The Queen v Getachew: Rethinking DPP v Morgan

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Abstract In The Queen v Getachew, a recent decision of the High Court of Australia that was soon followed by the Victorian Court of Appeal, the High Court correctly noted that there is a fine line between the mens reas of belief and knowledge which turns upon the degree of conviction with which a belief is held. In particular, the court emphasised that a belief in the existence of a fact or circumstance that contemplates a real possibility or perhaps a higher degree of doubt as to the existence of that fact or circumstance is tantamount to knowledge or awareness that such fact or circumstance may not exist. When applied to the principle enunciated in DPP v Morgan, that type of belief would not be mutually exclusive with the alternative mens reas that require the Crown to prove that the accused was aware that the complainant was not or might not be consenting to the penetration at issue. In Getachew, the High Court merely pointed out that the mens reas of knowledge and belief, though similar in certain respects, are separate and distinct mental states that were incorrectly and inexplicably treated as though they were identical in Morgan and innumerable decisions that have followed and relied upon Morgan since it was decided by the House of Lords in 1976. In the aftermath of Getachew, therefore, the principle that an accused can act with a mental state that is mutually exclusive of the mens rea for rape remains intact. What has changed is that it is knowledge, rather than a mere belief that the complainant is not or might not be consenting, that is mutually exclusive of the requisite mens rea for rape.

Keywords Rape; Mens rea for rape at common law and statutory offences of rape; Distinction between knowledge/awareness and belief

The Crimes Amendment (Rape) Act 2007 (Vic) affected significant changes to the law of rape in Victoria, most notably the inclusion of what the High Court referred to as a new ‘fault element’ of Victoria’s statutory crime of rape, a revised version of s. 38 and the addition of ss

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I wish to thank my research assistant, Tess Blackie, for her excellent contribution to this piece.

1 The Queen v Getachew [2012] HCA 10, (2012) 286 ALR 196 at [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Section 38(2)(a)(i)–(ii) and (4)(a)(i)–(ii) of the Crimes Act 1958 (Vic) provide that in order to be convicted under s. 38(2)(a) and (4), the prosecution must prove that the accused was aware that the complainant was not or might not have been consenting or, alternatively, that the non-consensual sexual penetration occurred without the accused having given ‘any thought to whether the person [was] not consenting or might not be consenting . . .’. The quoted fault element set out in subs. (ii) was added by virtue of the Crimes Amendment (Rape) Act 2007 (Vic).

2 Section 38 of the Crimes Act 1958 (Vic) is the statutory version of rape in Victoria. It must be read in conjunction with ss 35–37, which provide relevant definitions, deeming provisions and rules governing jury instructions or the lack thereof in rape prosecutions.

37AA and 37AAA of the Crimes Act 1958 (Vic)\(^3\) which mandate that juries receive various directions in rape prosecutions, and particularly so when the accused alleges that he or she acted with an honest belief that the complainant was consenting to the sexual penetration in question.\(^4\) Although these and other changes instituted by the 2007 Act have engendered their fair share of criticism,\(^5\) for present purposes the Act is merely intended to serve as a backdrop against which the High Court’s decision in *The Queen v Getachew*\(^6\) will be viewed. It is the writer’s view that the intent and impact of both the Act and *Getachew* are to erode the effect the House of Lords’ decision in *DPP v Morgan*,\(^7\) a decision that, until *Getachew*, had been reaffirmed time and again in a long line of decisions of the Victorian Court of Appeal\(^8\) and other appellate courts.\(^9\) The longstanding precept enunciated in *Morgan* will be discussed below.

**DPP v Morgan**

In *DPP v Morgan*,\(^10\) the accused and three others were convicted of raping his wife. The accused had enticed the others to partake in the crime by informing them, prior to the incident, that she was a bit ‘kinky’ and would likely struggle and protest as a means of becoming sexually aroused.\(^11\) For the purposes of this article, the key issue raised on appeal was whether the trial judge erred in directing the jury that if the accused acted with an honest and reasonable belief that the complainant was consenting, this would preclude the jury from finding that the accused had acted with the requisite mens rea for the common law offence of rape, thereby resulting in an acquittal. The House of Lords opined that

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\(^3\) *The Queen v Getachew* [2012] HCA 10, (2012) 286 ALR 196 at [18], [20].

\(^4\) Crimes Act 1958 (Vic), s. 37AA.

\(^5\) See, e.g., K. J. Arenson, ‘Ignorance of the Law as a Defence to Rape: The Destruction of a Maxim’ (2012) 76 JCL 336 (criticising the Victorian Court of Appeal for eviscerating *DPP v Morgan* [1976] AC 182 by construing s. 37AA of the Crimes Act 1958 (Vic) as leaving open the possibility of an acquittal despite the fact that the accused acted with an awareness that the complainant’s consent was lacking under the deeming provisions set out in s. 36 of the Crimes Act 1958 (Vic)); K. J. Arenson, ‘Rape in Victoria as a Crime of Absolute Liability: A Departure from Both Precedent and Progressivism’ (2012) 76 JCL 389 (arguing that the principle enunciated in *Morgan* was also eviscerated as a consequence of the Crimes Amendment (Rape) Act 2007 (Vic) which, in many instances, effectively permits Victoria’s statutory offence of rape to be prosecuted as one of absolute liability).


\(^7\) *DPP v Morgan* [1976] AC 182.

\(^8\) The *Morgan* principle was adopted by the Victorian Court of Appeal in *R v Saragozza* [1984] VR 187 and reaffirmed by the court in a more recent series of decisions: *R v Zilm* [2006] VSCA 72 (5 April 2006); *Worsnop v The Queen* [2010] VSCA 188 (28 July 2010); *Roberts v The Queen* [2011] VSCA 162 (2 June 2011); *Neal v The Queen* [2011] VSCA 172 (15 June 2011); and *Wilson v The Queen* [2011] VSCA 328 (27 October 2011).


\(^10\) *DPP v Morgan* [1976] AC 182.

\(^11\) Ibid. at 206.
the requisite mens rea is an intention to have carnal knowledge \(^{12}\) of the complainant without her consent\(^ {13}\)—meaning 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 sexual act.\(^ {14}\) In cases such as this in which a common law or statutory offence requires proof that the accused acted with a particular state of mind, this mental state is commonly referred to as the mens rea element of the offence which, like all other elements, must be proven beyond reasonable doubt to the satisfaction of the fact-finder.\(^ {15}\)

In writing for the majority, Lord Hailsham explained that a genuine belief that the complainant is consenting to carnal knowledge and the aforementioned mens rea are mutually exclusive of one another.\(^ {16}\) His Lordship then opined that this is true regardless of whether or not the putative belief in consent would have been entertained by a reasonable person in the position of the accused.\(^ {17}\) Lord Hailsham added, however, that the reasonableness or lack thereof of the belief is not devoid of relevance in rape prosecutions. To the contrary, the reasonableness of the accused’s putative belief is a circumstance to be taken into account by the fact-finder in determining whether it was genuinely held.\(^ {18}\)

Upon first impression, it is difficult to find fault with Lord Hailsham’s reasoning. If one engages in carnal knowledge of a woman without her consent or assists or encourages others to do so in the belief that she is giving her free and conscious permission to the sexual penetration at issue, how does one reconcile that belief with the mens rea element of the common law offence of rape which mandates that the accused must

\(^{12}\) At common law, carnal knowledge is defined as any amount of penile penetration of the vaginal cavity, however slight, and no emission of seminal fluid is required: Holland v The Queen (1993) 67 ALJR 946.

\(^{13}\) At common law, consent is defined as free and conscious permission: R v Wilkes and Bryant [1965] VR 475 at 480. Thus, if the complainant accedes to sexual penetration out of force, fear of force or any other type of harm, no consent has been given.


\(^{16}\) DPP v Morgan [1976] AC 182 at 208–9. Under s. 38 of the Crimes Act 1958 (Vic), Victoria’s statutory offence of rape, there are three methods by which rape can be committed. All required the same mens rea as the common law offence of rape until the advent of the Crimes Amendment (Rape) Act 2007 (Vic) which, in the case of two of the three methods, added an additional ‘fault element’ that permitted conviction upon proof that the accused gave no thought as to whether the complainant was not or might not have been consenting: The Queen v Getachew [2012] HCA 10, (2012) 286 ALR 196 at [27]. The Morgan principle would clearly apply as well to the new fault element.


\(^{18}\) Ibid. at 214. See above n. 8. 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 in n. 13, 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); Victorian Law Reform Commission, Rape: Reform of Law and Procedure, Report No. 43 (1991) para. 12.
intend to penetrate\textsuperscript{19} the complainant sexually without her consent while aware that she is not or might not be consenting? This reasoning applies with equal force to rape prosecutions brought under s. 38 of the Crimes Act 1958 (Vic).\textsuperscript{20} This brings us to the question of the extent to which the High Court’s decision in \textit{Getachew} has altered the long-standing precept enunciated in \textit{Morgan}. Perhaps the more important question is whether the impact of \textit{Getachew} should be viewed as a salutary or inimical development in the eternal quest for consistency and fairness in the system of criminal justice.

**The High Court’s decision in \textit{The Queen v Getachew}**

In \textit{The Queen v Getachew}\textsuperscript{21} the accused was convicted of rape under s. 38(2)(a) of the Crimes Act 1958 (Vic) despite his insistence that he had never sexually penetrated the complainant.\textsuperscript{22} Although no evidence was adduced that the accused acted with a belief that the complainant was consenting to the alleged sexual penetration, the accused appealed on the basis that the trial judge had erred in failing to direct the jury that it was incumbent upon the prosecution to satisfy the jury beyond reasonable doubt that the accused did not act in the belief that the complainant was consenting to the same.\textsuperscript{23} In accepting the accused’s submission, the Victorian Court of Appeal allowed the appeal, set aside the conviction and ordered a new trial.\textsuperscript{24} The High Court then granted the prosecution’s request for special leave to appeal.\textsuperscript{25}

In writing for the court, French CJ, Hayne, Crennan, Kiefel and Bell JJ began with an exposition of the Victorian legislation that replaced the common law offence of rape with the more complex statutory version that now exists.\textsuperscript{26} The court noted that the current statutory offence of rape, as with other sexual offences in Victoria, must be construed in light of the general provisions set forth in subdivision 8 of Division 1 of Part 1 which consist of ss 35–37B of the Crimes Act 1958 (Vic).\textsuperscript{27} Rape, as currently defined in Victoria, is set out in s. 38 of the 1958 Act which provides:

\begin{quote}
\textbf{38. Rape}

\begin{enumerate}
\item A person commits rape if—
  \begin{enumerate}
  \item he or she intentionally sexually penetrates another person without that person’s consent—
  \end{enumerate}
\end{enumerate}
\end{quote}

\textsuperscript{19} It is important to note that at common law, acts of forcible sodomy do not fall within the classification of rape for the reason that they involve penetration of orifices other than the vaginal cavity. Therefore, by definition, they do not constitute carnal knowledge of a woman, the very essence of the offence of rape at common law.

\textsuperscript{20} \cite{20}[2012] HCA 10, (2012) 286 ALR 196; see above n. 16 for a discussion of the \textit{mens rea} elements of s. 38.

\textsuperscript{21} \cite{21}[2012] HCA 10, (2012) 286 ALR 196.

\textsuperscript{22} Ibid. at [4].

\textsuperscript{23} Ibid. at [6].

\textsuperscript{24} Ibid at [8].

\textsuperscript{25} Ibid. at [9].

\textsuperscript{26} Ibid. at [10]–[19].

\textsuperscript{27} Ibid. at [10].
(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
(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.

(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.

(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.

Section 36 of the Act provides a statutory definition of consent as well as a list of circumstances in which the complainant’s consent will be deemed as lacking. That section provides:

**36. Meaning of consent**

(1) 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.

In commenting on the effect of s. 36, the court made the following observation:

The 2007 Act made other important changes to the law that took account of the recommendations made by the 2004 Victorian Law Reform Commission report. But not all of the recommendations made by that report were
reflected in amendments made after the report was published. In particular, neither the 2007 Act nor any of the earlier amendments gave effect to the recommendation . . . that what was called ‘[t]he defence of honest belief in consent’ not be available ‘where . . . one or more of the circumstances listed in section 36(a)–(g) existed and the accused was aware of the existence of such circumstances’. Instead, the accused’s awareness of the existence of such a circumstance was treated, in the amendments made by the 2007 Act, as a matter about which a trial judge was required to direct the jury. The required direction was that the jury should consider the accused’s awareness of the s 36 circumstance in deciding whether the prosecution established beyond reasonable doubt that the accused was aware that the complainant was not or might not be consenting to the sexual act.28

Against this background, the court then turned to the new version of s. 37 that was enacted as part of the 2007 Act.29 Section 37 provides:

**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.

(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. (emphasis added)

The court then focused on the purpose and effect of s. 37AA.30 That section states that

[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.31

28 Above, n. 21 at [17] (footnote omitted).
29 Ibid. at [19].
30 Ibid. at [20].
31 Ibid.
In commenting on s. 37AA, the court said that it deals with ‘the relationship between an accused’s asserted belief that the complainant was consenting and his or her awareness that the complainant was not or might not be consenting’. 32 The court then added that s. 37AA, when read in conjunction with s. 37, required s. 37AA directions to be given whenever ‘evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act’. 33 Although the court ultimately allowed the prosecution’s appeal on the basis that no such evidence was led or assertion made that required a s. 37AA direction, 34 it is nonetheless true that the court’s judgment in Getachew is of great importance because of its obiter dicta comments which, if subsequently applied, would effectively overrule the long-standing Morgan precept that an accused’s belief that the complainant is consenting to carnal knowledge or sexual penetration is mutually exclusive with the requisite mens rea for rape at common law and s. 38 of the Crimes Act 1958 (Vic) respectively; namely, an awareness that the complainant is not or might not be consenting to the relevant carnal knowledge or sexual penetration at issue. 35 Thus, the court was of the view that a genuine belief in consent is not necessarily an answer to rape if the belief accepts or encompasses the possibility that the complainant might not be consenting (emphasis added).

In further illuminating this point, the following passages from the court’s judgment in Getachew are most instructive:

Reference to an accused holding the belief that the complainant was consenting invites close attention to what was the accused’s state of mind. It was said in the Explanatory Memorandum accompanying the Bill for the 2007 Act that ‘belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive’. So much may be accepted if ‘belief in consent’ is treated as encompassing a state of mind where the accused accepts that it is possible that the complainant might not be consenting.

For present purposes, it is enough to notice that, if an accused asserted, or gave evidence at trial, that he or she thought or ‘believed’ the complainant was consenting, the prosecution may yet demonstrate to the requisite standard either that the accused was aware that the complainant might not be consenting or that the asserted belief was not held. It is to be recalled

32 Abopve, n. 21 (emphasis added). It is noteworthy that the additional fault element (mens rea) added by the 2007 Act is satisfied by proving that the accused gave no thought whatever as to whether the complainant was not or might not have been consenting: s. 38(2)(a)(ii) and (4)(b)(ii). As pointed out above at n. 16, the Morgan principle would apply equally to the new fault element because an honest belief that the complainant is not or might not be consenting cannot be reconciled with giving no thought as to whether the complainant is not or might not be consenting.


34 Ibid. at [29]–[37].

35 Ibid. at [26] and [27]; DPP v Morgan [1976] AC 182 at 208–9. It was further held in Morgan that so long as a genuine belief in consent was in fact held by the accused, it was unnecessary for the accused to also satisfy the fact-finder that the belief would have been held by a reasonable person in the same position as the accused: at 228–9. As noted above, however, the reasonableness of the belief is an important factor that may be taken into account by the fact-finder in determining whether the putative belief was in fact held: The Queen v Getachew [2012] HCA 10, (2012) 286 ALR 196 at [24].
that, since the 2007 Act, the fault element of rape has been identified as the accused being aware that the complainant was not or might not be consenting or the accused not giving any thought to whether the complainant was not or might not be consenting. The reference to an accused’s awareness that the complainant might not be consenting is, of course, important. An accused’s belief that the complainant may have been consenting, even probably was consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting.36

As the pertinent mens rea for rape at common law and under s. 38 of the Crimes Act 1958 (Vic) requires knowledge or awareness37 as opposed to a mere belief that the complainant is not or might not be consenting, it is apparent that the foregoing obiter dicta cannot be reconciled with the principle enunciated in Morgan. Thus, a clear understanding of the elusive distinction between the mens reas of knowledge and belief is critical to an understanding of the above-quoted passages from Getachew. This distinction was succinctly addressed by Professor Peter Gillies in his treatise, Criminal Law:

There is a clear conceptual distinction between knowledge and belief. ‘Belief’ as opposed to ‘knowledge’ may be used to refer to that state of mind in which D holds a fact to be true, but is not entirely free from doubt, while knowledge strictly . . . denotes the situation where D does not, having regard to the facts known to D, have any doubts as to the existence of the fact in issue. In many instances it will be difficult to have knowledge in its strictest sense, as opposed to belief—D cannot even be absolutely confident, for example, that D was born on the day shown on D’s birth certificate. Nevertheless, D will regard herself or himself as ‘knowing’ this date . . . In practice, therefore, there will frequently be little difference between situations of ‘knowledge’ and ‘belief’.38

By definition, therefore, the mens rea of belief denotes a state of mind in which the accused entertains some degree of doubt as to the existence of whatever fact or circumstance that he or she is required to believe according to the common law or statutory definition of the offence. Thus, if a person acts or omits to act (where there is a legal duty to act) with an honest belief as distinguished from knowledge or awareness39 as to the existence of a fact or circumstance that makes his or her conduct criminal, he or she is acting with an acceptance or contemplation that there is some degree of doubt as to the existence of that fact or circumstance. In legal parlance, that acceptance or contemplation is a mens rea

36 Above, n. 33 at [26] and [27].
39 Gillies, above n. 37 at 67–8, 72.
that is commonly referred to as recklessness. As the requisite mens rea for rape at common law and under s. 38 of the Crimes Act 1958 (Vic) is knowledge or awareness that the complainant is not or might not be consenting (recklessness), it is apparent that an accused’s belief that the complainant was consenting will not necessarily suffice to preclude the prosecution from proving that mens rea.

Eight months subsequent to the High Court’s rather significant obiter dicta comments in Getachew, the Victorian Court of Appeal transformed that discussion into legally binding precedent by expressly rejecting the applicant’s claim, predicated on the Morgan precept, that if the jury accepted his claim that he had acted in the belief that the complainant was consenting to the sexual penetration, this would have precluded it from finding that the mens rea for rape had been proven, thereby necessitating an acquittal. Expressly citing the High Court’s obiter dicta in Getachew, the Court of Appeal echoed the High Court’s pronouncement that an honestly held belief in consent and an awareness that the complainant was not or might not be consenting, or gave no thought whatever to the same, are not mutually exclusive. In writing for the Court of Appeal, Nettle, Redlich and Osborn JJA opined:

Directions along those lines may well have been desirable to provide the jury with further assistance. We note that, since the Victorian Criminal Charge Book was revised following the High Court’s decision in Getachew, it has included the following suggested directions concerning an accused’s belief in consent:

There is a difference between a belief in consent which [the accused] relies upon and an awareness that [the complainant] was not or might not be consenting, which is what this element is about. That is because there are different strengths of belief.

● At one end of the scale, I might have a belief as to something and the strength of that belief leaves no possibility for error.
● At the other end of the scale, I can have a belief as to something while being aware that I might be mistaken. For example, I might believe that I parked my car on the fourth level of a car park, but I’m aware that it

40 R v Crabbe (1985) 156 CLR 464; Boughey v The Queen (1986) 161 CLR 10. See also Gillies, above n. 37 at 59-67. Recklessness is regarded as a form of negligence and, therefore, denotes conduct on the part of the accused that falls below the standard of care that all persons must exercise in order to protect their neighbours from unreasonable risks of harm. Moreover, recklessness is a form of negligence that is regarded as aggravated negligence in the sense that it involves advertent as opposed to inadvertent unreasonable risk-taking conduct; that is to say that recklessness envisages situations in which the accused, though aware of the particular risk involved, nonetheless opts to proceed despite that awareness. Thus, when a person acts in the belief of the existence of facts or circumstances that make his or her conduct criminal, it is also true that he or she has acted with recklessness concerning those facts or circumstances, provided that his or her overall conduct falls below the standard of care that amounts to negligence.

41 See discussion above in nn. 16 and 32, however, which allude to a new fault element in s. 38 that was added by the Crimes Amendment (Rape) Act 2007 (Vic) and to which the Morgan principle would also apply.


might be on the third level. I then go to the fourth level to find my car, even though I’m aware it might not be there.

In order to prove this element of awareness, the prosecution must prove to you that [the accused] did not have such a strong belief that [the complainant] was consenting that he did not think of the possibility that she might not be consenting. In determining the strength of [the accused’s] belief in consent, you should consider the matters I just mentioned that are relevant to whether the belief was held. This includes any evidence of the belief, whether the accused was aware that, [describe relevant s. 36 or 37AAA(d) or (e) circumstances], whether the accused took steps to find out whether the complainant was consenting and any other relevant factors.

We consider it desirable that a jury be told the following. There is a difference between the state of mind of belief in consent and awareness that the complainant might not be consenting. It is for the prosecution to establish that the accused did not have a belief in consent that creates a reasonable doubt that he was aware that the complainant was not or might not be consenting. Whether the belief does create a doubt will depend upon the jury’s findings of fact as to the nature and extent of that belief.44

Although the Court of Appeal spoke of what it termed ‘belief’45 at opposite ends of a scale that is based upon the degree of strength with which a belief is held, the writer’s view is that a belief that is held with such strength that it leaves no room for the possibility of doubt is nothing more than a convoluted description of the state of mind (mens rea) known as knowledge or awareness.46 Whether one chooses to characterise such a state of mind as knowledge/awareness or the type of belief described by the Court of Appeal above, it is clear that either state of mind, if found by a jury to have been held by the accused at the time of the alleged sexual penetration, would preclude a finding that the accused possessed the necessary mens rea for rape and, therefore, result in an acquittal.

On the other hand, a state of mind (mens rea) that accepts or contemplates the possibility of error, however slight, is descriptive of the state of mind known as ‘belief’.47 This state of mind falls short of the requisite knowledge or awareness that the complainant is not or might not be consenting. To the contrary, a mere belief in consent which, by definition, accepts or contemplates the possibility or perhaps an even greater likelihood that the complainant might not be consenting, is tantamount to the mens rea required for rape at common law and under s. 38 of the Crimes Act 1958 (Vic); namely, knowledge or awareness that the complainant is not or might not be consenting (recklessness). The literal wording of the above-quoted passages from NT, when read in conjunction with Getachew, leads inexorably to the conclusion that the Morgan principle which has been reaffirmed by the High Court of Australia,

45 Ibid. at [16].
46 Gillies, above n. 37.
47 Ibid.
Victorian Court of Appeal and other appellate courts on numerous occasions in recent years,\(^{48}\) has now been abolished under the current Australian common law doctrine.

It would be easy to succumb to the temptation to be dismissive of what appears to be the sudden demise of *DPP v Morgan* by pointing out that the *Morgan* principle was predicated on an egregious failure to distinguish properly between the disparate *mens reas* of knowledge/awareness and belief. Although hindsight is always 20/20, the fact is that in many, if not most instances, there is a very tenuous distinction between these closely related but distinct *mens reas*.\(^{49}\) In fact, there is a cogent argument to be made that the distinction between the two is, in many instances, more metaphysical than real. Even the most pedestrian minds are aware that history has demonstrated time and again that things once believed to transcend the capabilities of mankind are now achievable as a result of advancements in science and technology. For this reason and other innumerable vicissitudes that are commonplace such as extraordinary coincidences, the sudden and untimely death or illness of living creatures and instances of extremely good or bad luck, we often hear the familiar refrain that ‘anything is possible’, or so it appears.

**Conclusion**

The point of this discussion is that there is often a thin, but clearly discernible, line between a strongly held belief and a belief that excludes any possibility of error. The principle enunciated in *Morgan* appeared to

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\(^{49}\) The difficulty in drawing this distinction is highlighted by the fact that although *Morgan* came under attack from the day it was decided, critics failed to seize upon this now apparent oversight. For criticisms of the *Morgan* principle, see *R v Taylor* (1985) 80 Cr App 327; *R v Haughtian* (1985) 80 Cr App 334 (which held that there was no requirement upon judges to give a direction in the terms of the *Morgan* principle where the circumstances of the case and considerations of fairness weighed against such a direction). See also V. J. Dettmar, ‘Culpable Mistake in Rape: Eliminating the Defence of Unreasonable Mistake of Fact as to Victim Consent’ (1985) 89 *Dickinson Law Review* 473; D. F. Alexander, ‘Twenty Years of *Morgan*: A Criticism of the Subjectivist Views of *Mens Rea* and Rape in Great Britain’ (1995) 7 *Pace International Law Review* 207; W. Larcombe, ‘*Worsnop v The Queen*: Subjective Belief in Consent Prevails (Again) in Victoria’s Pare Law’ (2011) 35 *Melbourne University Law Review* 697 (a case note criticising the Victorian Court of Appeal for failing to implement changes to the *Morgan* principle following statutory reforms passed in 2007). Perhaps the most poignant criticism of *Morgan* has been that it can result in the acquittal of those who, for example, become so inebriated of their own free will that they act with a state of mind that is mutually exclusive of the *mens rea* for rape. This argument has considerable appeal because it is only due to the accused’s irresponsible conduct that he or she is found to have held a state of mind that was mutually exclusive with the necessary *mens rea*. This argument is further exacerbated by the particularly hideous nature of rape as an offence and the practical certainty that the complainant will suffer irreparable emotionally scarring.
be sound because judges, practitioners and academics accepted it uncritically and seized upon the folly of failing to draw what has turned out to be an important distinction between knowledge/awareness and belief. Yet in hindsight, both Getachew and NT have correctly pointed out that the distinction between knowledge/awareness and belief is not a mere formality, but one that upon careful examination has literally forced the courts to rethink the Morgan principle. The result of this rethinking process is that the Morgan principle has been reshaped rather than abrogated in its entirety. While it is no longer true that a genuinely held belief in consent and the mens rea for rape are mutually exclusive,50 it is correct to state that as a consequence of the decisions of the High Court of Australia and Victorian Court of Appeal in Getachew and NT respectively, knowledge (or awareness) of consent and the mens rea for rape are mutually exclusive. This rather mundane proposition can be applied with the consistency that, in turn, creates both the reality and appearance of fairness that our adversarial system of criminal justice demands.

50 In fact, it can now be said that a person who acts with an honest belief as opposed to knowledge/awareness of consent is, by definition, someone who possesses the requisite mens rea for rape at common law and under s. 38 of the Crimes Act 1958 (Vic).