Director of Public Prosecutions Reference No 1 of 2002 [2002] NTCCA 11

TITLE:	DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2002
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 16/01 (9806399)
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JUDGMENT OF:	MARTIN CJ, ANGEL, THOMAS, BAILEY JJ and GALLOP AJ

CATCHWORDS:

CRIMINAL LAW - Particular offences - Offences against the person - Sexual offences - Rape - Whether Crown must prove as an element an intent to have sexual intercourse without consent - Mistaken belief as to consent - Whether mistaken belief need be based on reasonable grounds - Criminal Code 1983 (NT) s 31, s 32 and s 192(3)

REPRESENTATION:

Counsel:

Appellant:	W J Karczewski QC and M J Carey
Respondent:	S J Odgers SC and S Cox

Solicitors:

Appellant:	DPP
Respondent:	NTLAC

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

Director of Public Prosecutions Reference No 1 of 2002 [2002] NTCCA 11
No. CA 16/2001 (9806399)

CORAM: MARTIN CJ, ANGEL, THOMAS, BAILEY JJ and GALLOP AJ

REASONS FOR JUDGMENT

(Delivered 19 December 2002)

MARTIN CJ:

[1] On 25 May 2002 a man was found not guilty of one count of having sexual intercourse with a female without her consent contrary to s 192(3) of the *Criminal Code* (NT).

[2] The learned trial Judge directed the jury both orally and in writing that the Crown must prove each element of the offence beyond reasonable doubt before it could find him guilty. His Honour correctly included the absence of the woman's consent as an element of the offence, but further directed that the jury was also required to be satisfied beyond reasonable doubt that at the time he engaged in the act of sexual intercourse the man intended to do so without that consent. Directions were also given on the issue of mistaken belief as to consent.

[3] The text of those various directions are set out in full in the reasons of Bailey J.

[4] The Director of Public Prosecutions has referred for consideration and opinion of this Court the following points of law arising at the trial:

> "1. Was the learned trial judge correct in directing the jury, in respect of the elements of the offence prescribed by section 192(3) of the Criminal Code, that the Crown must prove beyond reasonable doubt, ***not only***
>
> (a) that the accused had sexual intercourse with the complainant, and
>
> (b) that the complainant did not give her consent to the accused having sexual intercourse with her
>
> ***but also***
>
> (c) that the accused intended to have sexual intercourse with the complainant without her consent?
>
> 2. Was the learned trial judge correct in directing the jury, in respect of the issue of the accused's mistaken belief as to consent, that such a mistaken belief need not be based on reasonable grounds?"

[5] As the reference was said to give rise to consideration of the correctness of the decision of this Court in *McMaster v The Queen* (1994) 4 NTLR 92 a bench of five Judges was convened to hear it. Other members of the Court have expressed doubt as to whether the decision in *McMaster* has any bearing on the issues raised on this reference since it dealt with a provision of the Code since repealed and replaced by the present subsection. Nevertheless, the following is the view of the law as expressed by Gray AJ in that case with whom the other members of the Court agreed:

> "In my opinion s 31(1) produces the result that the prosecution must prove that it was the intention of the accused to assault the victim without his or her consent. This involves the proposition that the accused knew that the victim was not consenting or knew that he or she may not be consenting and proceeded regardless. A judicial direction to this effect should, in my opinion, be given in all cases because the necessary mens rea of the accused is an element of the crime. The direction becomes a necessity, whenever the evidence raises the issue of the accused's intention in relation to consent."

[6] As to the application of s 32 of the Code, his Honour expressed the opinion that it did not touch upon the elements of the offence created by the then s 192(1), but a trial Judge should give a direction upon it in all cases where the evidence raises the issue. "There is a considerable degree of overlap between 31(1) and 32 (p 100)".

[7] In my opinion the issues raised on the reference are to be resolved by reference to the provisions of the *Criminal Code* guided by the well known rules of construction, detailed by Kirby J in *R v Barlow* (1997) 188 CLR 1 at 31 and recently affirmed by his Honour in *Murray v The Queen* (2002) 189 ALR 40 commencing at page 59 par 78.

> "(1) The applicable legislative provision appears in a code. This is a special kind of legislation. It does not merely collect and restate the pre-existing common law. Its purpose is to provide a fresh start and thereby to introduce greater clarity of expression and sharpness of concepts. The code provisions, appearing in expressions of ordinary English language, should not be glossed with notions of excessive subtlety or philosophical profundity. They should be capable of being explained to a jury, according to their own terms, which (at least in the present connection) are relatively simple in their expression;"

[8] The Territory Code was enacted long after those of Queensland, Western Australia and Tasmania. It should be taken as having been drafted with a

view to avoiding the problems which have arisen in relation to the provisions such as s 23 of the Queensland Code, which has been most recently considered by the High Court in *Murray* and the similar, but not identical s 23 of the Western Australian Code decided by that Court at the same time in *Ugle v The Queen* (2002) 189 ALR 22.

[9] Frequent reference is made throughout the High Court decisions to the various cases arising from those jurisdictions where their provisions have been considered, such as *Vallance* (1961) 108 CLR 56; *Mamote-Kulang v The Queen* (1964) 111 CLR 62; *Timbu Kolian v The Queen* (1968) 119 CLR 47 and *Kaporonovski v The Queen* (1975) 133 CLR 209. Those cases were all reported prior to the drafting of the Northern Territory Code. They have since been considered in *Falconer* (1990) 171 CLR 30 and *Ugle* and *Murray*.

[10] The differences between those code provisions and s 31 of the Territory Code are obvious.

[11] Subject to any express provision to the contrary, s 31 is intended to have general application, *Charlie v The Queen* (1999) 199 CLR 387 per Gleeson CJ at par 4 and 5. It applies in relation to the offence prescribed by s 192(3). In *Charlie* at par 12 Kirby J referred to s 31 and the issue of statutory construction which is addressed to:

> "… the meaning and proper operation of the Code, which is in material respects (that Brennan J noted) peculiar and different from other codes and legislative provisions operating within Australia as well as different from the common law"

[12] In *Murray* his Honour at par 78(4) said that he gained no assistance from the decision in *Charlie* when considering s 23 of the Queensland Code. In the same case Callinan J said that s 31 has no analogue elsewhere in Australia, par 62. His Honour also noted it was a new Code.

[13] Notwithstanding the Director's detailed review of the law under the State Codes, (as to which see the reasons of Bailey J) I am not convinced that they provide authoritative guidance to this Court in relation to this Code. However, with respect, I agree with Dixon CJ who observed that in relation to the Tasmanian Code:

> "It is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions … can be worked out judicially" (*Vallance v The Queen* (1961) 108 CLR 56 at p 61)

[14] Unhindered by what I consider to be extraneous considerations I turn to the definitions of "act" and "event" in the Code. Those words are not defined in the other Codes. An "act" in relation to an accused person, means the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention. An "event" means the result of an act or omission.

[15] If a person engages in an act of sexual intercourse with another that constitutes an "act". It is not unlawful without else. The act becomes unlawful if it be done without the other's consent. The act combined with

the lack of consent produces a result, that is, the person performing the act has sexual intercourse without the consent of the other. That combination of circumstances constitutes the offence prescribed by s 192(3) of the Code. The crime consists of a combination of an act and an event. Accordingly, s 31(1) applies to both elements of the offence.

[16] I would answer the first question on the reference in the affirmative.

[17] As to mistake, s 32 of the Code is to be construed bearing in mind the same guidance set out above regarding the construction of a Code. When applied to an appropriate case it renders the person not criminally responsible.

[18] But that is not to say that s 32 is exhaustive and that it is only its provisions which apply in all cases where the accused's belief is relevant and mistake is raised in the evidence. In the case of the offence under s 192(3), I have already indicated that the Crown must prove that the accused intended to have sexual intercourse with another person without that person's consent. That necessarily involves negating any material capable of indicating that the accused honestly believed the other person was consenting. That does not require the application of s 32. It is simply part of the burden resting on the Crown to discharge the onus resting upon it to prove the mental element of the offence.

[19] In that regard I agree with the reasons of Bailey J and with his conclusion. Reference might also be made to *R v Martin* (1963) Tas SR 103. The second question in the reference must also be answered in the affirmative.

ANGEL J:

[20] Pursuant to s 414(2) *Criminal Code* (NT) the Director of Public Prosecutions seeks the opinion of this Court as follows:

> "1. Was the learned trial judge correct in directing the jury, in respect of the elements of the offence prescribed by section 192(3) of the Criminal Code, that the Crown must prove beyond reasonable doubt, ***not only***
>
> (a) that the accused had sexual intercourse with the complainant, and
>
> (b) that the complainant did not give her consent to the accused having sexual intercourse with her.
>
> ***but also***
>
> (c) that the accused intended to have sexual intercourse with the complainant without her consent?
>
> 2. Was the learned trial judge correct in directing the jury, in respect of the issue of the accused's mistaken belief as to consent, that such a mistaken belief need not be based on reasonable grounds?"

[21] The judgment of Bailey J, which I have had the opportunity of reading in draft form, relieves me of the task of repeating the background to the reference which for the first time raises questions regarding the mental element of the crime of rape and the interplay between s 31 and s 192(3) *Criminal Code* (NT).

[22] Bailey J has referred to the mental element of common law rape and the relevant case law in the common law States of South Australia, Victoria and

New South Wales. He has also recounted the mental element of rape and relevant case law in the Criminal Code States of Western Australia, Tasmania and Queensland. I shall not reiterate these matters.

[23] Criminal responsibility under the *Criminal Code* (NT) is imposed, inter alia, with respect to intentional acts and foreseen events, s 31(1). In order to ascertain whether a person is criminally responsible, one necessarily must ask what act or event is in question. Because an event is the result of an act one can not have an event in the absence of an act. Section 192(3) *Criminal Code* (NT) prescribes no specific mental element. Section 31(1) *Criminal Code* (NT) applies to the crime of "sexual intercourse with another person without the consent of the other person". In s 192(3) the crime of "sexual intercourse with another person without the consent of the other person" constitutes neither an "act" nor an "event" within the meaning of the *Code*. Rather, it is constituted by the act of penetration accompanied by the extrinsic circumstance of lack of consent of the victim. The extrinsic circumstance of lack of consent is not part of the act of penetration and there is no result of the physical act involved as an element of the crime; that is, there is no event. On this aspect of the matter I respectfully agree with the reasoning of Cosgrove J in *Arnol* [1981] Tas SR 157 at 173–4; (1981) 7 A Crim R 291 at 302, supported as it is by the reasoning of Gibbs J, as he then was, (Stephen J concurring) in *Kaporonovski* (1973) 133 CLR 209 at 231, which has been subsequently approved in *Falconer*

(1990) 171 CLR 30 at 38 and *Van Den Bemd* (1995) 1 Qd R 401 at 403–4, (1994) 179 CLR 137 at 139.

[24] Section 31(1) only applies to s 192(3) in so far as there is an act and in the absence of any event. From this it follows that in order to prove the elements of s 192(3) the prosecution must prove:

> (a) that the accused intentionally had sexual intercourse with the complainant, and
>
> (b) that the complainant did not in fact consent to that act at the time;

and, if the issue of mistake under s 32 *Criminal Code* (NT) is raised on the evidence –

> (c) that the accused did not at the time have an honest and reasonable, but mistaken, belief that the complainant consented to the act of sexual intercourse.

[25] If my conclusion is correct, the law of rape in the Northern Territory accords with the law of rape in other Code States. That law simplifies directions to the jury. It offers protection (in my experience in the Territory, much needed protection) to persons who suffer at the hands of persons in drink and lust who have sexual intercourse without adverting at all to the issue of consent. The language of s 31 *Criminal Code* and definitions of "act" and "event" do not compel a different conclusion.

[26] I can not agree with Bailey J's sentiment, viz. "the blatant unfairness of the Code States' interpretation of rape provisions".

[27] The practical difference between the conclusion at which I have arrived and the common law position, it would seem, comes down in the end on the one hand, to the accused who adverts to the possibility of no consent and proceeds regardless and on the other hand the accused in drink and lust who does not advert to the question of consent at all. In the latter case it seems to me there is much to be said for the view that the victim requires the protection of the law just as much as in the former case.

[28] I would answer the reference as follows:

(1) No

(2) No.

THOMAS J:

[29] I have read the reasons for judgment prepared by Bailey J. I agree with his proposed answers to the two questions posed by the reference and with his reasons.

BAILEY J:

Background

[30] This is a reference pursuant to s 414(2) of the *Criminal Code* (NT) which provides:

> "(2) A Crown Law Officer may, in a case where a person has been acquitted after his trial on indictment, refer any point of law that has

arisen at the trial to the Court for its consideration and opinion thereon."

[31] The reference arises out of the acquittal of an accused ("WJI") on one count of having sexual intercourse with a female without her consent contrary to s 192(3) of the *Criminal Code* (NT). It is necessary to set out the whole of s 192 and s 192A which provide:

> "192. **Sexual intercourse and gross indecency without consent**
>
> (1) For the purposes of this section, "consent" means free agreement.
>
> (2) Circumstances in which a person does not freely agree to sexual intercourse or an act of gross indecency include circumstances where –
>
> (a) the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person;
>
> (b) the person submits because he or she is unlawfully detained;
>
> (c) the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing;
>
> (d) the person is incapable of understanding the sexual nature of the act;
>
> (e) the person is mistaken about the sexual nature of the act or the identity of the other person;
>
> (f) the person mistakenly believes that the act is for medical or hygienic purposes; or
>
> (g) the person submits because of a false representation as to the nature or purpose of the act.
>
> (3) Any person who has sexual intercourse with another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for life.
>
> (4) Any person who commits an act of gross indecency upon another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for 14 years.
>
> (5) Any person who attempts to commit the crime defined by subsection (3) is liable to imprisonment for 7 years.

(6) Any person who, being an adult, attempts to commit the crime defined by subsection (3) upon another person who is under the age of 16 years is liable to imprisonment for 14 years.

(7) Any person who attempts to commit the crime defined by subsection (3) and in the course of such an attempt causes bodily harm to the other person is liable to imprisonment for 14 years.

(8) Any person who attempts to commit the crime defined by subsection (3) and thereby causes grievous harm to the other person is liable to imprisonment for 17 years.

192A. **Direction to jury in certain sexual offence trials**

In a relevant case the judge shall direct the jury that a person is not to be regarded as having consented to an act of sexual intercourse or to an act of gross indecency only because the person –

(a) did not protest or physically resist;

(b) did not sustain physical injury; or

(c) had, on that or an earlier occasion, consented to –

(i) sexual intercourse; or

(ii) an act of gross indecency,

whether or not of the same type, with the accused."

[32] In the course of his summing up to the jury, the trial judge gave certain directions about the elements of an offence against s 192(3) of the *Criminal Code* and provided the jury with a written aide memoire summarising the elements of the offence. The terms of the aide memoire were as follows:

"AIDE MEMOIRE TO THE JURY

R v WJI

A. INTRODUCTION

1. The indictment contains one charge of having sexual intercourse without consent.

2. The charge consists of three elements. The Crown must prove each of the elements beyond reasonable doubt.

B. 1. The charge consists of the following three elements:

1.1 That on or about 27 January 1998 at Palmerston the accused had sexual intercourse with TRR.

1.2 That TRR did not give her consent to the accused having sexual intercourse with her.

1.3 That the accused intended to have sexual intercourse with TRR without her consent.

2. Element 1.1

"Sexual intercourse" for the purpose of this count, means penile penetration by the accused of the vagina of TRR.

3. Element 1.2

3.1 "Consent" means free agreement.

3.2 TRR does not consent to sexual intercourse if she submits because of force, fear of force or fear of harm of any type to herself.

3.3 TRR does not consent to sexual intercourse if she submits because she is unlawfully detained.

4. Element 1.3

4.1 The accused knew TRR was not consenting or may not be consenting and proceeded regardless.

4.2 If the accused mistakenly believed that TRR consented to his having sexual intercourse with her, he will NOT have intended to have sexual intercourse with her without her consent.

The Crown must therefore prove beyond reasonable doubt that the accused held no mistaken belief that TRR consented to having sexual intercourse with him.

4.3 Such a "mistaken belief" does NOT have to be based on reasonable grounds. However, if there is no reasonable basis for such a mistaken belief, you are entitled to take that into account in deciding whether or not the Crown has proved that no mistaken belief existed.

5. If the Crown has proved EACH of the three elements of the charge against the accused beyond reasonable doubt, your verdict must be one of GUILTY.

6. If the Crown has failed to prove ANY of the three elements of the charge against the accused beyond

reasonable doubt, your verdict must be one of NOT GUILTY."

[33] The matters upon which the Crown seeks the opinion of this Court, pursuant to s 414(2) of the *Criminal Code* (NT), are set in the reference in the following terms:

> "1. Was the learned trial judge correct in directing the jury, in respect of the elements of the offence prescribed by section 192(3) of the Criminal Code, that the Crown must prove beyond reasonable doubt, ***not only***
>
> (a) that the accused had sexual intercourse with the complainant, and
>
> (b) that the complainant did not give her consent to the accused having sexual intercourse with her
>
> ***but also***
>
> (c) that the accused intended to have sexual intercourse with the complainant without her consent?
>
> 2. Was the learned trial judge correct in directing the jury, in respect of the issue of the accused's mistaken belief as to consent, that such a mistaken belief need not be based on reasonable grounds?"

[34] In addition to the aide memoire the trial judge gave the jury some oral directions about the elements of the offence. He said:

> "Now, here there is no dispute that sexual intercourse took place. The issue is whether she consented or not, and if she did not consent, whether the accused man knew that she did not, or alternatively, knew that she may not be consenting but proceeded with his actions regardless. Now, there is an obligation imposed upon me to tell you

what evidence, if any, exists in this matter which is capable of amounting to corroboration."

[35] Further on his Honour identified the three elements of the offence as follows:

> "The three elements are identified in paragraph (b). (1), that on or about 27 January 1998 at Palmerston, the accused had sexual intercourse with TRR. I expect you will have no difficulty with that at all, ladies and gentlemen. It is not in dispute in these proceedings. (2) that TRR did not give her consent to the accused having sexual intercourse with her. That is in dispute. (3) that the accused intended to have sexual intercourse with TRR without her consent.
>
> .....
>
> I want to say just a little about consent before I take you to Element 1.3. The Crown case here, of course, is that the accused had sexual intercourse with TRR without her consent. That involves the proposition that the accused man knew that the complainant, TRR, was not consenting, or knew that she may not be consenting and proceeded regardless. The prosecution must prove beyond reasonable doubt that there was no consent on the part of TRR, and it must prove the elements set out in the aide-memoire beyond reasonable doubt."

[36] The issue of mistaken belief as to consent was dealt with in the aide memoire at par 4.2 and par 4.3. In addition the trial judge gave oral directions in respect of "mistaken belief" as follows:

> "Now, if you find those matters occurred, you may think that there is no room for any suggestion that the accused could have been in any doubt that she was not consenting. But that, of course, will all depend upon the facts as you find them and I remind you again that you need to bear in mind that the onus of establishing that there was no consent lies upon the Crown and it lies upon the Crown beyond reasonable doubt."
>
> Now, if I can take you back to the document that you have in front of you. Element 1.3, which is the element that the accused intended to have sexual intercourse with TRR without consent, is developed at the foot of page 1. The Crown must establish beyond reasonable doubt that the accused knew that TRR was not consenting, or may not be consenting, and proceeded regardless.

> In 4.2 and 4.3 I talk about mistake, and I will take you through that and then say something about it. If the accused mistakenly believed that TRR consented to his having sexual intercourse with her, he will not have intended to have sexual intercourse with her without her consent. The Crown must therefore prove beyond reasonable doubt that the accused held no mistaken belief that TRR consented to having sexual intercourse with him. Such mistaken belief does not have to be based upon reasonable grounds. However, if there is no reasonable basis for such mistaken belief, you are entitled to take that into account in deciding whether or not the Crown has proved that no mistaken belief existed.
>
> Now I have raised mistake with you but you may think that it is irrelevant to this case. There really is no room for mistake on the basis of either case that has been put to you. If you accept TRR, there can be no doubt that she made it very clear to the accused that she did not consent. WJI could be in no doubt that she was not consenting.
>
> If you accept the version of events provided to you by the defendant, then it is clear that she was consenting. Indeed, it was suggested that she was an equal participant at all times.
>
> So the issue of mistake really does not arise in this case. I remind you though that the accused does not have to prove his version of events. It is for the Crown to satisfy you that there is an absence of consent, and as to all of the elements of the offence, and it must do so beyond reasonable doubt."

[37] On the hearing of the reference it was said that the directions given by the trial judge were in accordance with the decision of this Court in *McMaster v The Queen* (1994) 4 NTLR 92. That decision was that, in a case of assault with intent to have carnal knowledge the prosecution must prove that it was the intention of the accused to assault the victim without his or her consent and that this involves the proposition that the accused knew that the victim was not consenting or knew that he or she may not be consenting and proceeded regardless. Gray AJ, who delivered the leading judgment in the matter, said that a judicial direction to this effect should be given in all cases

because the necessary mens rea of the accused is an element of the crime. Rightly or wrongly, I do not regard *McMaster v The Queen* as a satisfactory vehicle upon which to decide the questions raised by the reference. In that case, the accused had been charged with an offence of assault with intent to have carnal knowledge contrary to s 192(1) of the *Criminal Code* (NT) 1983, as it then provided. The respondent in the present case was not charged with assault with intent to have carnal knowledge. By the time the accused was charged, the offence was that of having sexual intercourse with a female without her consent.

[38] *McMaster v The Queen* was a case involving an offence of which an element was a specific intent. For these reasons, in my view, *McMaster* is not an authority for the proper interpretation of the elements of the offence against s 192(3) of the *Criminal Code* (NT) as it now reads.

The Mental Element in Rape

[39] The key question raised by the reference is whether or not the Crown is required to prove a mental element in relation to a completed crime contrary to s 192(3) of the *Criminal Code* (NT) (i.e. "rape"). The immediate reaction of the reasonable and informed layman might well be to suggest that the question is absurd : how could it be contemplated that an accused could be convicted of a crime with a maximum penalty of life imprisonment without the Crown being required to prove beyond reasonable doubt that the accused had a "guilty mind"?

[40] In summing up in the trial which gave rise to the reference, the learned trial judge directed the jury, in effect, that the mental element for rape is either an intention to have intercourse without the victim's consent or else a realisation by the accused that the victim may not be consenting, but a determination by him to have intercourse with her whether she is consenting or not. In accordance with that direction, the learned trial judge also directed the jury that if the accused held an honest belief that the woman consented, the requisite intention is negated, and this remains true whether or not his belief was based upon reasonable grounds. Such directions would be regarded as correct in law in South Australia (*R v Brown* [1975] 10 SASR 139), Victoria (*R v Flannery* [1969] VR 31; *R v Maes* [1975] VR 541), New South Wales (*R v McEwan* (1979) 2 NSWLR 926) and the United Kingdom (*DPP v Morgan* [1976] AC 182). However, the common law governs the law of rape in these jurisdictions. The law has been held to be different in Australian States where the law of rape is governed by a Criminal Code.

[41] In Western Australia (*Re Attorney-General's Reference No 1 of 1977* [1979] WAR 45; *BRK v R* [2001] WASCA 161), Tasmania (*Snow v R* (1962) Tas SR 271; *Arnol & Others v R* (1981) 7 A Crim R 291) and Queensland (*Thompson* (1961) Qd R 503), it has been held that the crime of rape comprises two elements:

(a) the accused had sexual intercourse with the complainant; and

(b) that the complainant did not in fact consent.

[42] As with s 192(3) of the *Criminal Code* (NT), the offence-creating provisions of the Code States prescribe no specific mental element. The Code States have applied provisions corresponding (but in very different terms) to s 31(1) of the *Criminal Code* (NT) to provide an extremely limited mental element in the crime of rape.

[43] Section 31(1) of the *Criminal Code* (NT) provides:

> "(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct."

[44] Courts in the Code States have applied their corresponding provisions to hold that the only mental element required to be proved by the Crown on a charge of rape is that the accused's physical act of penetration must be "voluntary and intentional". If the Crown proved this and the fact that the woman did not consent, then the crime of rape is made out. On this approach, the mental element required to be proved against a person accused of rape is, in practical terms, virtually non-existent. In *Ingram v R* [1972] Tas SR 250, Chambers J observed at p 263:

> "… on the hypothesis that it is virtually impossible for a man unintentionally to effect penetration, it seems to me clear that … the mental element in the crime of rape in Tasmania is reduced to microscopic proportions."

[45] In *Ingram*, the Tasmanian Court of Criminal Appeal sought to overcome the blatant unfairness of the Code States interpretation of rape provisions by

urging that trial judges have frequent recourse to directing juries as to Code provisions dealing with mistake of fact.

[46] Section 32 of the *Criminal Code* (NT) provides:

> "A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist."

[47] Section 14 of the *Criminal Code* (Tasmania) is drafted in similar terms. Neasey J in *Ingram* observed at p 259:

> "It will be seen that the defence of honest and reasonable belief as to consent becomes of particular importance in the law of rape as it is in this State. It is the only component of the relevant law which relates to the innocence or otherwise of the mind of the accused when the act was committed. It is therefore of more particular importance for the sake of elementary justice that the jury should be directed in this State to consider the question of mistake whenever the evidence leaves room for it than it is in places where the common law of rape applies."

[48] Burbury CJ and Chambers J made observations to similar effect.

[49] It is arguable, in my view, that the Tasmania Court of Criminal appeal was not entirely successful in its attempt in *Ingram* to ameliorate its earlier decision in *R v Snow*, supra. Each of the three judgments in *Ingram* acknowledged that under the *Criminal Code* (Tasmania), the onus was on an accused to establish a defence of "honest and reasonable mistake of fact" on a balance of probabilities. After *Ingram*, the Crown continued to be relieved effectively of having to prove any mental element to establish rape while the

accused bore the burden of persuasion that he had an "innocent mind". Under section 32 of the *Criminal Code* (NT), it is for the Crown to disprove the existence of an honest and reasonable mistake of fact beyond reasonable doubt. However, an accused bears the evidential burden of raising such a mistake as an issue fit to be considered by the jury.

[50] It can be argued that the practical difference in the approach to the mental element in rape between the position hitherto adopted under the *Criminal Code* (NT) (and common law) and the Code States comes down to the question : whether, in rape, the accused can properly be convicted notwithstanding that he in fact believed the woman consented – if such belief was not based on reasonable grounds? The Code States would answer this question in the affirmative. To date, the Territory (and common law) would answer in the negative. Cast in this way, I would suggest, the essential issue raised by the reference is not so much absurd, but rather academic or theoretical. Juries are invariably directed that if there is no reasonable basis for an accused's mistaken belief, they are entitled to take that into account in deciding whether or not the Crown has proved that no mistaken belief existed. I think that, in the light of such a direction, the prospects of a jury acquitting an accused who had no reasonable basis for believing that the complainant was consenting to intercourse because they were not satisfied beyond reasonable doubt that the accused's belief in consent was not honest are so remote as to be near fanciful.

The Crown's Submissions

[51] Mr Karczewski QC for the Crown referred extensively to authorities from Code States (see para [41] above) for support for the proposition that the combined effect of ss 31 and 192(3) of the *Criminal Code* (NT) is such that to establish rape, the Crown need prove only that the accused had sexual intercourse with the complainant and the complainant did not in fact consent.

[52] Mr Karczewski referred to *R v Barlow* (1997) 188 CLR 1 at 31, where Kirby J recalled some of the rules which have been established for the construction of provisions of a code in the following terms:

> "1. A code is enacted by an Act of Parliament. Like any other enactment, the imputed will of Parliament must be derived from the language of the enactment, understood in its context and, so far as possible, in order to give effect to its apparent purposes. Courts must give the language of a code, like any legislation, its natural meaning (*Jervis* [1993] 1Qd R 643 at 670-671, per de Jersey J). If that meaning is clear and unambiguous, it must be given effect. The court will only look externally to other sources where the meaning is doubtful either because of the inherent ambiguity of the language used or because the words used have previously acquired a technical or special meaning (*Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 22; *Stuart v The Queen* (1974) 134 CLR 426 at 437).
>
> 2. As a species of legislation, a code, such as the Code in question, is subject to a paramount rule. Its meaning is to be ascertained:
>
> > 'by interpreting its language without reference to the pre-existing law, although reference may be made to that law where the Code contains provisions of doubtful import or uses language which has acquired a technical meaning (*Robinson v Canadian Pacific Railway Co* [1892] AC 481 at 487). It is erroneous to approach the Code with the presumption that it was intended to do no more than restate the existing law (*Brennan v The King* (1936) 55 CLR 253 at 263) but when the

> Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law (*Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 76) including decisions subsequent to the Code's enactment (*Murray v The Queen* [1962] Tas SR 170 at 172-173, 192; *R v Rau* [1972] Tas SR 59 at 71-72).'
>
> Thus the first loyalty is to the code (*Jervis* [1993] 1 Qd R 643 at 647). But in the stated circumstances, regard may be had to the pre-existing common law and to parallel developments in non-code jurisdictions.
>
> 3. At least in matters of basic principle, where there is ambiguity and where alternative constructions of a code appear arguable, this Court has said that it will ordinarily favour the meaning which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions (cf *Vallance v The Queen* (1961) 108 CLR 56 at 75-76; *Parker v The Queen* (1997) 186 CLR 494 at 517-519). It will also tend to favour the interpretation which achieves consistency as between such jurisdictions and the expression of general principle in the common law obtaining elsewhere (*Zecevic v The Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665). This principle of interpretation goes beyond the utilisation of decisions on the common law or on comparable statutory provisions to afford practical illustrations of particular problems and the approaches adopted in resolving them (*Jervis* [1993] 1 Qd R 643 at 647). It represents a contribution by the Court, where that course is sustained by the language of the code in question, to the achievement of a desirable uniformity in basic principles of the criminal law throughout Australia. Variations in local opinion may result in divergencies in matters of detail in the criminal law. But in matters of general principle, it is highly desirable that unnecessary discrepancies be avoided or, at least, reduced."

[53] Mr Karczewski traced the history of the High Court's approach to the definition of the word "act" in such cases as *Vallance v R* (1961) 108 CLR 56, *Timbu Kolian v R* (1968) 119 CLR 47, *Kaporonovski v R* (1973) 133 CLR 209 and *R v Falconer* (1990) 171 CLR 30.

[54] In *Vallance*, where the accused was charged with the offence of unlawfully wounding another, the High Court discussed the meaning of the word "act" in s 13(1) of the *Criminal Code* (Tasmania). Section 13(1) provided:

> "No person shall be criminally responsible for *an act* unless it is voluntary and intentional, nor, except, as hereinafter expressly provided, for *an event* which occurs by chance." (emphasis added)

[55] *Timbu Kolian* involved a consideration of s 23 of the *Criminal Code* (Qld), adopted in Papua and New Guinea, to the offence of manslaughter. Section 23 provided that:

> "Subject to the express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for *an act or omission* which occurs independently of the exercise of his will, or for *an event* which occurs by accident." (emphasis added)

[56] *Kaporonovski* involved a consideration of s 23 of the *Criminal Code* (Qld), supra, to a charge of unlawfully causing grievous harm.

[57] *Falconer* involved a consideration of s 23 of the *Criminal Code* (WA) to a charge of wilful murder. Section 23 of the *Criminal Code* (WA) is drafted in the same terms as s 23 of the *Criminal Code* (Qld).

[58] In *Kaporonovski*, the leading judgment was given by Gibbs J (with whom Stephen J agreed). His Honour held that the differences between s 13(1) of the *Criminal Code* (Tasmania) and s 23 of the *Criminal Code* (Qld) were not such as to render it necessary to give the word "act" in the latter section a meaning different from that which it bore in the former (supra, at 229).

His Honour also held that meaning of the word "act" remained an open one upon which he was free to give his opinion. Gibbs J continued at 230-232:

> "I can, with respect, appreciate the force of the argument that since s 23 is intended to relieve an accused person from responsibility in the cases to which it applies, the 'act' referred to must be one which renders the person doing it liable to punishment. However, it would in my respectful opinion be a departure from the ordinary meaning of the word to regard 'act' as including all the ingredients of the crime other than the mental element. As has been pointed out, in many cases the bodily acts of the accused by themselves do not entail any criminal responsibility. Putting aside cases where a specific intention is required, there are many offences which are constituted only if the act of the accused was accompanied by some extrinsic circumstance (e.g. absence of consent on a charge of rape or the age of the girl on a charge of unlawful carnal knowledge) or had some particular consequence (e.g. the causing of grievous bodily harm, as in the present case). It would be straining language to regard the word 'act' as extending to all such external circumstances. Further, the phrase 'negligent acts' in the first paragraph of s 23, and the word 'act' in the second and third paragraphs, obviously can only apply to physical actions and do not refer, for example, to the consequences of those actions. However, perhaps the strongest indication of the intent with which 'act' is used in the first paragraph of s 23 is to be found in the very words of that paragraph, which, by distinguishing between an act and its consequences, show that 'act' is not intended to embrace the consequences as well as the action that produced them. Section 23 is elliptical and when it speaks of criminal responsibility for an act or for an event it does not mean that the act or event per se would necessarily give rise to criminal responsibility, but rather refers to an act or event which is one of the circumstances alleged to render the accused person criminally responsible. It seems to me that this must be beyond argument in so far as the section refers to an event, for an event – the consequences of an act – alone could hardly give rise to criminal responsibility. In my opinion the 'act' to which the first rule refers is some physical action, apart from its consequences – the firing of the rifle rather than the wounding in *Vallance v The Queen* (1961) 108 CLR 56 and the wielding of the stick, rather than the striking or the killing of the baby in *Timbu Kolian v The Queen* (1968) 119 CLR 47. I thus respectfully adopt the views of Kitto and Menzies JJ in *Vallance* rather than the contrary opinions.

> The pushing, by the applicant, of the hand holding the glass was an action willed by the applicant. It was not an action which occurred independently of the exercise of his will and the first rule in s 23 therefore had no application.
>
> In my opinion, the second rule does not apply. It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person: see *Vallance* at pp 61, 65, 82, *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at pp 69, 72, 85, *Timbu Kolian* at pp 67, 71 and *Reg v Tralka* [1965] Qd R 225 at pp 228, 233-234. It is impossible to say that the grievous bodily harm suffered by Bajric was so unlikely a consequence of pushing a glass forcibly towards his face that no ordinary person could reasonably have foreseen it – indeed no very strong argument was advanced to the contrary. In the present case the provisions of s 23 did not exculpate the applicant and the first question was rightly answered in the negative."

[59] In *Falconer*, a case involving a shooting of a husband by his wife,

Mason CJ, Brennan and McHugh JJ held at 38-39, supra:

> "In our opinion, the true meaning of 'act' in s 23 is that which Kitto J in *Vallance* attributed to 'act' in s 13(1) of the Tasmanian Code, namely, a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility. That meaning accords with the judgment of Menzies J in *Vallance* and was adopted by Gibbs and Stephen JJ in *Kaporonovski*, respectively. That view distinguishes between 'act' and 'event' in s 23, so that it is immaterial to the operation of the first limb of the section that the actor's mental state does not encompass the consequences of what he is doing.
>
> In the present case, what is the 'act' to which the first limb in s 23 refers? Is it merely a muscular movement of the accused's body (the contraction of the trigger finger), or is it the discharging of the loaded gun, or is it the entirety which commences with the contraction of the trigger finger and ends with the fatal wounding of the deceased? In one sense, it can be said that the discharge of a gun is the consequence of a bodily movement of contracting the trigger finger. In our opinion, however, a consequence which the bodily movement

> is apt to effect and is inevitable and which occurs contemporaneously with the bodily movement is more appropriately regarded as a circumstance that identifies the character of the 'act' which is done by making the bodily movement: cf per Barwick CJ in *Timbu Kolian*. Adopting the meaning of 'act' expressed by Kitto J in *Vallance*, the act with which we are concerned in this case is the discharge by Mrs Falconer of the loaded gun; it is neither restricted to the mere contraction of the trigger finger nor does it extend to the fatal wounding of Mr Falconer."

[60] In the submission of Mr Karczewski, s 31 of the *Criminal Code* (NT) was drafted to reflect the views of Gibbs J in *Kaporonovski* as to the effect of s 23 of the *Criminal Code* (Qld).

[61] The word "act" is defined in s 1 of the *Criminal Code* (NT) to mean:

> "… in relation to an accused person … the deed alleged to have been done by him; *it is not limited to bodily movement* …" (emphasis added)

[62] In the Crown's submission, the italicised words were inserted into the definition of "act":

(a) to overcome the difficulties caused by the difference of opinion among the justices of the High Court discussed by Gibbs J in *Kaporonovski*;

(b) in accordance with the judgement of Gibbs J in *Kaporonovski*: to define the scope of the act as extending to embrace the totality of the physical actions of the accused apart from the consequences of the act constituting the "event".

Hence, s 1 of the *Code* defines "event" to mean "the result of an act or omission"; and

(c) do not import any mental element. In *Kaporonovski*, Gibbs J observed at p 231:

> "Putting aside cases where a specific intention is required, there are many offences which are constituted only if the act of the accused was accompanied by some extrinsic circumstance (e.g. absence of consent on a charge of rape or the age of the girl on a charge of unlawful carnal knowledge) or had some particular consequence (e.g. the causing of grievous bodily harm, as in the present case). It would be straining language to regard the word 'act' as extending to all such external circumstances."

[63] It was submitted on behalf of the Crown that by not limiting the 'act' of the accused to "bodily movement", the Legislature intended that the word "act" in the *Criminal Code* (NT) be given the same meaning as that given to the word "act" in s 23 of the *Criminal Code* (Qld) by Gibbs J in *Kaporonovski* and subsequently approved by the High Court in *Falconer*.

Discussion

[64] Section 31(1) of the *Criminal Code* (NT) (set out at para [43] above) excuses a person from criminal responsibility for an *act, omission or event* unless it was intended or foreseen by him as a possible consequence of his conduct.

[65] Section 31(2) of the *Criminal Code* (NT) similarly excuses a person from criminal responsibility for an *act, omission or event* which occurs by accident. Section 31(2) provides:

> "A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct."

[66] In contrast to s 31(1) and (2) of the *Criminal Code* (NT), s 13(1) of the *Criminal Code* (Tasmania) (see para [54] above) excuses a person from criminal responsibility for an *act* unless it is voluntary and intentional or an *event* which occurs by chance.

[67] Similarly in contrast to s 31(1) and (2) of the *Criminal Code* (NT), s 23 of the *Criminal Codes* (Qld and WA) (see para [55] above) excuses a person from criminal responsibility for an *act or omission* which occurs independently of his will, or for an *event* which occurs by accident.

[68] Accordingly, the *Criminal Code* (NT) stands alone in excusing a person from criminal responsibility for an unintended and unforeseen *event*.
A further significant distinction between the *Criminal Code* (NT) and the Criminal Codes of Queensland, Western Australia and Tasmania is that the *Criminal Code* (NT) defines "act" and "event" while the State Codes provide no express guidance as to the meaning of those terms.

[69] In *Falconer*, Mason CJ, Brennan and McHugh JJ held, at 38, that the true meaning of "act" in s 23 of the *Criminal Code* (WA) and s 13(1) of the *Criminal Code* (Tasmania) is "… a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility …". Their Honours held:

> "That view distinguishes between 'act' and 'event' in s 23, so that it is immaterial to the operation of the first limb of the section that the actor's mental state does not encompass the consequences of what he is doing."

[70] In *Murray v R* (2002) 189 ALR 40, the High Court held that s 23 of the *Criminal Code* (Qld) applied to a charge of murder (and see also *Ugle v The Queen* (2002) 189 ALR 22 similarly applying s 23 of the *Criminal Code* (WA) to a charge of murder). In *Charlie v The Queen* (1999) 199 CLR 387, the High Court had reached the opposite conclusion in relation to the application of that part of s 31 of the *Criminal Code* (NT) concerning "accident" on a charge of murder. In *Murray* at paragraph [78], Kirby J observed:

> "I take the following points to represent common ground:
>
> (1) The applicable legislative provision appears in a code. This is a special kind of legislation. It does not merely collect and restate the pre-existing common law. Its purpose is to provide a fresh start and thereby to introduce greater clarity of expression and sharpness of concepts. *Brennan v R* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ; *Boughey v R* (1986) 161 CLR 10 at 30; 65 ALR 609 at 623-4; *R v Barlow* (1997) 188 CLR 1 at 31-3; 144 ALR 317 at 339-41; *Charlie v R* (1999) 199 CLR 387 at 393-4

[14]; 162 ALR 463 at 466. The code provisions, appearing in expressions of ordinary English language, should not be glossed with notions of excessive subtlety or philosophical profundity. They should be capable of being explained to a jury, according to their own terms, which (at least in the present connection) are relatively simple in their expression; cf *Zoneff v R* (2000) 200 CLR 234 at 260 [65], 261-2 [67]-[68]; 172 ALR 1 at 20, 20-1.

(2) …

(3) It is important to note the apparently deliberate distinction between the 'act or omission' referred to in s 23(1)(a) of the Code and the 'event' referred to in s 23(1)(b). It is a distinction easy to miss. In the present case, it does not appear to have been fully appreciated by the trial judge nor called by her to the notice of the jury. Reasons of Gummow and Hayne JJ at [42]-[44]; reasons of Callinan J at [149]-[150]. The relevant 'acts' in the present case as referred to in s 23(1)(a) included, ultimately, whatever the appellant did to cause the gun to discharge. The relevant 'event' was the entire occasion resulting in the death of the deceased. Reasons of Gummow and Hayne JJ at [51]. Where s 23 applies, these distinctions must be drawn to the notice of the jury if the jury are to be accurately instructed on its application.

(4) On past authority of this court, a question has arisen as to whether s 23(1)(a) has any application at all where the accused is charged with murder. That question was not resolved by the recent decision of the court in *Charlie v R* (1999) 199 CLR 387; 162 ALR 463. That case concerned s 31 of the Criminal Code of the Northern Territory. There are textual differences from the Queensland Code (reasons of Callinan J at [144]) and it is necessary to resolve the applicable rule without assistance from the decision in *Charlie*. The instructions that a trial judge *must* give to a jury depend mostly on the determination of the real issues in the trial. The judge is not required to give a disquisition on the law that unnecessarily goes beyond those issues. *Alford v Magee* (1952) 85 CLR 437 at 466 citing with approval 'Sir Leo Cussen's great guiding rule'. In a properly conducted trial, such issues will be defined, substantially, by the way the parties have elected to conduct their respective cases; and

(5) …"

[71] Later in his judgment, at paragraph [85], Kirby J also observed:

> "… it is difficult, as a matter of principle, to accept the proposition that s 23(1)(a) has no application to a charge of murder simply because that offence postulates intention as an element. The provisions of that paragraph are, in their terms, applicable to a great number and variety of offences mentioned in the Code for most of which the existence of the requisite intent is an essential legal ingredient. It seems unlikely that a general provision, stated at the outset of the Code, would be inapplicable to all of those offences simply because intent on the part of the accused is an ingredient of each offence."

[72] In Mr Karczewski's submission, *Charlie* is authority for the proposition that s 31 of the *Criminal Code* (NT) has no application to Code offences where the offence-creating provision expressly prescribes the intent required as an ingredient of the offence. In the light of the High Court's recent decisions in *Murray* and *Ugle* I think it is clear that such a broad proposition cannot be supported generally. In the case of rape, the virtually non-existent mental element which the Crown seeks to assign to the offence militates very strongly against exclusion of s 31.

[73] In the *Criminal Code* (NT), "act" is defined as the deed alleged to have been done by him; "it is not limited to bodily movement". Further s 31(1) and (2) make no distinction between the *act* and the *event.* A person is equally excused from criminal responsibility whether he did not intend or foresee as a possible consequence of his conduct the *act* OR the *event*. Accordingly, in contrast to the Criminal Codes of Queensland, Western Australia and Tasmania, it *is* material to the operation of s 31(1) that a person's mental

state does not encompass the consequences of what he is doing

(ie "the result of an act of omission" – see definition of 'event' in s 1 of the *Criminal Code* (NT)).

[74] In *R v Mardday & Ors* (1998) 7 NTLR 192, the Court of Criminal Appeal unanimously held:

> "Section 31 appears in Division 4 of Part II which deals with the subject of 'Criminal Responsibility' – a term not expressly defined by the Code. Section 23 (which forms a part of Division 1 of Part II – 'General Matters') provides:
>
> > '23. EFFECT OF AUTHORISATION, JUSTIFICATION OR EXCUSE
> >
> > A person is not guilty of an offence if *any act, omission or event constituting that offence* done, made or caused by him was authorised, justified or excused.' (emphasis added)
>
> The effect of s 31(1) is to excuse a person from criminal responsibility for an act, omission or event in specified circumstances. Accordingly, the combined effect of ss 23 and 31(1) would appear to be that a person is excused from criminal responsibility for *an act, omission or event constituting an offence* unless such act, omission or event was intended or foreseen by him as a possible consequence of his conduct.
>
> In *R v Krosel* (1986) 41 NTR 34, Nader J observed (at 35):
>
> > 'Section 31 sets forth circumstances in which a person is excused from criminal responsibility for an act, omission or event. The first question that must be asked in any case is what it is that the person is alleged to be criminally responsible for. That question can be answered only by reference to the definition of the crime concerned.'
>
> In the subsequent case of *Pregelj v Manison* (1987) 51 NTR 1, Nader J declined to follow his own analysis of s 31 adopted in *Krosel* (supra), but there is nothing in his later judgment which throws any doubt on the correctness of his starting point for the

analysis of criminal responsibility in relation to any particular offence."

[75] In the case of a person who is charged with an offence under s 192(3) of the *Criminal Code* (NT), the accused is alleged to be criminally responsible for having "sexual intercourse with another person without the consent of the other person". In my view, it matters not whether this is viewed as an "act" or an "event" within the meaning of the *Code*. On either view, s 192(3) imposes criminal responsibility for sexual intercourse ***without consent***. It is not to the point that "act" in relation to State Criminal Codes has been construed more narrowly than the definition provided in section 1 of the *Criminal Code* (NT). In my view, it is also clear that by including "event" in s 31(1) of the *Code*, the intention of the legislature was to impose criminal responsibility only where a person's mental state does encompass the consequences of his actions. Such an approach is consistent with "the fundamental principle that the criminal law is designed to punish the vicious not the stupid or the credulous" (*R v Brown* (1975) 10 SASR 139 at 148). Accordingly, if an accused neither intends to have sexual intercourse without consent nor foresees this as a possible consequence of his conduct, he is excused from criminal responsibility pursuant to ss 23 and 31(1).

[76] It follows from the above that I consider that the learned trial judge was correct in directing the jury in respect of the elements of the offence prescribed by s 192(3) of the *Criminal Code* (NT), that the Crown must prove, *not only*

(a) that the accused had sexual intercourse with the complainant; and

(b) that the complainant did not give her consent to the accused having sexual intercourse with her,

but also

(c) that the accused intended to have sexual intercourse with the complainant without her consent.

[77] Similarly, I consider that the learned trial judge was correct in directing the jury, with respect to the issue of the accused's mistaken belief as to consent, that such a mistaken belief need not be based on reasonable grounds. Once it is accepted that the Crown must prove that an accused knew that the complainant was not consenting or may not be consenting, but the accused was determined to have intercourse regardless of whether the complainant was consenting or not, an honest belief by the accused as to consent would necessarily negate the requisite intent irrespective of whether such belief was based on reasonable grounds.

[78] In *R v Flannery* [1969] VR 31 at 33, the Victorian Full Court observed:

> "Where there is absence of consent an accused's belief, albeit mistaken in fact, that the woman was consenting to the act of intercourse necessarily relates to … the element of intention involved in the crime. It is impossible to dissociate that intention from a genuine belief in the mind of the accused, even though mistaken in fact, that such consent existed. The existence of such a belief necessarily negatives an awareness that the woman was not consenting, or a realisation that she might not be and a determination to have intercourse with her whether she was consenting or not."

[79] Since rape is not an offence of negligence it follows that the accused's mistake need not be reasonable as a matter of law (*DPP v Morgan* [1976] AC 182; *Saragozza* [1984] VR 187; *McEwan* (1979) 2 NSWLR 926; *McCready* [1967] VR 325 at 326; *Sperotto* (1970) 1 NSWLR 502). If there is a mistake, there is a mistake. Whether a mistake is reasonable or not, its very existence is inconsistent with awareness on the accused's part that he is or may be acting without the complainant's consent.

[80] Mr Karczewski submitted that the effect of holding that a mistaken belief as to the complainant's consent need not be based on reasonable grounds would leave s 32 of the *Criminal Code* (NT) with no work to do in relation to the crime created by s 192(3). However, I do not consider that is correct. With respect, Mr Karczewski's submission fails to distinguish between a mistake of fact which negatives the mental element of an offence and a (reasonable) mistake of fact which may found a true defence pursuant to s 32 of the *Code*. In *R v Brown* (1975) 10 SASR 139 at 144 Bray CJ held:

> "I turn now to the question of the defence of mistake. It is sometimes put that mistake negates mens rea. In my opinion, though it may do so and very often will do so, yet the absence of mens rea and the existence of a mistaken belief in circumstances which would make the act innocent are not necessarily identical, and mens rea may co-exist with the existence of such belief and hence there may be room for the defence even where mens rea is an essential element of the crime. To apply that to the case of rape, a man may intend to have intercourse with a woman whether she consents or not but still believe, and perhaps reasonably believe, that she is consenting. In that case there would be mens rea but the belief may be effective to establish the defence."

[81] His Honour also observed at p 147

> "The view I have taken, then, is that on a charge of rape it is incumbent on the Crown to prove beyond reasonable doubt *inter alia* that the accused intended to have intercourse with the woman without her consent or not caring whether he had her consent or not. If the Crown proves that, the accused may nevertheless still be entitled to acquittal if he honestly believed on reasonable grounds that she was in fact consenting."

[82] In support of the approach he adopted, Bray CJ referred to Kitto J at 389 and Menzies J at 399 in *Reynhoudt's Case* (1962) 107 CLR 381 and the judgment of the Full Court of New South Wales in *R v Sperotto* (1970) 71 SR (NSW) 334 at 337 and 338 (and see also the later case of *R v Wozniak* (1977) 16 SASR 67 at 71-73 where Bray CJ again discusses the question of intention and belief in the context of mistake).

[83] With respect, I agree with the proposition advanced by Bray CJ in *Brown*. In a charge of rape under s 192(3), it will be a rare case where there needs to be any reference to s 32 of the *Criminal Code* (NT). However, the fact that a "defence" of honest and reasonable mistake will seldom be available in rape trials does nothing to assist the Crown's case on the present reference.

Conclusion

[84] For these reasons, I would answer the reference as follows:

1. Yes

2. Yes

GALLOP AJ:

[85] In preparing draft reasons for judgment, Bailey J and I have collaborated to a limited extent. That collaboration is reflected in Bailey J's reasons for judgment (see paragraphs [30] to [38]) and there is no need to repeat them.

[86] I have read the balance of Bailey J's reasons and agree with them and the answers proposed. I have added some observations of my own touching upon the mental elements in the offence created by s 192(3) of the Code.

The mental element

[87] The offence is not made out unless the Crown proves that it was intentional. What is it that the Crown must prove was intentional – the act of penetration alone or the act of penetration without consent? If it is the latter, that means that the mind of the penetrator is directed to the participation of the other party being either with consent or without consent. It is only where the mind of the penetrator tells the penetrator that the other party's participation is without consent that the offence can be committed. I leave aside for the moment the alternative state of mind of awareness that the other party may not be consenting and the intention is formed to penetrate anyway.

[88] Surely, it is the ordinary experience of life that mutual participation in sexual intercourse is a shared experience consented to by the person penetrated. Consent may be total and enthusiastic. It may be hesitant,

reluctant, even submissive, but nevertheless real. If there is consent and the penetrator has formed the intention to have sexual intercourse, it happens.

[89] Where, however, there is an absence of consent, the intending penetrator has to form the intention to have sexual intercourse without consent or not to have sexual intercourse at all without consent.

[90] If the intention is formed to have sexual intercourse without consent (or willy nilly not caring about whether the other is consenting or not), sexual intercourse may or may not occur. The absence of consent, manifested by physical resistance or clothing impediments or other preventative measures, such as raising alarm, may prevent sexual intercourse from happening. But the intention has been formed, even though the intending penetrator may fail to penetrate notwithstanding the formed intention to do so.

[91] The above considerations lead me to conclude that in the offence of sexual intercourse without consent, it is unreal to ignore the intention to have sexual intercourse without consent. Such is the effect of s 31(1) of the Code.

[92] Both questions should be answered in the affirmative.

———————————————