

GILLARD v. THE QUEEN (C20/2013)

Court appealed from: Court of Appeal of the Supreme Court of the Australian Capital Territory [2013] ACTA 17

Date of judgment: 18 April 2013

Date of grant of special leave: 8 November 2013

The appellant was convicted of multiple sexual offences against the victim ("DD") when she was aged between 10 and 16.

The appellant appealed against conviction and sentence. The ground of appeal relevant to this appeal was ground (c) which was expressed as follows: "In respect of counts 13, 14, 16 and 18 his Honour misdirected the jury in respect of the issue of consent". (Ultimately, this was relevant only to count 13 because in relation to the other counts the appellant simply denied that sexual activity had taken place at all.) Ground (c) raised the interpretation of s 67 of the *Crimes Act 1900* (ACT) ("the Act") which describes situations in which apparent or ostensible consent to a sexual act cannot be relied on by an accused because of the origins of the "consent".

At trial, counsel for the appellant had argued that the relevant provision had not been shown to be applicable in this case. His argument had the following elements: "(a) The appellant was not shown to be in a position of authority or trust in relation to DD, and the trial judge did not explain to the jury how they could conclude that he was; (b) Even if the appellant was in a position of authority or trust, s 67 did not 'negate' DD's consent unless that 'consent' had been obtained by a separately identifiable abuse of that position of authority or trust; (c) Furthermore, even if it could be shown that DD's will had been overborne by the abuse of the appellant's position of trust or authority, it also had to be shown that the appellant knew that DD's 'consent' has been obtained because of the overbearing of her will by that abuse (recklessness as to consent would not be sufficient)."

The Crown case was that consent was negated by abuse of trust (s 67(1)(h) of the Act).

The Court of Appeal (Refshauge, Penfold and North JJ) concluded that ss 67(1) and (2) were applicable to determining whether there was consent, not only where knowledge of absence of consent is alleged but also where the allegation is recklessness as to consent. The Court was satisfied that both the following matters were properly before the jury in the appellant's trial: the possibility that any apparent consent given by DD to any of the acts charged in counts 13 to 18 was caused by the abuse by the appellant of his position of authority over, or trust in relation to, DD (that is, the possibility that any "consent" was "negated" under s 67(1)(h)); and, the possibility that the accused was reckless as to whether the complainant was consenting at all. The Court did not consider that the trial judge misdirected the jury as to consent and the appeal was dismissed.

The grounds of appeal include:

- The Court of Appeal erred in holding that Higgins CJ did not err in directing the jury that it could find the appellant guilty in respect of counts 13, 14, 16 and 18 if it was satisfied that the complainant's consent was caused by the abuse of the appellant of his position of authority over the complainant and the appellant was reckless as to that circumstance.
- The Court of Appeal erred in failing to find that where s 67(1)(h) is relied upon by the prosecution to negate the consent, the requisite mental element is knowledge, by virtue of s 67(3).