial judge did not direct the jury to consider the possibility that the accused believed that the complainant was consenting to intercourse, in circumstances where the accused did not lead evidence or assert that he held such a belief.

The complainant had spent the night of 29 June 2007 drinking in Melbourne with three others (of whom one was the accused). In the early hours of the next morning, the group went to a suburban house, where the complainant and the accused lay on a mattress on the floor, and the other two shared a bed in the same room. The complainant gave evidence that the accused touched the complainant twice and that she asked him to stop both times. Having fallen asleep, the complainant later awoke to find the accused lying behind her, her clothing disarranged and the accused penetrating her.

The accused was charged and tried in the County Court of Victoria. The accused's defence was that he had not penetrated the complainant. He did not give evidence and made no assertion about his mental state.

Section 38 of the *Crimes Act* 1958 (Vic) ("the Act") defines the offence of rape in Victoria. Section 38(2) relevantly provides 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". Section 37 of the Act provides that the judge must direct the jury on certain matters if "relevant to the facts in issue in a proceeding", but otherwise must not direct the jury on those matters. Relevantly, s 37AA provides for directions to be given to a jury "if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act".

At trial, the trial judge directed the jury that the accused had not raised as an issue that the accused thought or believed that the complainant was consenting to penetration. The trial judge also directed the jury that they could be satisfied that the accused was aware that the complainant was not or might not be consenting if the accused was aware that the complainant was or might be asleep at the time of penetration. The accused was convicted and subsequently sentenced to four years and nine months' imprisonment.

The accused successfully appealed. The Court of Appeal held that the trial judge should have directed the jury not to convict the accused unless persuaded beyond reasonable doubt that the prosecution had excluded the possibility that the accused may have believed that the complainant was consenting, even though he knew that she was or might be asleep. By special leave, the prosecution appealed to the High Court of Australia.

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The High Court allowed the appeal, with the result that the accused's original conviction stands. The High Court held that the trial judge was correct not to give a direction about the accused's belief in the complainant's consent. The accused's belief in consent would have been relevant only if evidence was led or an assertion was made that the accused believed that the complainant had consented. Absent such an assertion or such evidence, to demonstrate that the accused knew that the complainant was or might be asleep was to demonstrate that he was aware that she might not be consenting. The High Court also emphasised that an accused's belief in consent is only relevant insofar as it sheds light on the accused's awareness that the complainant was not or might not be consenting, that being the mental element prescribed by s 38(2) of the Act.

- *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.*