THE QUEEN v GETACHEW (M139/2011)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2011] VSCA 164
Date of judgment:	2 June 2011
Date special leave granted:	29 September 2011

After a trial in the County Court of Victoria, the respondent was found guilty on one count of rape. The defence did not call any evidence. The complainant gave evidence that on 29 June 2007, she drank bourbon and champagne in several bars with a friend called Mary, a friend of Mary's (Bothin) and the respondent. The complainant said she was 'getting very drunk' and she decided not to drive home in her car. Instead, she, Mary and the respondent were driven by Bothin to a bungalow at the rear of a house in which Bothin's parents lived. The bedroom of the bungalow contained one bed. Bothin placed a mattress on the floor of the bedroom for the complainant and the respondent, while Bothin and Mary shared the bed. The complainant was wearing a short skirt, a top and a coat. As she was going to sleep, the respondent touched her leg. She told him to go away. The respondent touched her again. The complainant said that she told him that if he did not stop touching her, she would sleep in the car. The respondent offered to sleep somewhere else but the complainant said she told him, 'Don't worry about it. Just don't touch me and let me sleep'. The complainant gave evidence that after she went to sleep, she woke up and the respondent was lying behind her, her clothing was dishevelled and the respondent "was thrusting into me". The complainant said she pushed him away, got up and went out to her car. She said she was 'in complete shock'.

In his appeal to the Court of Appeal (Buchanan and Bongiorno JJA, Lasry AJA dissenting), the respondent submitted that the trial judge erred in his directions to the jury on the mental element required for proof of the offence of rape: in particular, by directing that such element would be established if the accused was aware that the complainant might be asleep. The Court noted that the defence case was based on the issue of whether or not penetration occurred, and there was no evidence of the respondent's state of mind. He had made a record of interview in which he failed to answer any questions and stood mute at his trial. However, the majority held that it was not incumbent upon defence counsel to expressly raise the question of the respondent's awareness that the complainant might not be consenting. The jury were required to be satisfied that the element of *mens rea* had been proved and, accordingly, counsel for the respondent was entitled to assume that the trial judge would instruct the jury as to that requirement. The majority found the trial judge erred in his instructions as to the element of *mens rea*, as the jury could be satisfied that the respondent was aware of the possibility that the complainant was asleep, but at the same time think that it was a reasonable possibility that he believed she was awake. The majority of the Court set aside the respondent's conviction and ordered a retrial.

Lasry AJA (dissenting) while agreeing that the trial judge's direction was in error, did not agree that the error had led to any miscarriage of justice.