

STATUTORY INTERPRETATION AND THE ORDINARY CRIMINAL LAWYER: *GILLARD V THE QUEEN*

By Lizzie McLaughlin



Lizzie McLaughlin is a solicitor at Burke & Mead Lawyers.

There were few occasions during my law degree in which a legal principle resonated to the extent that I retained it beyond the relevant exam. One such example was the explanation of the mental element for sexual assault: an accused person must either know that the complainant is not consenting or, having turned their mind to the possibility that he or she was not so consenting, continues in any event. The purity of the underlying principle was best demonstrated by the inverse: if a person does not turn their mind to the question of the complainant's non-consent, or believes the complainant is consenting, then he or she does not have the necessary criminal intent (See *R v Morgan* [1976] AC 182; *R v Banditt* (2005) 224 CLR 262).

Consent: legislative extensions

The law of consent across all Australian criminal jurisdictions has since expanded, albeit inconsistently. In NSW, section 61HA of the *Crimes Act 1900* (NSW) contains the extended legislative definitions of consent as they relate to both the physical and mental elements of the offence of sexual assault. The starting point is the same (consent is something freely and voluntarily given by one person to another: s61HA(1)). However, what may constitute non-consent now includes specific factual scenarios in which it otherwise would be difficult to establish that the complainant was not consenting to the sexual act. These situations include where the complainant lacks capacity to consent, is denied the opportunity to consent because he or she is unconscious or asleep, is under a mistaken belief, was subjected to threats, or where the accused has abused a position of authority (see subsections 61HA(4)-(6)).

Even the question of what constitutes the mental element of the offence has changed since *Morgan and Banditt*, albeit to a lesser extent. Section 61HA(3) provides that the mental element for the offence is established by proof that: the accused knew the complainant was not consenting, or there are no reasonable grounds for believing that the complainant does not

consent, or the accused is reckless as to the complainant's non-consent (section 61HA(3)).

Gillard v The Queen

The recent High Court decision of *Gillard v The Queen* [2014] HCA 16 shows how the legislative extension of legal concepts can lead to misstatements of the law when one does not keep in mind basic principles underlying the criminal law. Mr Gillard was tried on 19 counts of sexual offences. The two complainants were sisters, known to Mr Gillard because of his friendship with their father. The counts concerning the High Court decision related to four counts of sexual assault and acts of indecency when the complainants were over 16 years of age and in Mr Gillard's care. It was asserted by the Crown that the complainants were deemed not to be consenting by virtue of Mr Gillard's position of trust and authority over them at the time pursuant to section 67(1)(h) of the *Crimes Act 1900* (ACT) (the ACT Act). This provision is broadly reflective of section 61HA(6) of the NSW Act.

The mental element of the offences was put to the jury on alternative bases – that Mr Gillard either knew the complainant was not consenting, or was reckless as to consent. As to the question of knowledge, however, section 67(3) of the ACT Act expands its compass by providing that where an accused person knows consent to the sexual offence has been caused by his or her abuse of authority (see section 67(1)(h)), he or she is deemed to know the complainant is not consenting. At trial, however, the question of the accused's state of mind and the question of recklessness was presented to the jury in such a way that it appeared to become conflated and confused with the extension of liability regarding the accused's knowledge of the complainant's non-consent contained in section 67(3). This is evident from this statement made by the Crown Prosecutor at trial in her closing submissions: "There is also recklessness. That is sufficient, that the accused may have been reckless as to the cause of any apparent consent on the part of [the

complainant], if he was reckless to the fact that that's why [the complainant] was consenting because of that position of authority ..." (emphasis added).

The High Court found this interpretation, endorsed by the trial judge, amounted to a material misdirection on the question of consent because it left open the possibility that the jury could convict if satisfied in relation to the mental element of the offence that the accused was reckless as to the section 67(1)(h) circumstance (the negation of consent by virtue of the abuse of the position of authority). To get to this point, the High Court returned to the fundamental expressions of the mental element of sexual assault offences as set out in *Morgan and Banditt* before concluding thus: "[27] Regardless of how the prosecution proves the non-consent of the complainant, the mental element of the offences is satisfied by proof of the accused's knowledge that the complainant was not consenting or proof that the accused was reckless as to the complainant's consent. Proof that a person was reckless [as to the] ... existence of a section 67(1) circumstances, or of the risk that the circumstance may have caused the complainant's consent, would not of itself establish that the person's state of mind was of indifference to consent."

Practical tips

1. Break the offence down into its most basic form. Set out what is required to establish the physical and mental elements of the offence.
2. Check the legislation's dictionary and surrounding provisions for definitions, explanations, deeming provisions, exceptions, similar language, extensions or special interpretations.
3. If a word or phrase is not defined in the legislation itself, try a search engine for legislation. The phrase may be replicated in a another act.
4. Check your own ordinary dictionary for words that are left over.
5. Put your findings and definitions back into your breakdown of the elements of the offence.

First principles go a long way. **LSJ**