IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M139 of 2011

ON APPEAL FROM THE COURT OF APPEAL SUPREME COURT OF VICTORIA

BETWEEN:

10 THE QUEEN

Appellant

and

TOMAS GETACHEW

Respondent

20

APPELLANT'S REPLY

SUITABILITY FOR PUBLICATION

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

30 ### REPLY TO RESPONDENT'S ARGUMENT ON THE APPEAL

The Mens Rea element

1. The meaning of section 38 of the Crimes Act 1958 (or "the Act"), and specifically the fourth element (that is, the awareness of lack of consent) cannot be read in the absence of section 36 of the Act. When considering an awareness of lack of consent, that awareness must be of consent (or lack thereof) as defined in section 36.

40 2. The respondent contends that the Court of Appeal decision in ***Worsnop v The Queen***[1] relied on by the respondent as representing the law in Victoria[2] is fundamentally flawed. It presumes that section 38 of the Act reflects only the common law position and that the law of rape, specifically the fourth element, remains essentially unchanged regardless of the definition of consent contained in section 36 of the Act and other provisions of that legislation. The respondent submits this is not the case.

[1] (2010) 204 A Crim R 38; [2010] VSCA 188
[2] At paragraph 6.11 and 6.14 of the Respondent's submissions

Filed by: Craig Hyland
Solicitor for Public Prosecutions
565 Lonsdale Street
Melbourne Vic 3000
DX 210290

Date: 24 November 2011
Telephone: (03) 9603 7666
Direct: (03) 9603 7609
Fax: (03) 9603 7460
Reference: 0801413/SA

3. Section 36 fundamentally changed the definition of consent to mean "free agreement" that is communicated. Section 37A of the Act makes clear that the purpose of the Act is 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.

4. Consent was, at common law, not defined beyond its ordinary meaning and was reflective of the attitudes of the day[3]. As consent was not defined as free consent of the complainant, the consideration for any jury instead concentrated on a wholly subjective view of consent held by the accused.

5. The definition of consent is now contained in section 36 of the Crimes Act 1958 and refers to the free and communicated consent of the complainant. This must inform the meaning not only of the third element (lack of consent) but the fourth element also. The changes relating to consent are apparent on the face of the 1991 amendments to the Act, which made substantial changes to the law relating to rape by introducing both sections 36 and 38. The legislature further clarified its intention by subsequent amendments, including the introduction of section 37AA to the Act by way of the Crimes Amendment (Rape) Bill 2007 (Vic) and the second reading speech attaching thereto[4].

6. An accused's belief is not an element of the offence of rape. The matter to be proved is the accused's awareness. Belief is only relevant as a factual issue when an alleged belief is raised which could cause a jury to have reasonable doubt about the relevant question – that is, awareness of consent as defined in section 36 of the Act.

7. In any event, awareness that the complainant is asleep was, at common law sufficient to satisfy the awareness element of rape.[5]

8. To penetrate a complainant whilst he or she is asleep constitutes the *actus reus* of rape. If a jury finds, beyond reasonable doubt, that an accused was aware that he was or might be committing the *actus reus* of rape then it follows as a matter of logic that the *mens rea* element of the offence is satisfied. A belief that does not affect an awareness of consent as defined in section 36 of the Act (for example, a belief that it is acceptable to have sex with a sleeping woman or a belief that it is acceptable to penetrate a woman if she does not struggle or say "no") is not a relevant consideration for a jury.

The Rule in Pemble v The Queen[6]

9. In its submissions[7], the respondent alleges that the test in ***Pemble*** does not apply because all elements of the offence were put in issue by virtue of his plea

---

[3] See, for example, Glanville Williams, *Textbook of Criminal Law*, Second Edition, 1983, Stevens and Sons at 25.2 – 25.3
[4] See paragraph 42 of Applicant's submissions.
[5] See *R v Young* (1878) 14 Cox C. C. 114
[6] (1971) 124 CLR 107
[7] At paragraph 6.29 and 6.30

of not guilty. The appellant contends this is misconceived. All cases in which there is a plea of not guilty *ipso facto* put all elements of the offence in issue before the jury. Every case in which the rule in ***Pemble*** is applied is in the same position in that they all involve an accused who has pleaded not guilty. In every case the trial judge must explain the elements of the offence to the jury. The rule in ***Pemble*** requires the trial judge to charge on additional potential defences or alternative charges. In this case, the trial judge did correctly and separately explain each element of the offence and made clear that the onus of proving each element beyond reasonable doubt lay with the prosecution despite certain elements not being in issue[8].

10. On appeal, the Court of Appeal determined that the trial judge's charge precluded the jury from finding that the respondent believed the complainant was consenting,[9] as it did not leave open the possibility that the respondent had a positive belief in consent, notwithstanding an awareness that the complainant was or might be asleep.

11. As previously stated, the belief of an accused is not an element of the offence of rape. It is, for all intents and purposes, a factual defence to the fourth element of rape – that is, a belief by the accused which can displace the prosecution's proof of awareness of a lack of consent. It is not a question of onus. The onus always stays with the prosecution, and if a belief is alleged or is apparent on the evidence it must be disproved by the prosecution. However, if a trial judge is going to charge on the question of belief (as opposed to the question of awareness), he or she must and can only do so on the basis of actual evidence. This is when and how the principle in ***Pemble*** becomes enlivened.

12. In this case, the jury's verdict in the trial of the respondent represents a finding beyond reasonable doubt that the respondent was aware that the complainant was or might have been asleep. Any direction to the jury on the question of a belief would have to direct them to the evidence of that belief. In this case, that evidence is no more than a failure by the complainant to complain a third time when touched by the accused. A failure to complain whilst asleep could not form the basis of a defence at common law 130 years ago[10]. It cannot be sufficient to found a defence under the model of communicated free agreement required under the Crimes Act 1958.

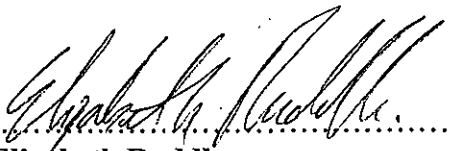
Dated: This 24th day of November 2011.

.....

Tom Gyorffy
Crown Prosecutor
Principal Counsel for the Appellant

---

[8] See paragraphs 31 and 32 of the Applicant's submissions.
[9] *Tomas Getachew v The Queen* [2011] VSCA 69 at [25] and [26]
[10] See *R v Young* (1878) 14 Cox C. C. 114 and *R v Mayers* (1872) 12 Cox C.C. 311



Elizabeth Ruddle
Counsel Assisting Principal Counsel
for the Appellant