

ON APPEAL FROM THE COURT OF APPEAL SUPREME COURT OF VICTORIA

BETWEEN:

10

THE QUEEN

Appellant

and

TOMAS GETACHEW

Respondent

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APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

30 **PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED**

2. This appeal raises the following questions:

2A The Court of Appeal erred in holding that His Honour's direction - that if the jury was satisfied beyond reasonable doubt that the respondent was aware that the complainant was either asleep or might be asleep, that would be sufficient to establish that he was aware that the complainant was not or might not be consenting was wrong at law.

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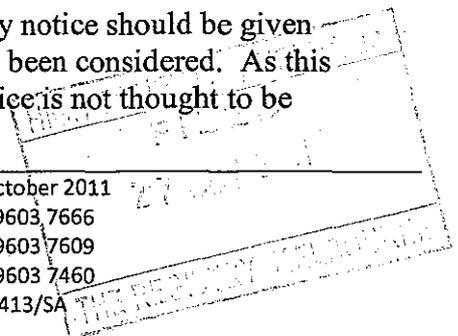
2B. The Court of Appeal erred in law in holding that on the facts and issues relied on by the respondent at his trial, the element of his awareness that the complainant was not consenting or might not be consenting was enlivened.

PART III: NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT 1903(CTH)

3. The appellant certifies that the question of whether any notice should be given under section 78B of the *Judiciary Act 1903* (Cth) has been considered. As this matter does not raise any constitutional issue such notice is not thought to be necessary.

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Part IV: CITATION OF THE REASONS FOR JUDGMENT

4. The Court of Appeal's judgment is not contained in an authorized report. It is cited as *Tomas Getachew v The Queen* [2011] VSCA 69, with that being its medium neutral citation.

Part V: NARRATIVE STATEMENT OF FACTS

10 The material facts are:

5. The complainant went out with friend Mary Ngomomati ("Mary") on the evening of 29 June 2007;
6. She was in the company of her friend Mary, Mhlanga Bothin ("Bothin") and the respondent;
7. The complainant drank bourbon and champagne at a function and at various bars during the night and next morning till about 5.00 am;
- 20 8. In the early hours of 30 June 2007, the four travelled in the complainant's car from Melbourne to Bothin's bungalow;
9. The complainant did not drive because of her intoxication. The car was driven by Bothin;
10. Bothin's bungalow contained one bed in which he and his girlfriend Mary slept that morning;
- 30 11. Bothin placed a mattress on the floor on which the complainant and the respondent slept;
12. The complainant was wearing a short skirt, a top and a coat;
13. The complainant said as she was going to sleep, the respondent touched her leg. She told him to go away;
14. The respondent touched her again. The complainant told him if he did not stop touching her she would go and sleep in her car;
- 40 15. The respondent offered to sleep somewhere else but the complainant told him "Don't worry about it. Just don't touch me and let me sleep";
16. When the complainant fell asleep she had her back to the respondent. She had pulled her coat down as far as it would go, buttoned it up and put her arms across her chest;
17. The complainant gave evidence that "After I went to sleep I woke up and the [respondent] was lying behind me and my clothing was all dishevelled and my skirt was up and my underwear was down and he was thrusting into me";
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18. She said she had her knees up and the respondent was "...holding me on my hips and thrusting his penis into my anus. It wasn't a deep penetration, I would estimate about 1 centimetre, but it was definitely inside me. It was penetration.";
19. The complainant said that when she awoke, she realised what the respondent was doing and immediately clenched her muscles and "removed him";
- 10 20. The complainant pushed the respondent away, got up and went to her car. She said she was "in complete shock";
21. The respondent also got into the car and he asked her what was wrong. She said to him "Is that why I woke up with your dick half way up my arse" and the respondent replied "I was just freezing";
22. The complainant told the respondent to get out of her car which he did;
23. The complainant went into the bungalow and came out with Mary and Bothin. They all sat in her car for a time;
- 20 24. The complainant then drove Mary home in her car;
25. The complainant reported the matter to the police who interviewed the respondent;
26. The respondent made a no comment record of interview; and
27. At trial the respondent stood mute and defence counsel did not call any other evidence.
- 30 28. In addition in his final address to the jury defence counsel said:
- "This case, as you will have appreciated from the way it has been run from this end of the bar table, has really been all about the first of those elements, the issue of whether or not penetration occurred....".
29. All of the cross-examination of the complainant was premised on the fact that she was asleep and could not have known that her anus was penetrated by the respondent's penis.
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Part VI: APPELLANT'S ARGUMENT

The case at trial

30. At trial, this matter was run by defence counsel on the issue of penetration alone.
31. Notwithstanding that the sole live issue in the case was whether or not penetration occurred, the trial judge directed the jury that:
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- (a) The Crown must satisfy the jury of each and every element beyond reasonable doubt¹;
- (b) Despite consent and awareness in consent not being put in issue, the jury still had to consider those elements²;
- (c) That the fourth element related to the accused's state of mind and that the prosecution was required to prove that at the time of penetration, the accused was aware the complainant was not consenting or might not be consenting³.

- 10 32. The trial judge explained the fourth element of awareness in consent in the context of the evidence⁴ by stating that the fourth element would be satisfied "if the prosecution can prove beyond reasonable doubt that Mr Getachew was aware that [the complainant]...was either asleep or unconscious or so effected by alcohol as to be incapable of freely agreeing, or aware that she might have been in one of those states".
33. It is this part of the charge that the Court of Appeal determined fell into error because it took away from the jury the consideration of the possibility that even though the respondent thought that the complainant might have fallen asleep, he
20 believed that she had finally consented.⁵

GROUND 2A: An awareness that a person "might be asleep" is sufficient to satisfy the test "might not be consenting"

34. The fourth element of rape is defined by section 38(2)(a)(i) and (ii) of the Crimes Act 1958 (Vic) (or "the Act). Insofar as it is relevant to this case, the prosecution can prove that element by establishing beyond reasonable doubt either that:
- 30 (a) The respondent was aware that the complainant was not consenting; or
(b) The respondent was aware that the complainant might not be consenting.
35. The concept of consent is informed by the definition of consent found in section 36 of the Crimes Act 1958. Under the Act, consent means free agreement. Free agreement is to be interpreted consistent with the objective set out in section 37A(a) of the Crimes Act 1958. Section 36(d) of the Act is what applied to this case, and read in combination with sections 36, 37 and 37A makes it clear that consent must be communicated not assumed.
- 40 36. It is only a freely given consent which is communicated in some way that can found a defence. It is for that reason a person who is proved beyond reasonable doubt to be aware that the complainant might not be consenting is guilty of rape. This is made clear by section 37(1)(a) and was clarified by the introduction of sections 37AA and 37AAA, discussed below in paragraph 42.

¹ See the Charge of His Honour Judge Allen, Trial Transcript, 6/4/2009 at pages 171 – 176 esp. at 171 line 8-10, 171 line 29 – 172 line 2, 171 line 3-5, 172 line 23-26, 175 line 23 – 176 line 1.

² Ibid at 174 line 16-25 and 175 line 12-22

³ Above n 1 at 172 line 16-22

⁴ Above n 1 at 175 line 1-11

⁵ *Tomas Getachew v The Queen* [2011] VSCA 69 at [25] – [26] per Buchanan JA

37. In this context therefore, it is not just any belief held by the respondent that leads to acquittal, it is only a belief which is capable of giving rise to a reasonable doubt about (a) and (b) in paragraph 34 above which is relevant.

38. The effect of the decision of the Court of Appeal is that any belief about the consent of the complainant even if not relevant to the issues in paragraph 34 (a) and (b) above, no matter how ridiculous or misguided it might be, can found a defence. Such an interpretation defeats the intention of the legislation which insists on a free and communicated consent.

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39. In the Court of Appeal judgment, Buchanan JA stated at [25] that “the jury may have concluded that the applicant thought that the complainant might have fallen asleep but accepted that it was a reasonable possibility that the applicant believed that the complainant was finally consenting”.

40. It is submitted that, if the jury did so find, the fourth element would still be satisfied. The test is whether the accused was aware that the complainant “might not be consenting” which, as a matter of law, includes an awareness that the complainant “might be asleep”.

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41. The conclusion of the Court of Appeal means that the respondent is given the benefit of awareness about consent where he has the factual awareness that the complainant might be asleep. The circumstance that she might be asleep means that she might not be consenting because as a matter of law section 36(d) of the Crimes Act 1958 provides that a person who is asleep cannot consent.

42. This was made clear during the second reading speech of the Crimes Amendment (Rape) Bill 2007 (Vic) which brought sections 37AA and 37AAA into the Act when the Attorney-General stated:

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“Of particular concern to the commission was the distinction between the current direction relating to an accused person’s ‘belief’ in consent and the fault element of the offence of rape, which is ‘awareness’ of lack of consent or awareness’ that the complainant might not be consenting. The relationship between these two concepts has caused confusion.”⁶

“The directions make it clear that an asserted belief in consent, even if accepted by the jury, is not the end of the story. The jury must proceed to decide whether the prosecution have proven beyond a reasonable doubt that the accused was either aware that the complainant was not or might not be consenting. That is to say, belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive.”⁷

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43. In relation to sleep, as a question of fact the accused can have one of three mental states:

⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2858 – 2860 (Rob Hulls, Attorney-General) at 2858

⁷ Ibid at page 2859

- (a) Aware that the complainant is asleep;
- (b) Aware that the complainant might be asleep (this could include being unsure as to whether the person is or is not asleep or being of the view that they might be awake and consenting);
- (c) Aware that the complainant is awake.

44. If the jury find beyond reasonable doubt that the accused held either state (a) or (b), then that finding is sufficient to satisfy the fourth element of the offence.

10 45. Belief in consent is only relevant if, as a factual circumstance, it creates a reasonable doubt about one of the elements that the Crown has to prove. That is, a belief is only relevant where it creates a reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting. Any other belief is irrelevant to the jury's considerations.

20 46. Section 37AA of the Crimes Act 1958 (Vic) sets up the methodology for a jury to consider mistaken belief in consent. The first item that must be considered is evidence of the allegation or assertion of belief in consent. In this case neither the parties nor the judge considered that any of the evidence raised the issue of mistaken belief in consent and the accused did not make any such assertion.

30 47. The second item that must be considered by the jury is whether the belief is reasonable. Pursuant to *R. v. Morgan*⁸ the reasonableness of the belief is the test used to measure or independently verify the existence of the belief. However this test is further narrowed by the provision of section 37AA(b)(i) of the Act which provides that the jury must have regard to the existence of an awareness by the accused of one of the circumstances in section 36. It is submitted that the effect of this provision is to ensure that in cases where an accused is found by the jury (beyond reasonable doubt) to have an awareness of one of the factors in section 36 that is sufficient to satisfy the fourth element of rape. It must, as a matter of statutory construction, follow then that if an accused is aware that a person might be in one of the states listed in section 36 then this is sufficient to satisfy the fourth element as well.

40 48. When looking at the issue of mistaken belief in consent, such considerations are curtailed by the definition of consent in section 36. Where an accused has a belief in consent within the meaning of section 36 (that is, a belief in free agreement) then such can be sufficient to displace (create a reasonable doubt about) any awareness that would satisfy the fourth element. However, a belief that does not go to the issue of free agreement cannot be sufficient to displace the requisite awareness to establish the fourth element of the offence.

49. Any alleged belief in consent must be of sufficient weight to create a reasonable doubt which displaces proof beyond reasonable doubt that the accused was aware that the complainant was not consenting (or asleep) or might not be consenting (or asleep).

⁸ [1975] UKHL 3; [1976] A.C. 182; [1975] 2 All E.R. 347

50. In this case, the Court of Appeal has found that notwithstanding the matters in paragraph 46, above, the trial judge was obliged to charge on the issue of awareness of consent. By applying the principle in *Worsnop v. R*⁹ in [25] of its judgment, the Court of Appeal considered that the fact that the complainant did not move or complain whilst her clothes were being manipulated was a factual circumstance which enlivened the issue of belief in consent.
- 10 51. However, the Court of Appeal has approached the matter in the wrong way. It has approached the matter backwards by considering the issue of belief and not the elements as set out in section 38 (that is, awareness). Once the jury as satisfied beyond reasonable doubt that the accused knew the complainant was asleep or might be asleep, the possibility of that he believes she is awake and consenting is eliminated in the evidentiary setting.
- 20 52. It is often said that an honest yet unreasonable belief in consent is sufficient to mandate an acquittal of an accused charged with rape. However, against the background of a communicative model of consent and the specific legislative provisions in Victoria a belief is only relevant where it feeds into the question of awareness. That awareness must be of consent as defined in section 36, not consent in the wider sense of the word or the generic sense as envisaged at common law.
53. The Victorian legislation makes clear that genuine free consent is required. The Parliament's intention is to have a "communicative model" of consent, and this is reflected in the second reading speech referred to above. The Court of Appeal's decision is inconsistent with that legislative intention.

GROUND 2B: The issue of a mistaken belief in consent was not open to the jury – Scope of *Pemble v The Queen*¹⁰

- 30 54. In *Pemble v. The Queen* the duty of the trial judge was defined as requiring that he or she direct the jury on "any matter upon which the jury could in the circumstances of the case upon the material before them, find or base a verdict in whole or in part".¹¹ This obligation exists whether or not the issue is raised by counsel. These principles have been enshrined in section 37 of the Crimes Act 1958.
55. Many tests have been formulated to assist in the application of this principle. In *R. v. King*¹² after a review of the authorities, the court concluded that the appropriate test was the existence of a "viable case of an available verdict"¹³.
- 40 56. In Victoria the Court of Appeal in *R. v. Tran*¹⁴ required the trial judge to give a direction only where there is a "real issue arising from evidence as distinct from a remote or artificial possibility".¹⁵

⁹ [2010] VSCA 188

¹⁰ (1971) 124 CLR 107

¹¹ Ibid at 117 – 118, per Barwick CJ

¹² (2004) 59 NSWLR 515; (2004) 144 A Crim R 405

¹³ Ibid at [5] and [11] – [12]

¹⁴ [2007] VSCA 192

¹⁵ Ibid at [42] per Redlich JA

57. The issue of awareness was not raised in a record of interview, evidence of the complainant, cross-examination of the complainant or in submissions by counsel. If the issue is enlivened it must be on the evidence referred to in paragraphs 12 to 19 above.
58. Those paragraphs do not raise a viable case or a real issue on the respondent's awareness that the complainant was not or might not be consenting.
- 10 59. This is confirmed by AJA Lasry's evaluation of the evidence in [37] and [38] of the Court of Appeal's judgment. His Honour's conclusion "there was no reasonable possibility that if the jury had been properly directed the verdict might have been different" is consistent with the conclusion that there was no evidence or material to enliven this issue in the *Pemble* sense. See also Bongiorno JA at [33].
60. The factual findings of Buchanan JA in [25] of the Court of Appeal's judgment are purely speculative and could not enliven the issue of the fourth element of rape.
- 20 61. A perfectly appropriate verdict of a jury arrived at after a fair trial has been set aside by the Court of Appeal. It is in the interests of the administration of justice in this case and generally that that appellant be granted the relief it seeks.

Part VII: APPLICABLE LEGISLATION

62. The applicable statutory provisions are attached as annexures to these submissions. Annexure "A" is the Crimes Act 1958 (Vic) as it was at the time of the offence. Annexure "B" are amendments made and brought into force between the time of the offence being committed and the trial of this matter. Sections 37AA and 37AAA applied to this case. The amending Acts bringing about these changes are not included.
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Part VIII: ORDERS SOUGHT

63. The appellant seeks Orders that:
- (a) the appeal to this Court be allowed;
 - (b) the judgment and Orders of the Court of Appeal made on 2 June 2011 be set aside; and
 - 40 (c) in lieu thereof:
 - (i) the respondent's application for leave to appeal against conviction be dismissed;
 - (ii) the verdict of guilty be affirmed; and
 - (iii) the respondent's conviction and sentence be affirmed.

Dated: This 27th day of October 2011

Tom Gyorffy
.....

Tom Gyorffy
Crown Prosecutor
Principal Counsel for the Appellant

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Elizabeth Ruddle
.....

Elizabeth Ruddle
Counsel Assisting Principal Counsel
for the Appellant

ON APPEAL FROM THE COURT OF APPEAL SUPREME COURT OF VICTORIA

BETWEEN:

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APPELLANT'S SUBMISSIONS

ANNEXURE A

Crimes Act 1958
Act No. 6231/1958
Part I—Offences

s. 35

(8) *Sexual Offences (General Provisions)*

Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 44–62)
amended by
Nos 6761
s. 2, 7332
s. 2(Sch. 1
item 18), 7577
s. 2, 8280 s. 6,
substituted as
Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 44–46) by
No. 9509 s. 5,
substituted as
Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 36–39) by
No. 8/1991
s. 3,
substituted as
Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 35–37) by
No. 81/1991
s. 3.

35. Definitions

(1) In Subdivisions (8A) to (8G)—

"de facto spouse" means a person who is living with a person of the opposite sex as if they were married although they are not;

"domestic partner" of a person means a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender);

"sexual penetration" means—

- (a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or

News s. 35
inserted by
No. 81/1991
s. 3.

S. 35(1) def. of
"domestic
partner"
inserted by
No. 2/2006
s. 3(1).

s. 36

- (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes;

"vagina" includes—

- (a) the external genitalia; and
(b) a surgically constructed vagina.

S. 35(1A)
inserted by
No. 2/2006
s. 3(2).

- (1A) For the purposes of the definition of "domestic partner" in sub-section (1), in determining whether persons are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 275(2) of the **Property Law Act 1958** as may be relevant in a particular case.
- (2) For the purposes of Subdivisions (8B) to (8E) both the person who sexually penetrates another person and the other person are taking part in an act of sexual penetration.

S. 36
substituted by
No. 81/1991
s. 3.

36. Meaning of consent³

For the purposes of Subdivisions (8A) to (8D) "consent" means free agreement. Circumstances in which a person does not freely agree to an act include the following—

- (a) the person submits because of force or the fear of force to that person or someone else;
- (b) the person submits because of the fear of harm of any type to that person or someone else;
- (c) the person submits because she or he is unlawfully detained;

Crimes Act 1958
Act No. 6231/1958

Part I—Offences

s. 37

- (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
- (e) the person is incapable of understanding the sexual nature of the act;
- (f) the person is mistaken about the sexual nature of the act or the identity of the person;
- (g) the person mistakenly believes that the act is for medical or hygienic purposes.

37. Jury directions on consent⁴

- (1) If relevant to the facts in issue in a proceeding the judge must direct the jury that—

S. 37
substituted by
No. 81/1991
s. 3,
amended by
No. 81/1997
s. 4(1)(a)(b)(2)
(ILA s. 39B(1)).

- (a) the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement;
- (b) a person is not to be regarded as having freely agreed to a sexual act just because—
 - (i) she or he did not protest or physically resist; or
 - (ii) she or he did not sustain physical injury; or
 - (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person;

S. 37(1)(a)
substituted by
No. 2/2006
s. 4. 1/12/06

s. 37A

- (c) in considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances—

and relate any direction given to the facts in issue in the proceeding so as to aid the jury's comprehension of the direction.

S. 37(2)
inserted by
No. 81/1997
s. 4(2).

- (2) A judge must not give to a jury a direction of a kind referred to in sub-section (1) if the direction is not relevant to the facts in issue in the proceeding.

S. 37A
inserted by
No. 2/2006
s. 5.

37A. Objectives of Subdivisions 8A to 8G

The objectives of Subdivisions (8A) to (8G) are—

- (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
- (b) to protect children and persons with a cognitive impairment from sexual exploitation.

S. 37B
inserted by
No. 2/2006
s. 5.

37B. Guiding principles

It is the intention of Parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and

Crimes Act 1958
Act No. 6231/1958

Part I—Offences

s. 38

- (d) sexual offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

(8A) *Rape and Indecent Assault*⁵

Pt 1 Div. 1
Subdiv. (8A)
(Heading and
ss 47–50)
inserted by
No. 9509 s. 5
amended by
No. 10079
s. 8(1),
substituted as
Pt 1 Div. 1
Subdiv. (8A)
(Heading and
ss 40–43) by
No. 8/1991
s. 3,
substituted as
Pt 1 Div. 1
Subdiv. (8A)
(Heading and
ss 38, 39) by
No. 81/1991
s. 3.

38. Rape

S. 38
substituted by
No. 81/1991
s. 3.

- (1) A person must not commit rape.
Penalty: Level 2 imprisonment (25 years maximum).
- (2) A person commits rape if—
 - (a) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting; or

S. 38(1)
amended by
No. 48/1997
s. 60(1)(Sch. 1
item 19).

s. 38A

(b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

S. 38(3)
inserted by
No. 67/2000
s. 4,
substituted by
No. 2/2006
s. 6(1).

(3) A person (the offender) also commits rape if he or she compels a person—

(a) to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act; or

(b) who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.

S. 38(4)
inserted by
No. 67/2000
s. 4,
amended by
No. 2/2006
s. 6(2).

(4) For the purposes of sub-section (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act—

(a) without the victim's consent; and

(b) while being aware that the victim is not consenting or might not be consenting.

S. 38A
inserted by
No. 2/2006
s. 7.

38A. Compelling sexual penetration

(1) A person must not compel another person to take part in an act of sexual penetration.

Penalty: Level 2 imprisonment (25 years maximum).

(2) A person (the offender) compels another person (the victim) to take part in an act of sexual penetration if—

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APPELLANT'S SUBMISSIONS

ANNEXURE B

(8) *Sexual offences (general provisions)*

Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 44–62)
amended by
Nos 6761
s. 2, 7332
s. 2(Sch. 1
item 18), 7577
s. 2, 8280 s. 6,
substituted as
Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 44–46) by
No. 9509 s. 5,
substituted as
Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 36–39) by
No. 8/1991
s. 3,
substituted as
Pt 1 Div. 1
Subdiv. (8)
(Heading and
ss 35–37) by
No. 81/1991
s. 3.

35 Definitions

(1) In Subdivisions (8A) to (8G)—

de facto spouse means a person who is living with a person of the opposite sex as if they were married although they are not;

domestic partner of a person means—

- (a) a person who is in a registered domestic relationship with the person; or
- (b) a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender);

New s. 35
inserted by
No. 81/1991
s. 3.

S. 35(1) def. of
*domestic
partner*
inserted by
No. 2/2006
s. 3(1),
substituted by
No. 12/2008
s. 73(1)(Sch. 1
item 16.1),
amended by
No. 4/2009
s. 37(Sch. 1
item 9.1).

sexual penetration means—

- (a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or
- (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes;

vagina includes—

- (a) the external genitalia; and
- (b) a surgically constructed vagina.

S. 35(1A)
inserted by
No. 2/2006
s. 3(2),
substituted by
No. 12/2008
s. 73(1)(Sch. 1
item 16.2).

(1A) For the purposes of the definition of *domestic partner* in subsection (1)—

S. 35(1A)(a)
amended by
No. 4/2009
s. 37(Sch. 1
item 9.2(a)).

(a) *registered domestic relationship* has the same meaning as in the **Relationships Act 2008**; and

S. 35(1A)(b)
amended by
No. 4/2009
s. 37(Sch. 1
item 9.2(b)).

(b) in determining whether persons who are not in a registered domestic relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case.

- (2) For the purposes of Subdivisions (8B) to (8E) both the person who sexually penetrates another person and the other person are taking part in an act of sexual penetration.

36 Meaning of consent²

For the purposes of Subdivisions (8A) to (8D) *consent* means free agreement. Circumstances in which a person does not freely agree to an act include the following—

- (a) the person submits because of force or the fear of force to that person or someone else;
- (b) the person submits because of the fear of harm of any type to that person or someone else;
- (c) the person submits because she or he is unlawfully detained;
- (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
- (e) the person is incapable of understanding the sexual nature of the act;
- (f) the person is mistaken about the sexual nature of the act or the identity of the person;
- (g) the person mistakenly believes that the act is for medical or hygienic purposes.

37 Jury directions

- (1) If relevant to the facts in issue in a proceeding the judge must direct the jury on the matters set out in sections 37AAA and 37AA.
- (2) A judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding.

S. 36
substituted by
No. 81/1991
s. 3.

S. 37
substituted by
No. 81/1991
s. 3,
amended by
Nos 81/1997
s. 4, 2/2006
s. 4,
substituted by
No. 57/2007
s. 3.

s. 37AAA

(3) A judge must relate any direction given to the jury of a kind referred to in section 37AAA or 37AA to—

- (a) the facts in issue in the proceeding; and
- (b) the elements of the offence being tried in respect of which the direction is given—

so as to aid the jury's comprehension of the direction.

S. 37AAA
inserted by
No. 57/2007
s. 4.

37AAA Jury directions on consent

For the purposes of section 37, the matters relating to consent on which the judge must direct the jury are—

- (a) the meaning of consent set out in section 36;
- (b) that the law deems a circumstance specified in section 36 to be a circumstance in which the complainant did not consent;
- (c) that if the jury is satisfied beyond reasonable doubt that a circumstance specified in section 36 exists in relation to the complainant, the jury must find that the complainant was not consenting;
- (d) that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement;
- (e) that the jury is not to regard a person as having freely agreed to a sexual act just because—
 - (i) she or he did not protest or physically resist; or

- (ii) she or he did not sustain physical injury; or
- (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person.

37AA Jury directions on the accused's awareness

S. 37AA
inserted by
No. 57/2007
s. 4.

For the purposes of section 37, if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act, the judge must direct the jury that in considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider—

- (a) any evidence of that belief; and
- (b) whether that belief was reasonable in all the relevant circumstances having regard to—
 - (i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
 - (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
 - (iii) any other relevant matters.

s. 37A

S. 37A
inserted by
No. 2/2006
s. 5.

37A Objectives of Subdivisions 8A to 8G

The objectives of Subdivisions (8A) to (8G) are—

- (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
- (b) to protect children and persons with a cognitive impairment from sexual exploitation.

S. 37B
inserted by
No. 2/2006
s. 5.

37B Guiding principles

It is the intention of Parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) sexual offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

s. 38

(8A) Rape and indecent assault³

Pt 1 Div. 1
Subdiv. (8A)
(Heading and
ss 47–50)
inserted by
No. 9509 s. 5
amended by
No. 10079
s. 8(1),
substituted as
Pt 1 Div. 1
Subdiv. (8A)
(Heading and
ss 40–43) by
No. 8/1991
s. 3,
substituted as
Pt 1 Div. 1
Subdiv. (8A)
(Heading and
ss 38, 39) by
No. 81/1991
s. 3.

38 Rape

S. 38
substituted by
No. 81/1991
s. 3.

(1) A person must not commit rape.

Penalty: Level 2 imprisonment (25 years maximum).

S. 38(1)
amended by
No. 48/1997
s. 60(1)(Sch. 1
item 19).

(2) A person commits rape if—

(a) he or she intentionally sexually penetrates another person without that person's consent—

S. 38(2)(a)
substituted by
No. 57/2007
s. 5(1).

(i) while being aware that the person is not consenting or might not be consenting;
or

(ii) while not giving any thought to whether the person is not consenting or might not be consenting; or

s. 38A

(b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

S. 38(3)
inserted by
No. 67/2000
s. 4,
substituted by
No. 2/2006
s. 6(1).

(3) A person (the offender) also commits rape if he or she compels a person—

(a) to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act;
or

(b) who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.

S. 38(4)
inserted by
No. 67/2000
s. 4,
amended by
No. 2/2006
s. 6(2).

(4) For the purposes of subsection (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act—

(a) without the victim's consent; and

(b) while—

(i) being aware that the victim is not consenting or might not be consenting;
or

(ii) not giving any thought to whether the victim is not consenting or might not be consenting.

S. 38(4)(b)
substituted by
No. 57/2007
s. 5(2).

S. 38A
inserted by
No. 2/2006
s. 7.

38A Compelling sexual penetration

(1) A person must not compel another person to take part in an act of sexual penetration.

Penalty: Level 2 imprisonment (25 years maximum).