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Ignorance of the Law as a Defence to Rape: The Destruction of a Maxim

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Abstract In DPP v Morgan, the House of Lords correctly concluded that an accused who entertained a genuine belief that a woman was consenting to carnal knowledge of her person could not be convicted of the common law crime of rape as such a belief and the requisite mens rea to convict were mutually exclusive of one another. Though England and Wales have resiled from this position by virtue of the Sexual Offences Act 2003, s. 1(b), which allows for conviction upon proof that the accused did not reasonably believe that the complainant was consenting, the Morgan principle has retained its vitality at common law as well as under the various statutory crimes of rape that exist throughout Australia, most notably the provisions of s. 38 of the Crimes Act 1958 (Vic). Despite a long line of Victorian Court of Appeal decisions which have reaffirmed the Morgan principle, the court has construed s. 37AA(b)(ii) of the Act as leaving open the possibility of an acquittal despite the fact that the accused acted with an awareness that one or more factors that are statutorily deemed as negating consent under s. 36(a)-(g) of the Act were operating at the time of his or her sexual penetration; specifically, the court held that the foregoing factors do not necessarily preclude a jury from finding that the accused acted in the genuine belief that the complainant was consenting. This article endeavours to explain how the accused could be aware of such circumstances at the time of penetration, yet still entertain such a belief. The article ultimately concludes that such an anomaly can only be explained through a combination of the poor drafting of s. 37AA(b)(ii) and the court’s apparent refusal to follow the longstanding precept that ignorance of the law is never a defence to a crime, ostensibly prompted by its adherence to the cardinal precept that legislation is not to be construed as superfluous.

Keywords Rape; Defence of consent; Honest and reasonable belief in consent; Ignorance of the law

In DPP v Morgan the House of Lords enunciated the principle that an accused cannot be convicted of the common law offence of rape if the criminal act of carnal knowledge was accompanied by an honest, though not necessarily reasonable belief that the complainant was consenting. This belief, according to the House of Lords, necessitates an acquittal because it cannot be reconciled with the mens rea for rape that requires proof that the accused intended to have carnal knowledge of the complainant without her consent. In Morgan, this mens rea was construed to mean that at the time of the criminal act, the accused was aware that the complainant was not or might not be consenting. Although the Morgan

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principle is still considered a sound principle under the common law as well as the statutory version of rape that now exists in Victoria, a recent line of decisions of the Victorian Court of Appeal, whilst appearing to reaffirm the Morgan precept, has emasculated its impact by effectively holding that ignorance of the law is tantamount to an honestly held belief that the complainant was consenting. This article will not only examine these recent decisions, but address the question of why the Court of Appeal would embrace a view that is not only untenable, but flouts the time-honoured maxim that ‘ignorance of the law is not a defence’.\(^1\)

**Introduction**

There is surely no paucity of notorious maxims in the law, but there is arguably none more hackneyed than ignorance of the law is no excuse.\(^2\) In a series of recent decisions dealing with ss 37AAA and 37AA of the Crimes Act 1958 (Vic), the Victorian Court of Appeal has tacitly overruled this maxim and adopted the precept that ignorance of the law is tantamount to a genuine belief that the complainant was consenting to the proscribed sexual penetration or conduct, thereby absolving the accused of liability for various sexual assault offences in which the complainant’s lack of consent is a constituent element. The discussion to follow will first examine the history and rationale for the general common law principle that where an accused’s bona fide belief that something is true cannot co-exist with one or more of the mens reas required by an offence, the fact-finder must be instructed to acquit if it finds that the putative belief was actually held by the accused at the time of his or her criminal act or omission.\(^3\) Secondly, the discussion will carefully examine the language of the foregoing sections in order to determine whether they are consonant with or inimical to this precept. Thirdly, and assuming the latter, attention will then focus on the Court of Appeal’s rather alarming decision to eschew the above maxim as a means of construing ss 37AAA and 37AA as though they were consistent with the precept. Finally, the discussion will turn to the question of what factor or factors may account for this blatant departure from what is perhaps the most widely known maxim known to the law.

**The DPP v Morgan principle**

In the case of DPP v Morgan,\(^4\) the accused and three cohorts were convicted of raping his wife. Prior to the incident, the accused had encouraged the others to have sex with his wife and informed them that

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1 Johnson v Youden [1950] 1 KB 544 at 546.
3 R v Tolson (1889) 23 QBD 168 ‘an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence’; R v Brown (1975) 10 SASR 139 at 151-2; DPP v Morgan [1976] AC 182 (‘Morgan’).
4 [1976] AC 182. It should be noted that England and Wales have now resiled from the Morgan principle by virtue of s. 1 of the Sexual Offences Act 2003. In order to
because she was somewhat ‘kinky’, they should not be surprised if she struggled as that was the only way she could become sexually aroused. All four men were convicted. For present purposes, the primary issue raised on appeal to the House of Lords was whether the trial judge had misdirected the jury in stating that an honest and reasonable belief by the accused that the complainant was consenting would negate the requisite intention to have carnal knowledge of the complainant without her consent, thereby necessitating an acquittal. In a rather discursive discussion of what must be proven in order to satisfy the jury that the accused had this intention, the House of Lords ultimately concluded that the prosecution must prove beyond reasonable doubt that the accused intended to have carnal knowledge of the complainant without her consent while aware that she was not or might not be consenting to the same. When a common law or statutory offence requires proof that the accused acted with a particular state of mind such as this, in legal parlance that mental state is commonly referred to as a mens rea element of the crime that, like all other elements of the offence, must be proved beyond reasonable doubt.

In writing for the majority, Lord Hailsham opined that a bona fide belief that a woman is consenting to carnal knowledge cannot be reconciled with the mens rea for rape which requires proof that the accused intended to have carnal knowledge of the complainant without her consent while being aware that she was not consenting or might not be consenting. Lord Hailsham further held that this is so irrespective of whether the belief was such that it would have been held by a reasonable person in like circumstances. His Lordship also emphasised, however, that this is not to say that the reasonableness of the alleged belief is devoid of relevance; rather, the reasonableness of the putative belief is a factor that may be considered by the jury in determining whether it was in fact held by the accused.

prove rape under s. 1, the prosecution must prove, as a constituent element, that the accused did not reasonably believe the complainant was consenting.
5 Ibid. at 206.
6 At common law, carnal knowledge denotes any amount of penile penetration of the vaginal cavity, however slight, and regardless of whether there is emission of seminal fluid: Holland v The Queen (1993) 67 ALJR 946.
7 At common law, consent denotes free and conscious permission: R v Wilkes and Briant [1965] VR 475 at 480. Thus, if one accedes to sexual intercourse out of force or fear of force or other harm of any type, there is no consent.
9 Ibid. at 208-9.
10 Myerson v Collard (1918) 25 CLR 154 at 167; R v Turnbull (1943) 44 NSWLR 180; Iannella v French (1986) 119 CLR 84.
12 Morgan [1976] AC 182, 208–09. This intention could only be proved by satisfying the jury beyond reasonable doubt that the accused had carnal knowledge of a woman while aware that she was not or might not be consenting: at 215.
13 Ibid. at 210.
Ignorance of the Law as a Defence to Rape: The Destruction of a Maxim

In logic and principle, Lord Hailsham’s reasoning is all but impervious to criticism. If a person has carnal knowledge of a woman or assists or encourages others to do so while holding a belief that she is consenting, it is impossible to reconcile that belief with the *mens rea* for rape which requires that the accused must intend to have carnal knowledge of a woman without her consent while aware that she is not or might not be consenting. It is noteworthy that at common law, acts of forcible sodomy were not classified as rape because they involved penetration of orifices other than the vaginal cavity via penile penetration. Instead, these acts were criminalised under the statutory crime of buggery that, inexplicably, was considered as a less serious crime than rape. As acts of forcible sodomy are now considered no less intrusive, abhorrent and repugnant than the crime of rape according to its common law definition, statutes have now been enacted in all Australian jurisdictions that broaden the scope of rape to include all forms of non-consensual sexual penetration.

The *Morgan* principle and ss 37AAA and 37AA of the Crimes Act 1958 (Vic)

Sections 37AAA and 37AA of the Crimes Act 1958 (Vic) provide:

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;

(‘Roberts’); *Neal v The Queen* [2011] VSCA 172 (15 June 2011) (‘Neal’); and *Wilson v The Queen* [2011] VSCA 328 (27 October 2011) (‘Wilson’). The *Morgan* principle was recently reaffirmed by the High Court’s decision in *R v Getachew* [2012] HCA 10 (28 March 2012) at [21]-[25] (‘Getachew 2’). These Victorian Court of Appeal decisions, unlike *Morgan*, dealt with the statutory crime of rape under s. 38 of the Crimes Act 1958 (Vic) which supplanted the common law crime of rape that existed in Victoria prior to 1981. While the basic principle of *Morgan* was reaffirmed in each of these decisions, it should be noted that unlike the general common law definition of consent or the lack thereof set out above n. 7, s. 36 of the Crimes Act 1958 (Vic) appears to provide a finite list of circumstances in which consent is deemed to be lacking: Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 1998 (Jim Kennan, Attorney-General); Victoria, Law Reform Commission, *Rape: Reform of Law and Procedure*, Report No. 43 (1991) 6 [12].

15 The common law definition of rape required ‘carnal knowledge of a woman’;


16 For example, the Sexual Offences Act 1956 (UK), s. 1(1) specified a maximum penalty of life imprisonment for rape while forced buggery (s. 12(1)) attracted as little as 10 years as a maximum penalty where the victim was an adult male.

17 See, e.g., Crimes Act 1900 (NSW), s. 61H(1); Criminal Code (NT), s. 1; Criminal Code (Qld), s. 1; Criminal Law Consolidation Act 1935 (SA), s. 5(3); Tasmania Criminal Code (Tas), s. 1; Crimes Act 1958 (Vic), s. 35. In New South Wales, what is referred to as ‘rape’ in other jurisdictions is encompassed in s. 611 which is termed ‘sexual assault’.
(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

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. (emphasis added)

Read together, ss 37AAA and 37AA appear to codify the basic principle enunciated in Morgan,\(^{18}\) the only difference being that s. 37AA sets out specific factors that a jury must be directed to consider in its determination of whether to accept evidence that the accused honestly believed that the complainant was consenting to the sexual act in question. Notably, s. 37AA does not enumerate an exhaustive list of factors. This is evidenced by s. 37AA(b)(iii) which states that in addition to the specific factors enumerated in s. 37AA, the jury must be directed to 'consider . . . any other relevant factors'. It is fair to conclude, therefore, that ss 37AAA and 37AA are entirely consonant with the Morgan precept.

In Victoria and elsewhere, rape and various other sexual offences require the prosecution to prove, as a constituent element, that the complainant did not consent to the sexual conduct in question. Section 36 of the Crimes Act 1958 (Vic), which expressly states that it is applicable only with regard to offences contained in Subdivisions (8A) to (8D) of the Act, enunciates a myriad of circumstances in which consent to the alleged sexual conduct will be lacking. That said, there are two plausible constructions of s. 36: one that regards the circumstances

Ignorance of the Law as a Defence to Rape: The Destruction of a Maxim

enumerated in subss (a)–(g) of that section as the only factors that will negate consent, and another that regards subss (a)–(g) as merely an exhaustive list of circumstances in which lack of consent is deemed to exist and operates to complement and augment the broader notion of lack of consent as expressed by the use of the term 'free agreement' in s. 36 which prefaces the deeming situations set out in subss (a)–(g).

Section 36 provides:

36. Meaning of consent

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.

It is noteworthy that s. 36 is silent on the question of whether Parliament intended subss (a)–(g) to constitute a finite rather than a mere suggested list of factors that will be deemed as negating consent. Though the question has yet to be authoritatively decided by either the Victorian Court of Appeal or the High Court of Australia, the writer believes the better view to be that subss (a)–(g) of s. 36 represent an exhaustive set of circumstances which, if proven, will negate the complainant's consent. In the writer's opinion, there are at least three factors that lend credence to this view. The first is that the very breadth of s. 36(a)–(g) suggests that the Victorian Parliament considered practically every conceivable circumstance is which 'free agreement' should be deemed as having been negated. Secondly, had Parliament intended otherwise, it could, for example, have prefaced subss (a)–(g) with the words, 'include, but are not limited to the following' or other words to that effect. Since it did not, and given the breadth of the circumstances set forth in subss (a)–(g), both logic and common sense militate in favour of a finite construction of s. 36. Finally, while the Second Reading Speech of the Crimes (Rape) Bill 1991 does not directly address this issue, it does imply that the list was intended to be exhaustive because the intention of the legislation was said to be that of expressly stating and defining the

elements of rape to remove uncertainty. This stated purpose is obviously best served by a closed definition of the factors negating consent. Though there are more than ample statements made by the Victorian Law Reform Commission and even some academic commentary that support the contrary point of view, none of these statements carries the force of law, nor are they reflected in the statute itself or its legislative history.

On another view, however, s. 36 begins by declaring that ‘consent means free agreement’ and only then goes on to add a finite list of circumstances in which consent will be deemed as lacking. Although the term ‘free agreement’ is not specifically defined in s. 36 nor in its Explanatory Memorandum or Second Reading Speech, the fact that Victoria is a common law jurisdiction necessitates that the common law remains in effect in the absence of a clear legislative intention to the contrary, either expressly or by necessary implication. Thus, in the event of a statutory ambiguity such as the undefined use of the term ‘free agreement’ in s. 36, the Victorian courts are duty bound to give the term whatever meaning, if any, it has at common law or at least resort to common law principles in an attempt to ascertain its meaning. In R v Wilkes and Bryant, the Full Court of the Supreme Court of Victoria did not take issue with the trial judge’s direction that insofar as the crime of rape is defined at common law, a woman’s lack of consent to carnal knowledge denotes a lack of ‘free and conscious permission’ to the same. This may be viewed as a form of tacit approval of the trial judge’s direction. Thus, one must assume that the term ‘free agreement’ or the lack thereof under s. 36 must be accorded the same meaning as expressed by the Full Court of the Supreme Court of Victoria in Wilkes and Bryant. Though the situations in which consent will be deemed as lacking under s. 36(a)–(g) are quite expansive, it requires little imagination to envisage that there are circumstances outside the parameters s. 36(a)–(g) in which consent in the form of free and conscious permission will be lacking.

For example, take the stereotypical rape scenario in which the complainant is kidnapped and forcibly dragged into a dark alley where despite screaming, kicking and continually protesting against the impending act of sexual penetration, the rapist is still able to consummate the sexual act through the use of brute force. Here, it is apparent that the rapist acted without the victim’s free and conscious permission, yet it
ignorance of the law as a defence to rape: the destruction of a maxim

appears that none of the circumstances envisaged in the deeming provisions of s. 36(a)–(g) operate to negate consent. Although subss (a) and (b) of s. 36 mandate that consent is negated where the victim submits because of force, fear of force or fear of harm of any type which is directed at the victim or another person, it would require a highly tortured construction of the word ‘submits’ in order to bring the victim’s conduct within the meaning of that term. The term submits is not specifically defined at common law and is defined in the Collins Australian Compact Dictionary as ‘[accepting] the will of another person . . .’. As there is no doubt whatever that V has been raped under s. 38(2)(a) of the Act in the example postulated, this serves as a vivid illustration that s. 36(a)–(g) was intended as a finite and carefully circumscribed list of deemed circumstances that operate concurrently with and augment the broader notion of ‘free agreement’ or the lack thereof in determining whether the requisite element of lack of consent is present under the various rape provisions of s. 38 of the Act.

Although the first sentence of s. 36 declares that its provisions apply for purposes of Subdivisions (8A) to (8D) of the Crimes Act 1958 (Vic), Subdivision (8A) includes only the crimes of rape (s. 38) and indecent assault (s. 39), while Subdivisions (8B) to (8D) include many other crimes of a sexual nature. For illustrative purposes, however, attention will focus only on the crime of rape as defined in s. 38 of the Act. Although rape can be committed in a variety of ways under s. 38, all methods require the prosecution to prove that the complainant did not consent to the sexual penetration in question.

In addition, s. 38 generally requires proof that the accused was aware that the complainant was not or might not have been consenting to the sexual penetration. While it is true that rape can also be committed under s. 38 in circumstances where it is proved that the accused gave no thought to whether the complainant was not or might not have been consenting, it is difficult to envision that many, if any, cases will arise in which the prosecution will be successful in proving that the accused gave no thought to whether consent was or might be lacking. Bearing this in mind, the primary focus of the remainder of this article will be on the typical scenario in which the prosecution alleges, and is therefore required to prove, that the accused was aware that the complainant was not or might not have been consenting. That is not to suggest, however, that the Morgan principle would apply with any less force when the

27 Section 38(2)(a) provides:

38. Rape
(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—
(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 . . .

28 Section 38(2)(a)(i), (2)(b), (3), (4)(b)(i).
29 Section 38(2)(a)(ii), (3), (4)(b)(ii).
prosecution seeks to convict on the basis that the accused gave no thought whatever as to whether the complainant was not or might not have been consenting to the sexual penetration at issue.

Equating ignorance of the law with an honest belief in consent

In a recent series of decisions in which the Victorian Court of Appeal had occasion to construe ss 37AAA and 37AA,\(^{30}\) the court reaffirmed the Morgan principle that juries must be directed that they must acquit on the charge of rape if they find that the accused held a genuine, though not necessarily reasonable belief, that the complainant was consenting at the time of the alleged criminal conduct.\(^{31}\) The court then addressed the relationship between the foregoing sections;\(^{32}\) s. 37AAA is concerned with various matters relating to consent upon which the jury must be directed, while s. 37AA relates to the directions that must be given to juries on the question of whether the accused was aware at the time of his or her criminal conduct that the complainant was not or might not have been consenting; that is, the question of whether the often contentious mens rea element for rape under s. 38 was proved beyond reasonable doubt. In particular, s. 37AA deals with the factors that a jury must take into account in deciding this question when an accused alleges that he or she acted with a genuine belief that the complainant was consenting to the sexual penetration in question. The problem confronting the court in these decisions was how, if at all, the lack of consent and mens rea elements of rape can be reconciled with the language of s. 37AA(b)(i) that provides:

For the purposes of s 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—

\[\ldots\]

(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 . . .

Simply stated, if a jury finds under s. 37AA(b)(i) that the accused was aware 'that a circumstance specified in s. 36 existed in relation to the


complainant', how could it reach any conclusion other than that the accused was aware that the complainant was not consenting to the sexual penetration? Given that s. 36 enumerates the circumstances under which consent is negated, how can an accused be aware that one or more of those circumstances is operating in relation to the complainant and, at the same time, hold a bona fide belief that the complainant was consenting? Thus, s. 37AA(b)(i) is, on its face, a paragon of superfluous and circular reasoning in stating that juries must be directed that one factor they must consider in determining whether the accused possessed the requisite mens rea to convict for the crime of rape is whether the accused did in fact possess such a mens rea. Moreover, though the mysterious and circular wording of s. 37AA(b)(i) makes reference to 'whether the accused was aware that that circumstance existed in relation to the complainant', why should this reasoning apply with any lesser force in circumstances where the accused is aware that one or more of the factors set out in s. 36 might exist in relation to the complainant, a state of mind that is also a sufficient mens rea for rape under the various provisions of s. 38 of the Act?

Notwithstanding that the Victorian Court of Appeal has reaffirmed the Morgan principle on numerous occasions, it has somehow concluded time and again that an accused can be aware that one or more of the circumstances set out in s. 36 is operating in relation to the complainant and, at the same time, hold a genuine belief that the complainant was consenting. How can the court's conclusion be justified in view of the Morgan precept and the degree of clarity with which the lack of consent and mens rea elements of rape are enunciated under ss 36 and 38 of the Act respectively? In the writer's view, there is only one possible explanation.

The court is stating, in effect, that contrary to the maxim that ignorance of the law is no excuse, an accused can be aware or reckless as to the fact that one or more of the s. 36 circumstances exists in relation to the complainant, yet still hold a belief that the complainant was consenting. In other words, while the maxim that ignorance of the law is no excuse denotes that the law does not require the prosecution to prove that the accused intended to violate the law in order to convict, the Court of Appeal has eschewed this maxim as a means of reconciling the palpable conflict between the Morgan principle, the lack of consent and mens rea elements of rape, and the paradoxical language of s. 37AA(b)(i).

Thus, the recent line of authority suggests that unless it can be proved

33 Most recently in the High Court in Getachew 2 [2012] HCA 10 (28 March 2012).
beyond reasonable doubt that the accused was also aware that the circumstances enumerated in s. 36 are those in which consent is not given, he or she is entitled to an acquittal on the charge of rape irrespective of whether he or she was aware or reckless as to the fact that one or more of those circumstances existed in relation to the complainant; that is, provided that evidence is led that he or she acted with a bona fide belief that the complainant was consenting.

Conclusion

The principle enunciated by the House of Lords in Morgan is predicated upon sound reasoning as evidenced by its adoption and reaffirmation in a long line of decisions of the Victorian Court of Appeal and courts in other jurisdictions. Having examined the contentious mens rea of the crime of rape as defined at both common law and under s. 38 of the Crimes Act 1958 (Vic), it is apparent that an irreconcilable conflict exists between the principle enunciated in Morgan, the lack of consent and mens rea elements of rape as defined by ss 36 and 38 of the Act respectively, and s. 37AA(b)(i) of the Act. It is axiomatic that when statutory ambiguities arise, the judiciary is duty bound to accord legislation the effect that Parliament intended. In this instance, the writer believes that the obvious intention of Parliament in enacting ss 37AAA and 37AA was to give full effect to the Morgan principle, and the decisions of the Court of Appeal serve to confirm this view.

When confronted with the duty of giving ss 36, 38 and 37AA(b)(i) their intended effect, and faced with the irreconcilable conflict among them, the Court of Appeal apparently relied on the rule of interpretation that presumes legislation is not to be construed as redundant. Had the Court of Appeal conceded that one cannot be aware that one or more of the circumstances enumerated in s. 36 exists in relation to the complainant and, at the same time, hold a belief that he or she was consenting, that would have inexorably compelled the court to hold that s. 37AA(b)(i) is redundant, thereby violating a cardinal tenet of statutory construction. Confronted with this dilemma, the court opted for an interpretation of these conflicting provisions that, while obviating the need to declare s. 37AA(b)(i) redundant, violated the maxim that ignorance of the law is no excuse. Under the circumstances, therefore, one should not be too inclined to fault the court for casting aside this maxim.
as an alternative to violating the long-standing rule of interpretation that legislation should not be construed as superfluous.\textsuperscript{39}

Most, but not all of the relevant decisions of the Court of Appeal were decided in 2010 and 2011.\textsuperscript{40} Thus, it is the writer's hope that the Victorian Parliament will soon take remedial action to eliminate this conflict and give ss 37AAA and 37AA their intended effect; to wit: to codify the Morgan principle with added guidance to juries (s. 37AA) in the form of mandatory directions as to what specific matters they must consider in determining whether the accused actually held an honest belief that the complainant was consenting or, to put the matter another way, whether the prosecution has satisfied its burden of proving the requisite \textit{mens rea} for the crime of rape as defined in s. 38 of the Crimes Act 1958 (Vic).

\textsuperscript{39} \textit{Shell Company of Australia Ltd v City of Melbourne} [1997] 2 VR 615, 643 at [39]–[40]; \textit{Commissioner of State Revenue v Landrow Properties Pty Ltd} [2010] VSCA 197 at [51].
