CITATION: *The Queen v Willcocks (No 2)* [2018] NTSC 38

PARTIES: THE QUEEN

v

WILLCOCKS, Kevin

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: 21728562

DELIVERED: 12 June 2018

HEARING DATE: 18 May 2018

JUDGMENT OF: Barr J

CATCHWORDS:

CRIMINAL LAW – Defences – accused charged with sexual intercourse without consent – whether defence of mistaken belief under s 43AW *Criminal Code* (NT) should be put forward for consideration by the jury – evidential burden – discharged by slender evidence – held defence should be put forward for consideration by the jury

CRIMINAL LAW – *Criminal Code* (NT) Part IIAA – defence of mistaken belief based on actual belief, not reasonable belief – whether jury may consider self-induced intoxication in determining whether belief existed – whether jury must have regard to the standard of reasonable person who is not intoxicated – held jury may consider evidence of intoxication without regard to the standard of reasonable person who is not intoxicated

CRIMINAL LAW – *Criminal Code* (NT) – charge contrary to s 192(3) *Criminal Code* – sexual intercourse without consent – elements of offence – physical element ‘conduct’– fault element ‘intention’ – physical element ‘circumstance in which conduct happens’ – alternative fault elements for

physical element of ‘circumstance’ – knowledge – recklessness – deemed recklessness

Criminal Code (NT) s 43AE (a), s 43AH (1), s 43AI(1), s 43AE (c), s 43AJ, s 43AK (2), s 43AU, s 43AW, s 43BT, s 43BU (2), s 192(3), s 192(4A)

R v Navarolli [2010] 1 Qd R 27, (2009) 194 A Crim R 96; *B v R* [2015] NSWCCA 103, followed

Oblach v The Queen (2005) 65 NSWLR 75; *R v Garcia* [2016] QCA 174, considered

REPRESENTATION:

Counsel:

Crown:	T McNamee, N Loudon
Accused:	M Thomas

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	

Judgment category classification:	B
Judgment ID Number:	Bar1804
Number of pages:	14

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Willcocks (No 2) [2018] NTSC 38
No. 21728562

BETWEEN:

THE QUEEN

AND:

KEVIN WILLCOCKS
Accused

CORAM: BARR J

REASONS FOR TRIAL RULINGS

(Delivered 12 June 2018)

Introduction

[1] The accused stood trial in May 2018 charged with having had sexual intercourse without consent with NW, a female, on 10 June 2017. The particular act alleged was the insertion of the neck of a beer bottle into the complainant's vagina.[1]

[2] The offence is contrary to s 192(3) *Criminal Code*, which reads as follows:

> (3) 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.

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1 The definition of "sexual intercourse" in s 1 Criminal Code includes "the insertion to any extent by a person of … an object into the vagina … of another person".

[3] Part IIAA of the *Criminal Code* (NT) applies to this offence. Therefore, in order to prove the accused guilty of the offence, the Crown was required to prove each of the following elements beyond reasonable doubt:-

1. That the accused had sexual intercourse with NW [physical element 'conduct' – s 43AE(a)].
2. That the accused intended to have sexual intercourse with NW [fault element 'intention' in relation to conduct – s 43AH (1), s 43AI (1)].
3. That NW did not consent to the accused having sexual intercourse with her [physical element: a circumstance in which conduct happened s 43AE(c)].
4. That at the time of the act of sexual intercourse, the accused knew that NW was not consenting to his having sexual intercourse with her [fault element 'knowledge' of circumstance – s 43AH (1), s 43AJ].

   OR

   That at the time of the act of sexual intercourse, the accused was reckless as to whether NW was not consenting to his having sexual intercourse with her [fault element 'recklessness' – s 43AH (1); definition of "reckless in relation to a circumstance" – s 43AK (2)(a) and (2)(b)].

   OR

   That at the time of the act of sexual intercourse, the accused did not give any thought as to whether or not NW was consenting to the accused having sexual intercourse with her [deemed recklessness as to lack of consent to sexual intercourse – s 192(4A)].

[4] Prior to the Crown's closing address, counsel for the accused indicated that he proposed to rely on s 43AW of the *Criminal Code* (NT).[2] The section is contained within Part IIAA, Division 3, Subdivision 3 of the Code. Division 3 is headed "Circumstances in which there is no criminal

2 T 733.4.

responsibility". Subdivision 3 is headed "Mistake or ignorance".[3] The section reads as follows:

> **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:
>
> (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.

[5] The section has application in the present case, where negligence is not a fault element for any physical element of the offence charged. The relevant fault elements are intention, knowledge and recklessness.

[6] It is important to note that, contrary to the repeated submissions of the Crown,[4] the mistaken belief referred to in s 43AW does not have to be a reasonable belief, although, pursuant to s 43AW(2), the reasonableness of the belief may be taken into account by the jury in determining whether the

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3 While it may be useful at times to describe the 'circumstances' referred to in the various sections of the separate subdivisions of Division 3 (Lack of capacity of children, Intoxication, Mistake or ignorance, and External factors) as 'defences', that description is not technically correct, for reasons explained by Spiegelman CJ in *Oblach v The Queen* (2005) 65 NSWLR 75; [2005] NSWCCA 440 at [28]. The decision in *Oblach* concerned the test of duress in s 10.2 of the *Criminal Code* (Cth), which corresponds with s 43BB of the *Criminal Code* (NT).

4 T 734.4 – 735.9; 761.5; 763.9.

accused actually had that mistaken belief.[5] Nonetheless, a jury applying s 43AW might well consider that an accused had a mistaken belief even though the jury considered that the belief was unreasonable.

[7] In relation to mistaken belief, counsel for the accused relied on several passages in the evidence of the accused, extracted below:

> <u>Examination in chief</u>
>
> Now, on the subject of putting a beer bottle, or a tip of it into the vagina of the lady; what do you say to that? --- I honestly don't recall putting the beer bottle in, but I do recall being down there and seeing the size of her vagina. I do recall that.
>
> Yes?---I know I did get in close. I know I was playing the fool. ……….
>
> … Now, on the subject of the question of the insertion of a beer bottle, or a tip of it into the vagina; what do you say to that, to the jury on that subject?--- Well, I was the only one there and I do – I recall looking down and there was a stubby in her vagina.
>
> Yes?---So, I was obviously responsible for what happened.
>
> So, you're responsible for putting that – you accept responsibility for that. Is that right?---No one else was there, and that's – yes, I obviously do. Yeah.
>
> Yes. Now, as to why that would occur; that is ---?---Well, I wouldn't do it to hurt anyone. I wouldn't do it to upset anyone. I was just thinking that obviously I wanted to liven up the party a little bit, and I was thinking obviously just to put a stubby in and she can spit a stubby out at us instead of a dildo.
>
> Yes?---That's obviously my recollection of what I was doing. I'm always a little bit of a joker and clown around, you know.
>
> Yes?---Obviously the trick never went very well.
>
> Yes. Now, Mr Willcocks, were there any rules stated by the lady at that point, either at the start, beginning, middle or at some point?---No. Not that I heard. I was there most of the time. ……….

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5 See, for example, *R v Navarolli* [2010] 1 Qd R 27; (2009) 194 A Crim R 96 at [73], per Chesterman JA (Muir JA and Fryberg J agreeing). The decision in *Navarolli* concerned directions given to the jury in relation to mistaken belief under s 9.1 of the *Criminal Code* (Cth), which corresponds with s 43AW of the *Criminal Code* (NT).

Yes. Just in terms of – how were you positioned. Do you have a recollection when you say you were in close, as to how you were placed at that time?---I was definitely down very close because, when I looked, her vagina was very close to my face. ……….

Yes. Okay, but in terms of how your body was positioned at the time, do you have a recollection as to how it was positioned at that point, when you were in close?---Well my – I recall, after I did it, I thought I'd got up and was going to go into the slips catch motion.[6]

You're referring to - - - ?---As in cricket.

A cricket position. Slips, is that right?---You, well that's what she was sort of saying. Spitting the dildos to people and …. Something about cricket. I can't remember. …

So if you could just elaborate that upon your understanding, with regard to cricket at this point, what was it Mr Wilcox?---At this point I was - -

Positioning?--- I was like in the – in the slips position. I was going back into the slips position. And looked down and the stubby's sitting in her vagina. And then I'm like, looked and thought 'well hang on, we're not all on the same page here'.[7]

<u>Cross-examination</u>

So you even have a recollection, don't you, of in fact how she was positioned on the mat facing Kris and projecting dildos out at him?---Yeah I do … 'cause it was something different, I've never seen it – you don't see that sort of stuff every day and yeah. ……….

… And you recall her turning around to project dildos out in to the, well, at you?---No. No I don't. ……….

All right, and up until the point – up until the point that you got involved there was no one that had approached her and inserted the dildo straight back into her. You would accept that wouldn't you?---No, I don't recall. I don't recall so I can't say yes or no. ……….

Yeah and you accept that you were certainly under the influence of alcohol at the time?---Yeah.

And there was nothing in anyone's conduct to – well there was nothing that N herself had done that would make you think that it was okay to insert a beer bottle into her vagina?---Well I was under – at the time - - -

6 Transcript reads, incorrectly: "… it thought it got up".

7 T 656.7 – 658.3.

Do you accept that - - -?---At the time I didn't think that would be a problem. I thought it was, sort of, show – it would boost the show up, get everyone a bit more excited and I guess just – yeah - - -

So, you have a recollection of in fact the reason as to why you inserted that beer bottle into her vagina. Is that what you're saying? --- (no audible response)

That's what you've just told the jury?---Well, that's what I feel. That's my feelings on the whole situation - - -

…

All right. So, you're saying to the jury, you don't have a recollection of doing that, but you have a recollection of the reason why you're doing it. Is that what you want the members of the jury to believe? That you somehow had [have] an absence of recollection of this whole thing, but you know the reason why you've done it?---Well, I remember sitting there, going back in the slips thing, but I, sort of, remember back looking down and my – the end of my stubby was sitting in N's vagina. I remember that. And, I am not a violent person and I wouldn't hurt anyone. And, that's my conclusion on why I would do something like that. ……….

Yes. So, you know the reason as to why you put the beer bottle in her vagina. Correct?---Well, it wouldn't be to hurt her. It wouldn't be to upset her. It wouldn't be to – in a violent act. I'm not that sort of person to harm anyone. So, my assumptions are were to liven up the party a bit, because everyone was leaving and there was – there was not a lot of interest in there anymore. That's what I can come down to.[8]

<u>Re-examination</u>

At one point there was a question raised by the Crown which concerned something about not touching the lady unless invited. … I think you might have been about to answer that question but didn't fully. Are you able to clarify your position on that subject please?---Well if [the statement of the named witness] is correct, what he says, I did not touch. I touched the dildo and the stubby went in her. I didn't – skin to skin contact, I wouldn't have touched her. I hadn't touched her, it was two material items.

Yes but what about the question of inserting something into her, be it a dildo or – in this case a beer bottle. What do you say about that and the question of whether that required an invitation in your mind at that time?---Well no. I wouldn't have done it if I didn't think it was right. I'm not going to put someone's – I'd never go out of my way to upset

8 T 672 – 674 (extracts, not continuous).

> anyone and I thought – obviously I thought at the time it was the right thing to do in the mood of the party.[9]

[8] It can be seen that the accused was giving evidence about what he believed was his state of mind immediately prior to inserting the bottle or tip of the bottle into the complainant's vagina. It appears that he was re-constructing, because, as he admitted, he had no actual memory. In his evidence, he was attempting to explain his state of mind based on (1) what he actually remembered thinking and doing before (but not immediately before) the insertion of the beer bottle, and subsequently, and based on (2) information provided to him by others. One such piece of subsequent information was the evidence of AS to the effect that, immediately prior to inserting the beer bottle, the accused was down on his hands and knees and playing with a dildo in the complainant's vagina, a dildo which she had inserted herself. The accused was manipulating the dildo, moving it in and out, without apparent objection from the complainant.[10] It was in that context, according to AS, that the accused then pulled out the dildo and inserted the tip of the stubby.

[9] The evidence of AS was to some extent inconsistent with the Crown case insofar as the complainant alleged that the insertion of the beer bottle came unexpectedly, when the accused was returning a dildo which the complainant had projected from her vagina in his direction. Nonetheless, if the jury accepted the evidence of AS, the jury had evidence of an objective

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9 T 688.

10 T 519 – 522.

circumstance which could have caused the accused to believe that the complainant was consenting to the insertion of the neck of the beer bottle. The jury could use inferential reasoning to impute a mistaken belief to the accused, based on the evidence of AS and other evidence.

[10] Apart from the evidence referred to in [7] – [9], there was evidence of good character led from several witnesses, from which the jury could draw an inference that it was not in the character of the accused to engage in the conduct charged if he had been aware at the time that it was contrary to the wishes of the complainant.

[11] In opposing any direction in relation to s 43AW *Criminal Code*, the Crown argued (1) there was no evidence, or that the evidence was insufficient, for the defence to be put,[11] and that (2) the evidence was contradicted by other evidence given by the accused. The Crown did not contend that it was unnecessary to put the defence because it was superfluous, being entirely incorporated within the matters which the prosecution was already required to prove or disprove beyond reasonable doubt.[12]

[12] In response to a question from the bench as to 'how high' the evidence needs to go before the defence should be put to the jury for its consideration, the Crown initially contended that it had to be raised "on the

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11 T 750.9.

12 The discussion in Odgers *Principles of Federal Criminal Law*, 2nd Edition, Lawbook Co. (2013), at [9.1.100] was raised with the prosecutor at T 759.8 and T 760.5. The issue has been considered in a number of intermediate Court of Appeal decisions in relation to jury directions given in trials for the prosecution of offences against the *Criminal Code* (Cth); see, for example, *R v Garcia* [2016] QCA 174.

balance" (balance of probabilities),[13] then submitted "there has to be *some evidenc*e of it, and there is not",[14] and then reverted to a submission suggesting that the evidence must establish mistaken belief on the balance of probabilities.[15]

[13] After hearing further oral argument, I ruled that the defence should be put to the jury for its consideration.

[14] I was satisfied that the accused had discharged the evidential burden under s 43BU (2) of the *Criminal Code*. That subsection provides:

> A defendant who wishes to deny criminal responsibility by relying on a provision of Division 3 … bears an evidential burden in relation to that matter.

[15] The expression "evidential burden" is defined in s 43BT of the *Criminal Code* to mean the burden of "adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist".

[16] In *B v R*,[16] Simpson J considered the nature and extent of the identical burden imposed under the *Criminal Code* (Cth) and observed as follows:

> Whether the appellant succeeded in discharging the evidential burden in relation to either defence was a question of law for the trial judge (s 13.3(5)). Such a burden may be discharged by "slender evidence". Any evidence adduced or pointed to in support of either defence must be

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13 T 757.9.

14 T 758.9.

15 T 759.4.

16 *B v R* [2015] NSWCCA 103 at [237]. The case concerned, inter alia, the defence of sudden or extraordinary emergency in s 10.3 of the *Criminal Code* (Cth), which corresponds with s 43BC *Criminal Code* (NT).

taken at its most favourable to the appellant: *The Queen v Khazaal* [2012] HCA 26; 246 CLR 601 at [74].

[17] In the circumstances, I was satisfied that the relatively low evidential burden set by s 43BU (2) of the *Criminal Code* had been met.

[18] The Crown submission referred to in [12] above, that there has to be *some evidence*, was more or less correct. The alternating submissions, to the effect that an accused must establish mistaken belief on the balance of probabilities before the defence could be put to the jury, were plainly wrong.

Consequential directions – intoxication and mistaken belief

[19] Having determined that the 'defence' of mistaken belief (ie, belief that the complainant was consenting to the insertion of the beer bottle into her vagina) should be put forward to the jury for its consideration, I next had to consider whether the accused's intoxication could be considered by the jury in determining whether he held such mistaken belief. There was clear evidence that the accused was significantly intoxicated at the time of the alleged offence. The relevant statutory provision is s 43AU *Criminal Code*, which reads as follows: -

> **43AU Intoxication – relevance to defences**
>
> (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
>
> (2) However, if:
>
> (a) each physical element of an offence has a fault element of basic intent; and

(b) any part of a defence is based on actual knowledge or belief,

evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.

(3) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

(4) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

[20] Because the defence of mistaken belief pursuant to s 43AW(1) is based on actual belief, s 43AU(1) applies. Therefore, unless excluded by some other sub-section of s 43AU, it would be proper for the jury to consider evidence of intoxication in determining whether the accused had the relevant mistaken belief (in the context that the Crown was required to disprove such belief beyond reasonable doubt).

[21] The Crown argued that s 43AU(1) did not apply, for two reasons.

[22] First, prosecuting counsel submitted that s 43AU(3) modified the operation of s 43AU(1), because part of the defence was based on reasonable belief. Therefore, it was argued, it was necessary for the jury to have regard to the standard of a reasonable person who is not intoxicated. When it was pointed out that a defence under s 43AW(1) requires a mistaken belief, not a mistaken reasonable belief, prosecuting counsel argued that s 43AW(2) "imports a notion of reasonableness" into s 43AW(1).[17] I rejected that

17 T 763.9.

submission as contrary to the proper interpretation of s 43AW(1)(a).[18] The only role for consideration of reasonableness is in determining whether the mistaken belief was actually held. No part of the defence is based on reasonable belief.[19]

[23] Prosecuting counsel next submitted that, on its proper interpretation, s 43AU(2) applied so as to require that evidence of self-induced intoxication not be considered in determining whether the relevant mistaken belief existed.[20] However, it is apparent that s 43AU(2) only applies in circumstances where "each physical element of an offence has a fault element of basic intent" (s 43AU(2)(a)) . That is not the case in relation to an offence charged contrary to s 192(3) *Criminal Code*. The element that the alleged victim did not consent to the accused having sexual intercourse with her is a "physical element" within the meaning of s 43AE(c), namely, "a circumstance in which conduct happens". However, the fault element for that physical element is specified in s 192(3)(b) as either knowledge or recklessness,[21] not basic intent.[22] Therefore, it cannot be said that each physical element of the offence charged contrary to s 192(3) has a fault element of basic intent. It follows that s 43AU(2) does not apply so as to modify or displace s 43AU(1).

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18 See [6] above, and footnote 4.

19 T 765.3.

20 T 765.6: "based on a standard of a reasonable person who is not intoxicated"; T 767.6 – T 768.

21 Those fault elements are provided by s 192(3) *Criminal Code*, the law which creates the offence. It is not necessary to rely on s 43AM(2).

22 The Crown ultimately appeared to concede this at T 768.4.

[24] The specific directions ultimately given to the jury in relation to mistaken belief were as follows:

> There is a further matter for your deliberation.
>
> If you are satisfied beyond reasonable doubt as to element 3, that NW did not consent to the accused having sexual intercourse with her, the accused would not be guilty of the offence if, at the time of the offending conduct, he was under the mistaken belief that the NW was consenting to such sexual intercourse.
>
> You are entitled to consider all of the circumstances to determine whether the accused believed that NW was consenting to such sexual intercourse, including the extent to which the accused was affected by alcohol at the relevant time.
>
> The mistaken belief does not have to be a reasonable belief, but it must be actually held. When you are considering whether the mistaken belief was actually held, you are able to take onto account whether it was a reasonable belief in the circumstances.
>
> The accused does not have to prove that he was under the mistaken belief that NW was consenting to sexual intercourse. Rather, the Crown must prove beyond reasonable doubt that the accused was not under such mistaken belief.

[25] It should be clarified that the 'defence' of mistaken belief would not apply in the circumstance contemplated by s 192(4A), that is, if an accused had not given any thought as to whether or not a complainant was consenting to sexual intercourse.[23]

[26] In the present case, the jury were unable to agree on a unanimous verdict, or a majority verdict under s 368 *Criminal Code*. Accordingly, I discharged the jury without requiring a verdict.

[27] These reasons are published to the parties in confidence, pending any retrial which may take place.

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23 T 747 – T 749.6.