CITATION:	*Willcocks v The Queen* [2021] NTCCA 6
PARTIES:	WILLCOCKS, Kevin Glenn v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 8 of 2019 (21728562)
DELIVERED:	10 September 2021
HEARING DATES:	23 October 2020
JUDGMENT OF:	Grant CJ, Kelly and Blokland JJ

CATCHWORDS:

CRIME – Appeals – Appeal against conviction – Unreasonable verdict

Applicant found guilty of sexual intercourse without consent – Whether verdict unreasonable and not supported by evidence at trial – Evidence identified by applicant did not lead to a satisfaction that the jury, acting rationally, ought to have entertained a reasonable doubt as to proof of guilt –– Appeal on this ground dismissed.

Criminal Code 1983, s 43AB, s 43AE, s 43AH, s 43AI s 43AJ,s 43AK, s 192

GAX v The Queen (2017) 344 ALR 489, *Libke v The Queen* (2017) 230 CLR 559, *Lynch v The Queen* [2020] NTCCA 6, *M v The Queen* (1994) 181 CLR 487, *Pell v The Queen* [2020] HCA 12, *SKA v The Queen* (2011) 243 CLR 400, referred to.

CRIME – Appeals – Appeal against conviction – Miscarriage of justice

Whether trial judge erred by not putting mistaken belief to the jury – In order to have operation mistaken belief must negate relevant fault element – A state of satisfaction on the part of the jury that either knowledge or recklessness was satisfied would obviate any possibility of a mistaken belief – It was unnecessary to direct the jury on the issue of mistake in this case – Appeal on this ground dismissed.

Criminal Code 1983, s 43AW

Bahar & Ors v The Queen (2011) 45 WALR 100, *Garcia v The Queen* [2016] QCA 174, *R v Donaldson & Poumako* (2009) 103 SASR 309, referred to.

REPRESENTATION:

Counsel:

Applicant:	T Game SC with M Thomas
Respondent:	WJ Karczewski QC (Director of Public Prosecutions) with S Geary

Solicitors:

Applicant:	Peter McQueen
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	26

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Willcocks v The Queen [2021] NTCCA 6
CA 8 of 2019 (21728562)

BETWEEN:
KEVIN GLENN WILLCOCKS
Applicant
AND:
THE QUEEN
Respondent

CORAM: GRANT CJ, KELLY and BLOKLAND JJ

REASONS FOR JUDGMENT
(Delivered 10 September 2021)

THE COURT:

[1] Following a trial by jury the applicant was found guilty of one count of sexual intercourse without consent contrary to s 192(3) of the *Criminal Code 1983* (NT). The applicant has brought an application for an extension of time within which to make an application for leave to appeal against conviction. The proposed grounds of appeal are that:

(a) the conviction was unreasonable and cannot be supported having regard to the evidence; and

(b) that the trial judge erred in failing to put the question of 'mistaken belief' to the jury.

Background

[2] Leaving aside the question of the applicant's knowledge or belief, there is no challenge to the facts as determined by the trial Judge in sentencing the applicant. So far as is relevant for these purposes, they may be summarised as follows.

[3] At some time prior to 10 June 2017, arrangements were made for a 'buck's party' to be held on that day. As part of the arrangements, the host organised for a bus to take the guests on a 'pub crawl', and hired the complainant to act as a topless waitress on the bus and to perform a 'dildo show' when the bus returned to the host's residence.

[4] On the appointed day the complainant arrived at the host's residence at about 2 pm, and shortly afterwards those present boarded the bus and travelled to a tavern in the Darwin rural area. There, more alcohol was consumed and after a short period of time the guests boarded the bus and travelled to a second licensed premises in the Darwin rural area. The applicant joined the group at the second premises. The group continued drinking alcohol there and subsequently moved to a third licensed premises in the Darwin rural area. More alcohol was consumed by the members of the party and the bus then travelled on to a fourth licensed premises, where those present consumed more alcohol before departing for the host's residence.

[5] During the course of the afternoon, the complainant acted as a topless waiter whilst the bus was in transit. She was also drinking alcohol. She entertained the guests during the journeys in various ways, including by exposing her buttocks and breasts to those in a motor vehicle following the bus and by giving some of the guests what were described as ‘motorboats’, which involved the complainant rubbing her breasts into the faces of some of the men. The guests on the bus were well-behaved and acted appropriately towards the complainant, and there was no suggestion that the complainant authorised or permitted anyone to touch her genitalia.

[6] The party arrived back at the host’s residence at around 7 pm. Shortly after their arrival, the complainant told the host that she was going to get ready for the ‘show’. Before the ‘show’ started, all of the guests who had participated in the ‘pub crawl’ continued drinking beer or spirits and were intoxicated, some of them heavily so.

[7] In preparation for the ‘show’, the complainant set up her iPod so that she could play music and changed into a schoolgirl outfit. The complainant’s evidence was that before the show started, she addressed the group in a loud voice and told the guests that there was to be no touching unless invited, that photos and video recordings were not to be taken, and that no one was permitted to move onto the rug on which she would be performing. The complainant’s evidence was that this was something that she invariably did at the commencement of every ‘show’.

[8] Some of the witnesses who had been in attendance recalled that the complainant had said something to this effect. Most of the witnesses either had no memory of the complainant saying anything to that effect, or only vague recollections of some sort of ground rules being stated. The applicant's account was that he did not hear the complainant say anything to that effect. However, the evidence did establish that none of those present attempted to take any photos or videos of the 'show', and those present did not venture onto the rug once it was put down except for those invited to participate in the 'show'.

[9] The first part of the 'show' involved the complainant performing a striptease in front of the 'buck' while intermittently and variously plying him with a whip, shaving cream, moisturiser and candle wax. For most of this part of the 'show' the complainant was naked.

[10] The next part of the show involved the complainant placing the 'buck' onto a chair, laying on her back in front of him, inserting a dildo into her vagina, and shooting the dildo towards the 'buck', who was meant to catch and return it to her. The complainant shot a number of dildos in this fashion, but the 'buck' was unable to catch them due to his level of intoxication. There was also some involvement by the 'best man' in these parts of the 'show', but he was also very intoxicated and had no memory of his involvement.

[11] The complainant then performed the same trick directed to the other men who remained watching the 'show'. In the course of doing so, she shot a

dildo at the applicant, who caught it. The complainant's evidence was the applicant was the only person other than the 'buck' at whom she shot a dildo on that night. One of the witnesses who was in attendance gave evidence that he saw the applicant kneel down and play with the dildo while it was in the complainant's vagina, moving it in and out, before then placing the tip of the stubbie into the complainant's vagina. That witness had only recently arrived at the host's residence from work and was relatively sober. The applicant himself had no recollection of that happening.

[12] Another of the witnesses gave evidence that the complainant fired several dildos at the other guests, and had allowed some of those men to play with the dildo whilst it was in her vagina. That witness was highly intoxicated at the time of the events he was recounting, and his evidence in that respect was not corroborated by any of the other witnesses. However, the complainant herself conceded that she had allowed men to place dildos in her vagina in other shows, and it was possible that might also have happened on the night in question.

[13] Whatever the uncertainties may have been in that respect, the evidence unequivocally established that when the applicant inserted the beer bottle into the complainant's vagina she immediately became distressed. The show stopped. On the applicant's account, he apologised to the complainant. The complainant rang an associate who came to the premises and took her home. The complainant reported the matter to police at 8:44 pm that evening.

Unreasonable verdicts

[14] Section 192(3) of the *Criminal Code* provides:

> A person is guilty of an offence if the person has sexual intercourse with another person:
>
> (a) without the other person's consent; and
>
> (b) knowing about or being reckless as to the lack of consent.

[15] The criminal responsibility provisions in Part IIAA of the *Criminal Code* (NT) have application to this offence. Under those provisions:

(a) the first physical element of the offence was conduct, being the insertion of the bottle into the vagina of the complainant;[1]

(b) the fault element in relation to that physical element was that the applicant intended to engage in that conduct;[2]

(c) the second physical element of this offence was the circumstance in which the conduct happened, which was that the sexual intercourse took place without the complainant's consent;[3]

(d) the fault elements in relation to that physical element were knowledge or recklessness;[4]

(e) the applicant had knowledge of the complainant's lack of consent if he was aware of that lack of consent;[5]

---

1 *Criminal Code*, s 1 (definition of 'sexual intercourse'), s 43AE.

2 *Criminal Code*, ss 43AH, 43AI.

3 *Criminal Code*, s 43AE.

4 *Criminal Code*, s 43AH.

5 *Criminal Code*, s 43AJ.

(f) the applicant was reckless in relation to the complainant's lack of consent if he was aware of a substantial risk that the complainant was not consenting, and having regard to the circumstances known to him it was unjustifiable to take that risk.[6]

[16] Section 43AB of the *Criminal Code* provides that '[t]he law that creates the offence may provide different fault elements for different physical elements'. In relation to the alternative of recklessness, s 192(4A) of the *Criminal Code* provides that 'being reckless as to a lack of consent to sexual intercourse … includes not giving any thought to whether or not the other person is consenting to the sexual intercourse'. Accordingly, the section which creates the offence provides a third way in which the fault element in relation to the lack of consent might be established, in addition to knowledge and recklessness as defined in Part IIAA.

[17] Therefore, in order to find the applicant guilty of the offence the jury was required to be satisfied beyond reasonable doubt that at the time of the act of sexual intercourse: (1) the accused knew that the complainant was not consenting to that act; or (2) the accused was aware of a substantial risk she was not consenting but unjustifiably took that risk; or (3) the accused did not give any thought as to whether or not the complainant was consenting.

---

6 *Criminal Code*, s 43AK(2).

[18] The principles governing appeals on the ground that a verdict is unreasonable were recently reviewed by this Court in *Lynch v The Queen*,[7] and we largely repeat that review for ease of reference. In *M v The Queen*, the High Court stated:

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as "unjust or unsafe" or "dangerous or unsafe". In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand".
>
> …
>
> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe and unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regards to those considerations.[8]

[19] The test in *M v The Queen* has been affirmed in subsequent decisions of the High Court.[9] An appeal on this ground requires an appellate court to make its own independent assessment of the whole of the evidence, and to

---

7 *Lynch v The Queen* [2020] NTCCA 6.

8 *M v The Queen* [1994] HCA 63; 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ.

9 *SKA v The Queen* [2011] HCA 13; 243 CLR 400 at [11]-[14]; *GAX v The Queen* [2017] HCA 25; 344 ALR 489 at [25]; *Pell v The Queen* [2020] HCA 12; 268 CLR 123.

determine whether, having regard to any advantages the jury had, it holds a reasonable doubt about the guilt of the appellant. The task of conducting an independent assessment of the evidence requires an appellate court to weigh any competing evidence that might tend against the verdicts reached by the jury.[10]

[20] In considering convictions for sexual offences, there may be evidence which required the jury, acting rationally, to have entertained a reasonable doubt as to guilt. The High Court has explained that analysis in the following terms:

> The court examines the record to see whether, notwithstanding [an acceptance of the complainant's evidence] – either by reason of inconsistencies, discrepancies, or other inadequacy; or in the light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.[11]

[21] In terms of resolving any doubt held by an appellate court, the majority in *M v The Queen* said:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.[12]

[22] In *Libke v The Queen*, Hayne J expressed the process of reasoning as follows (footnotes omitted):

---

10 *SKA v The Queen* (2011) 243 CLR 400 at [24] per French CJ, Gummow and Kiefel JJ.

11 *Pell v The Queen* (2020) 268 CLR 123 at [39].

12 *M v The Queen* (1994) 181 CLR 487 at 494.

> But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt.[13]

[23] In *Pell v The Queen*, the High Court confirmed that the statement from *Libke* extracted above was consistent with what was said by the majority in *M v The Queen*, and imposes no stricter test.[14]

[24] The matters which an appeal court may take into account in determining whether it was open on the evidence to be satisfied of guilt beyond reasonable doubt cannot be exhaustively catalogued. In this case, there is no doubt that the applicant inserted the bottle into the complainant's vagina, that he intended to do so, and that the complainant had not consented to that act of sexual intercourse. The issue arising under this ground is whether the jury could be satisfied beyond reasonable doubt that the fault element attending the complainant's lack of consent had been established. The applicant's contentions in that respect may be summarised as follows:

(a) the contextual evidence was that the incident took place at a drunken buck's party, and that in the lead up to the incident, including in the bus on the way to the host's premises, the complainant had not been conducting herself in a manner which suggested a rule that participants in the 'show' were not permitted to touch her;

---

13 *Libke v The Queen* [2007] HCA 30; 230 CLR 559 at 596-597 [113].

14 *Pell v The Queen* (2020) 268 CLR 123 at [44]-[45]; see also *Tyrell v The Queen* [2019] VSCA 52 at [70].

(b) the unqualified evidence of two of the Crown witnesses was that prior to the act of penetration with the beer bottle, other men, including the applicant, had been inserting dildos into the complainant's vagina;

(c) during the course of her evidence, the complainant conceded that she may have allowed men to insert dildos into her vagina on this evening, although she had no recollection of doing so;

(d) the applicant's account was that although he had no memory of actually inserting the beer bottle, he thought that he did so in order "to liven the party up" and because he considered the insertion of a beer bottle was no different to the insertion of a dildo;

(e) the applicant's account was that at no stage prior to the incident did he hear the complainant make any specific statement that there was a no-touching rule, or any general statement of ground rules concerning what could or could not be done by participants during the course of the complainant's 'show';

(f) the applicant's account was that he was surprised in the circumstances that the complainant reacted negatively to the insertion of the beer bottle, and that he had immediately apologised to her;

(g) there was no evidence that the applicant knew at the time he inserted the beer bottle that the complainant was not consenting, and the contextual evidence, together with the applicant's surprise, should necessarily have caused the jury to entertain a reasonable doubt as to

whether the applicant was aware of a substantial risk that the complainant was not consenting;

(h) as to the third manner in which the fault element concerning lack of consent might be satisfied, the contextual evidence established a reasonable possibility that the applicant, rather than not giving any thought to whether the complainant was consenting, had made a judgement that there was, or would be, consent to the use of a bottle because it was in his mind interchangeable with a dildo.

[25] It may legitimately be argued that the jury ought to have entertained a doubt as to whether the applicant knew the complainant was not consenting or was aware of a substantial risk that the complainant was not consenting. However, it cannot be said that having regard to the evidence as a whole the jury ought to have entertained a doubt that the applicant did not give any thought as to whether or not the complainant was consenting. As the respondent submitted, the applicant had no recollection of the insertion of the bottle or his actual state of mind at the time he performed the act of penetration, and it was open to the jury to conclude that his evidence in relation to his state of mind leading up to that conduct was a mixture of reconstruction and *ex post facto* reasoning. The applicant's account in that respect was:

> My first initial – I thought why I did it was to liven the party up and I've put the stubby in not thinking that it's any different being a dildo, stubby for her to spit it back to liven up the show a bit.
>
> …

> And I have always been involved in previous buck shows and Fizzy and Johnny was asking me whether I could help out at the start and I never did. I never did and maybe I was trying to help out.[15]

[26] That the applicant had no present recollection of his thought processes immediately before inserting the bottle into the complainant's vagina is evident from the following evidence given during the course of his cross-examination:

> My theory initially was, I didn't know, I thought I might have stumbled, being drunk, falling onto her belly and accidentally putting it in her vagina like she said, but there was no violence. There was no kicking, there was no – none of that.[16]

[27] Even taking all of the contextual factors into account without qualification, the state of the evidence did not require the jury to conclude that there was a reasonable possibility that the applicant had actually turned his mind to the question of whether or not the complaint was consenting. This ground of appeal is not made out.

Mistaken belief

[28] The other ground of appeal is that the trial judge erred in failing to put 'mistaken belief' to the jury. Section 43AW of the *Criminal Code* provides:

> **43AW Mistake or ignorance of fact – fault elements other than negligence**
>
> (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

---

15 Appeal Book (**AB**) 386.

16 AB 392.

(a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and

(b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

(2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

[29] That provision is based on and in identical terms to s 9.1 of the *Criminal Code* (Cth), which was adopted as part of the general principles of criminal responsibility appearing in Chapter 2 of the *Criminal Code* from the report of the Model Criminal Code Officers' Committee published in December 1992. The relevant commentary in that report stated:

> Consistent with the approach based on subjective fault elements, the Code provides that mistaken belief may negative intention, knowledge and recklessness. This codifies the common law position. (There is no clear scope for the operation of mistake in negligence offences since they only require that D intends to act.) The reasonableness of the mistake is merely a factor to consider in deciding whether the mistaken belief was actually held (see s.306.1).
>
> This is consistent with the common law position (*Morgan* [1976] AC 182) but different to the approach taken under s.24 of the Griffith Codes which require that the mistake be reasonable. Section 306 differs slightly from the Griffith Codes in that there is no explicit reference to the mistaken belief being "honest"; the Committee thought that the inclusion of this word would be redundant.
>
> There was some discussion of whether it was necessary to state these principles at all given that the Code requires the fault element to be established and a mistake which meant that the fault element was not present would mean that the prosecution could not establish its case. The similar provision proposed by the Gibbs Committee (s.3M(1) of its Draft Bill) was criticised by the Brisbane Conference as superfluous. One submission shared that view. Another was concerned that the provision might be misconstrued as a substantive defence. Although, strictly speaking, evidence of a mistake is only one sort of evidence which may cast doubt on the presence of a fault element, the Committee

> thought that for the sake of clarity, the Code should state the matter explicitly. In part, the Committee was influenced by the fact that the Code will speak to a wider audience than lawyers. Even among lawyers, the law of mistake has produced a good deal of confusion. Only one submission thought that the mistake should be reasonable.

[30] The discussion of superfluity in that report draws attention to the fact that in the circumstances of this case, in order for the jury to find beyond reasonable doubt that at the time of the act of sexual intercourse the applicant knew that the complainant was not consenting to that act, the jury must necessarily have excluded any mistaken belief on the part of the applicant that the complainant was consenting. Similarly, in order for the jury to find beyond reasonable doubt that the applicant was aware of a substantial risk the complainant was not consenting but unjustifiably took that risk, the jury must necessarily have excluded any mistaken belief that there was no such risk. Finally, there is an *ex facie* incompatibility between a finding beyond reasonable doubt that the applicant did not give any thought as to whether or not the complainant was consenting and a mistaken belief on the part of the applicant in that respect. If that is correct, a direction by the trial judge in relation to mistaken belief would have been otiose, and would not have assisted the applicant's position in terms of the matters which the Crown was required to prove. As one commentator has stated:

> Section 9.1 provides that a person is not criminally responsible for an offence if a mistaken belief about, or ignorance of, a fact or facts 'negates any fault element' (other than negligence). It is apparent that the provision is superfluous. Even if it did not exist, the situation would be the same – if a fault element cannot be proved because the

> defendant had a particular mistaken belief about a fact, or was ignorant of a fact, it cannot be proved. The defendant is not guilty if the offence has a fault element that cannot be proved.[17]

[31] Counsel for the respondent made reference in support of this proposition to the decision of the South Australian Court of Criminal Appeal in *R v Donaldson & Poumako*.[18] The issue relevantly under consideration in that case was whether the appellants were excused from criminal responsibility for the offence of offering securities without lodging a disclosure document as required by the *Corporations Act 2001* (Cth). Recklessness was the relevant fault element for the offence. The appellants claimed that they were under the mistaken belief that the transactions were exempt from the disclosure provisions, and that the trial judge erred by not instructing the jury on the application of the defence of mistaken belief to the circumstances of the case. Duggan J, with whom the other members of the Court agreed, stated (citations omitted):

> In my view, s 9.1 of the *Criminal Code* is of no practical relevance in a case such as the present. Whereas a distinct defence of mistake of fact is relevant to cases of strict liability, a consideration of the fault elements in a case which does not involve strict liability will subsume any issue involving mistake of fact. This was recognised in the report of the Model Criminal Code Officers:
>
> > Although, strictly speaking, evidence of a mistake is only one sort of evidence which may cast doubt on the presence of a fault element, the Committee thought that for the sake of clarity, the Code should state the matter explicitly. In part, the Committee was influenced by the fact that the Code will speak to a wider audience than lawyers.

---

17 Odgers, *Principles of Federal Criminal Law*, Fourth Edition, Lawbook Co, [9.1.100].

18 *R v Donaldson & Poumako* [2009] SASC 31; 103 SASR 309.

> The section has been described as superfluous in that "if a fault element cannot be proved because the defendant had a particular mistaken belief about a fact, or was ignorant of a fact, it cannot be proved".
>
> This no doubt explains why s 9.1 was not alluded to by counsel at the trial and was not referred to in the summing up of the trial judge.[19]

[32] In *Bahar & Ors v The Queen*,[20] the relevant question was whether the trial judge had failed to adequately direct the jury with regard to the defence of mistake under s 9.1 of the *Criminal Code*. In fact, the trial judge had not directed the jury on that matter at all. President McClure, with whom the other members of the Court agreed, stated in that respect:

> The fault elements must exist at the time of the performance of the physical elements. The defence of mistake must negate the mental elements (knowledge and intention) that apply to the performance of the appellants' crew duties during the voyage. The only relevant facts about which the appellants could arguably have been mistaken or ignorant were (1) that the vessel was transporting passengers or (2) that the passengers were being taken to Australia. However, positive knowledge of the purpose and destination of the voyage and an intention to facilitate it were elements of the offence of which the jury had to be satisfied beyond reasonable doubt. That is, proof of those fault elements (knowledge and intention as to the bringing or coming to Australia of the passengers on the vessel) itself and without more negatives any possibility of the defence of mistake under the Code: see *Miles v The State of Western Australia* [2010] WASCA 93. Accordingly, it was unnecessary to direct the jury on the issue of mistake. The conviction appeals should be dismissed.[21]

[33] The Queensland Court of Criminal Appeal came to the same conclusion in *Garcia v The Queen*.[22] After citing the relevant passages in *Donaldson &*

---

19 *R v Donaldson & Poumako* (2009) 103 SASR 309, [23]-[25].

20 *Bahar & Ors v The Queen* (2011) 45 WALR 100.

21 *Bahar & Ors v The Queen* (2011) 45 WALR 100 at [28].

22 *Garcia v The Queen* [2016] QCA 174.

Poumako and *Bahar*, North J, with whom the other members of the Court agreed, stated (citations omitted):

> The appellant submitted that the approach endorsed by the decisions I have referred to deprive s 9.1 of any content or application and that the defended principles of statutory instruction not to give the section an interpretation and thereby operation one that was useful and pertinent and not one that was superfluous or insignificant. But as Duggan J pointed out in *R v Donaldson & Poumako* the potential for a limited scope for the explicit operation of s 9.1 of the Code was recognised when in the Model Criminal Code Officer's Report of 1992. In the circumstances of this trial the proof beyond reasonable doubt of recklessness on the part of the appellant negatived the possibility of a defence of mistaken belief or ignorance of facts under s 9.1. This follows from the application of straight forward principles of reasoning but also from the requirement of s 9.1(2) that the mistaken belief or ignorance be "reasonable in the circumstances". Proof beyond reasonable doubt of recklessness in the context of the importation of a border controlled drug negatives scope for the operation of s 9.1. The section is rendered neither superfluous, void nor insignificant by the interpretation or operation I prefer. The section remains useful and pertinent indicating a state of mind where there is no criminal responsibility but its existence is negatived when recklessness is proven beyond reasonable doubt.
>
> His Honour correctly and conventionally directed the jury that the burden of proof of the prosecution case rested upon the prosecution, that there was no burden upon the appellant to prove his innocence or any fact. As part of these directions the jury was instructed that the appellant was presumed innocent and that the standard of proof of guilt was beyond reasonable doubt …
>
> …
>
> When these directions are considered together with those [concerning the requisite state of mind], the jury can have been in no doubt that it had to conclude beyond reasonable doubt that the appellant was reckless (within the meaning of that term) before it could return a verdict of not guilty.
>
> In this case a specific direction in terms of s 9.1 was not required to avoid a possible miscarriage of justice. If the prosecution could satisfy the jury beyond reasonable doubt the appellant was reckless then a verdict of guilty would follow. If however the jury could not be so satisfied beyond reasonable doubt a verdict of not guilty would follow. It was not necessary in order to acquit for the jury to be reminded of other states of mind such as a mistaken and reasonable mind in terms of

> s 9.1. His Honour's directions required the jury to be satisfied that the prosecution had excluded all other hypotheses beyond reasonable doubt.
>
> The directions given by his Honour were clear and in accordance with authority. It is well established that an intermediate Court of Appeal when considering national legislation should not depart from nor decline to follow decisions of other intermediate Courts of Appeal unless the Court is satisfied that the earlier decisions are plainly wrong. I am not so satisfied. Indeed for the reasons I have given I agree with them.[23]

[34] As described above, the fault elements in this case were knowledge or recklessness. The only relevant fact about which the applicant could arguably have been mistaken was that the plaintiff was consenting to the insertion of the beer bottle because other objects had been inserted into her vagina during the course of the 'show'. This is not a case in which the existence of that particular mistaken belief could have operated to negate the relevant fault element, as is required by s 43AW(1)(b) of the *Criminal Code* in order for the defence to have operation. Rather, a state of satisfaction on the part of the jury that the applicant knew that the complainant was not consenting to the act would obviate any possibility of a mistaken belief on his part that the plaintiff was consenting; as would a finding that the applicant was aware of a substantial risk the complainant was not consenting

---

23 *Garcia v The Queen* [2016] QCA 174 at [39]-[43]. Although in *R v Navarolli* (2009) QCA 49; [2010] 1 Qd R 27 at [71]-[74] the Queensland Court of Criminal Appeal found that the trial judge had erred concerning the content of the direction as to mistaken belief, that case was decided in a particular context. The appellant had been convicted for obtaining credit without disclosing his status as an undischarged bankrupt contrary to the *Bankruptcy Act 1966* (Cth). The trial judge had determined to provide directions to the jury on the issue of mistake of fact, but in doing so directed the jury on the test under s 24 of the *Criminal Code* (Qld) rather than the *Criminal Code Act 1995* (Cth), including the plainly erroneous direction that any such belief had to be reasonable. The appeal court did not deal with the anterior question of whether the direction was required at all. As the Court observed in *Garcia*, the decision is not inconsistent with the other decisions concerning the operation of s 9.1 of the Code.

or that the applicant did not give any thought to whether or not the complainant was consenting.

[35] The first paragraph of the aide memoire which was provided to the jury by the trial Judge provided expressly:

> The accused is charged with one count of having sexual intercourse with [the complainant] without her consent. This count consists of a number of elements. The Crown must prove each element beyond a reasonable doubt before you are entitled to convict.

[36] The aide memoire then went on to set out the elements of the offence in terms which are consistent with the physical and fault elements described above. In its terms, the aide memoire directed the jury that in order to convict it had to be satisfied beyond reasonable doubt that at the time of the act of sexual intercourse: (1) the applicant knew that the complainant did not consent to him inserting the neck of the bottle into her vagina; OR (2) the applicant was aware that there was a substantial risk that the complainant was not consenting to him inserting the neck of the bottle into her vagina but unjustifiably took that risk; OR (3) the applicant did not give any thought to whether or not the complainant was consenting to that act of sexual intercourse.

[37] During the summation to the jury, the trial Judge directed the jury as to the presumption of innocence, that the onus of proof beyond reasonable doubt remained on the Crown throughout, and that the accused did not have to

prove anything.[24] That direction as to onus and standard was reiterated throughout the summation. The trial Judge directed the jury as to the fourth element of the charge in terms which were consistent with the aide memoire.[25] Again, reference was made to the onus resting on the Crown to prove that fourth element of knowledge or recklessness beyond reasonable doubt, in one or other of the three ways available to do so. When dealing with the applicant's lack of recollection, the trial Judge stated:

> Because [the applicant] cannot remember inserting the tip of the bottle, it means that he is unable to tell you himself why he did it and what was on his mind at the time and what knowledge he had. However, he is able to test the evidence called by the Crown.
>
> As I said, an accused person does not have to prove anything. The burden of proof is on the Crown and if, by testing the witnesses, the Crown facts fail to satisfy you of [the applicant's] guilt, then he is entitled to an acquittal.[26]

[38] The trial Judge then conducted an extensive and exhaustive review of the relevant evidence which had been given by the witnesses during the course of the trial, particularly in relation to the complainant's conduct and her interactions with the guests at the party. The trial Judge concluded that review by addressing the requisite findings concerning the accused's state of mind in the following terms:

> But you can see what the Crown case was. The Crown case was that he knew all along that he had the bottle in his hand, he knew he put it in, he knew that she did not invite him and then he pulled it out, so he knew, in other words, that she was not consenting or at least he was

24 AB 479.

25 AB 484.

26 AB 495.

reckless as to whether he was consenting or not. That is the Crown case.

…

If the accused – one of the ways in which the Crown is suggesting to you that this accused's memory is not to be accepted on this issue, is all of the things that he can remember. You may remember the Crown went through them in some detail both immediately before and immediately afterwards, the conversation, for example, going to the bus, looking for the phone, seeing her, according to him, other men putting in the dildo in her vagina, looking at the vagina and seeing how big it was.

He remembers all of that, both sides but the precise moment of having the bottle in his hand, putting it in, he says he does not remember. The Crown says that is rubbish and you should infer he knew exactly what he was doing and he intended to do it.

So that is what the Crown has said but it is a matter for you whether you draw that inference or not. One of the possibilities in this case is that, if you look – if you remember the way the accused explained it that he thought that it would be okay, so he says, to put the bottle in, it is no different from a dildo, he is telling you and therefore he thought it would be okay.

Maybe and if that is what he was thinking he thought that she was going to consent to what he did. If that is that he thought, it might be a mistaken belief. He was mistaken about that but that was what he believed, then it would be open to you to say, well I am not satisfied that he knew that she was not consenting.

Or on the other hand you might think, well even if that is the case, he did not really turn his mind to it and I am satisfied that he did not give it any thought. That is also open to you.

The important point is that if he honestly - if he believed that she was consenting, then, of course, he cannot be guilty, if that is how you see things. We do not know what really was in his mind, other than what he has told us. He does not say, 'I believed he was consenting'. How could he? Because he says he has no memory.

So it is a matter of whether you are prepared to draw that inference or whether, put it another way because, bear in mind there, the onus of proof is on the Crown at all times. Has the Crown satisfied you, beyond reasonable doubt? Because this is the crucial question. Did he know she was not consenting or was he reckless about it? Bear in mind

the - with what I have told you about what recklessness is in the aide-memoire.[27]

[39] During the course of its deliberations, the jury sought further explanation in relation to the elements of the offence. In providing that further explanation, the trial Judge relevantly stated:

> The other matter is talking about the fourth element. Now, the fourth element is in two parts. The first part is that the accused knew that [the complainant] did not consent to his inserting the neck of the bottle into her vagina. So, that is the first part. Do you remember the Crown has pitched its case essentially on - - -? Its case is that he did know that she was not consenting. That is how the Crown pitched its case. And what it was saying to you in support of that was that you should reject his evidence that he has no memory of doing that. You remember how the Crown put to you a number of things that the accused was able to remember immediately before and immediately after.
>
> …
>
> So, as part of that, the Crown suggest that you should reject his evidence that he has forgotten or does not recall actually putting the bottle into her vagina, although he accepts that he did it. So, you will remember the Crown has to prove that he did have that knowledge, beyond reasonable doubt.
>
> Now, you might say well, we are not satisfied with that. And then you need to look at recklessness as an alternative. So, the Crown is relying on recklessness as well as the alternative to proving knowledge of lack of consent. The Crown has to prove one or the other. And there are two ways in which the Crown can prove recklessness.
>
> The first way is because the Crown says he is aware that there was a substantial risk that she was not consenting and there are two limbs to that. Having regard to the circumstances known to him, he was unjustifiable to take the risk. So, that is one way of putting it.
>
> But there is another way of looking at recklessness and that is whether or not - it includes not giving any thought at all to whether she was consenting to him doing that. So, if you were to come to the conclusion that the Crown has satisfied you on the evidence, that he gave no thought whatsoever to whether [the complainant] was consenting to what he was about to do to her, then you would find him guilty. Remember, the Crown has to satisfy you, beyond reasonable doubt,

27 AB 538-539.

about one or more of those factors. So, it is that either he knew, or he was reckless. And thinking about recklessness, it could be either as set out in 2.2 or as set out in 2.3 [of the aide memoire].

So, in relation to your question, is an assumption of consent equal to recklessness or an example of recklessness, that really goes to whether - it goes to 2.3. Has the Crown proved that he did not give any thought to whether [the complainant] was consenting to the sexual intercourse? All right.

…

… You have to consider whether, in all of the circumstances, the Crown has proved knowledge or recklessness. Does that help? All right. Is there anything more I should say?

THE FOREPERSON: Just to clarify perhaps, this knowledge or intent at the time.

HIS HONOUR: Yes, it is at the time.

THE FOREPERSON: At that time.

HIS HONOUR: The time that the bottle is being put into the vagina, not some later time. And of course, if you think it is a reasonable, I should say this, if you think there is a reasonable possibility that he was mistaken about whether she was consenting or not, well then the Crown will not have proved its case, because that would mean that there is a reasonable possibility that he was innocent. Okay, does that help? Okay, and whether he was mistaken or not, you have to look at all of the circumstances, the same as everything else.[28]

[40] With respect, those passages, together with the aide memoire and the general directions previously given, adequately illustrated for the jury the fact that the fourth element could not be satisfied by reference to either knowledge or recklessness if there was a reasonable possibility that the applicant thought the complainant was consenting to the insertion of the beer bottle. That explanation was made in terms of 'mistaken belief', but it was unnecessary to use that particular formulation. Although that part of the passage at AB538 which suggested that a mistaken belief might subsist together with a

28 AB 563-564.

failure on the part of the applicant to turn his mind to the issue was potentially confusing, that matter was immediately clarified by the trial Judge's clear and strong direction that the applicant could not be found guilty if he believed the complainant was consenting, and that the onus remained always on the Crown. That issue was then further clarified by the explanation given during the course of the jury's deliberations. For these reasons, it was unnecessary to provide any specific or additional direction to the jury on the issue of mistaken belief in this case.

[41] To draw that conclusion in the circumstances of this case is not to say that the legislative formulation of mistaken belief may never have application in the determination of criminal responsibility under the Model Criminal Code provisions. During the course of oral submissions, counsel for the applicant described a hypothetical scenario in which one partner in a long-standing and sexually active relationship performed an act of sexual penetration on the other partner in that relationship in the absence of any express indication of consent. It was said that in those circumstances a mistaken belief that the other partner was consenting could coexist with not giving any thought at the time the act was committed to whether or not the other partner was consenting. That might conceivably be so in those circumstances, but this is not such a case. First, as has been described in the context of the first ground of appeal, on proper analysis the applicant's evidence was not to the effect that he was suffering from a mistaken belief at the relevant time. Secondly, the relationship and interactions between the applicant and the

complainant were not of such nature or duration as could foster an assumptive (but mistaken) belief of consent in the absence of any consideration of that matter.

[42] This ground is not made out.

Disposition

[43] Time within which to make an application for leave to appeal against conviction is extended; leave to appeal is granted; and the appeal is dismissed.

———————————————————