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The Chaotic State of the Law of Rape in Victoria: A Mandate for Reform

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Abstract This article is intended as a final commentary and sequel to two earlier articles in this journal that have examined the arcane and circular wording of s. 37AA of the Crimes Act 1958 (Vic) and its patent incompatibility with ss 36 and 38 of that Act that define the elements of rape. In particular, this article will revisit many of the essential points raised in the first two articles in order to afford readers with an appropriate backdrop against which the Victorian Court of Appeal’s decision in GC v The Queen will be examined. The article concludes with a strenuous recommendation that s. 37AA be repealed or substantially amended in order to comport with ss 36 and 38 as well as the Court of Appeal’s decision in NT v The Queen that significantly reshaped the Morgan principle.

Keywords Rape; Consent; Genuine belief in consent; Morgan principle; Sexual offences

Prior to 1981, rape in Victoria was a common law offence that consisted of carnal knowledge ¹ of a woman against her will.² As the words ‘against her will’ wrongly implied that some form of resistance on the part of the complainant was necessary for a rape to occur,³ the courts ultimately replaced those words with ‘without her consent’⁴ to accurately reflect the elements of rape as it now exists at both common law and under the various statutory versions of rape such as, for example, s. 38 of the Crimes Act 1958 (Vic). It is important to note that acts of forcible sodomy are not classified as rape at common law because they involve penetration of orifices other than the vaginal cavity.⁵ Thus, such acts were made criminal only by virtue of the statutory offence of buggery that was inexplicably

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¹ At common law, carnal knowledge denotes any amount of penile penetration, however slight, of the vaginal, anal or oral cavity of a female: Holland v The Queen (1993) 67 ALJR 946. Thus, the common law crime of rape could only be perpetrated by a man against a woman as a principal in the first degree. A woman could be guilty of raping another woman, but only as a joint principal in the first degree or as an accessory, whether as a principal in the second degree or an accessory before the fact: K. J. Arenson, M. Bagaric and P. Gillies, Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials, 3rd edn (Oxford University Press: Oxford, 2011) 300.

² Arenson, Bagaric and Gillies, above n. 1 at 299, citing Hale’s Pleas of the Crown, vol. 1, 626.


⁴ 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.

⁵ Arenson, Bagaric and Gillies, above n. 1 at 299.
viewed as a less serious crime than rape as evidenced by the fact that it was punishable by a lower maximum period of imprisonment and/or fine. As acts of forcible sodomy are no less invidious than carnal knowledge of a woman without her consent, all Australian jurisdictions have now repealed the crime of buggery and enacted legislation that extends the ambit of rape to all forms of non-consensual sexual penetration. Aside from the aforementioned changes, other antiquated relics of rape at common law that have been abolished in recent decades are: a man was legally immune from raping his lawfully wedded spouse unless they were separated at the time pursuant to a court order; a boy under the age of 14 was conclusively presumed to be incapable of committing the crime of rape; and a woman who had consented to carnal knowledge could not thereafter revoke the same until after the carnal knowledge had ceased.

Insofar as the requisite mens rea for rape at common law is concerned, it was held by the House of Lords in DPP v Morgan that the accused must act with an intention to have carnal knowledge of the complainant without her consent. This was construed as 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. In writing for the majority in Morgan, Lord Hailsham further opined that an accused’s genuine belief that the complainant is consenting is dissonant with the foregoing mens rea, and this is true irrespective of whether the alleged belief in consent would have been held by a reasonable person in the position of the accused. His Lordship was careful to emphasise, however, that the reasonableness or lack thereof of the putative belief is not totally bereft of relevance in rape prosecutions; rather, it is a

6 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.

7 The Crimes Act 1958 (Vic) makes clear that buggery is no longer a criminal offence (s. 59). The issue of the legalisation of buggery is often conflated with discussions of the history of homosexuality in the law and thus hard to trace independently. Buggery between two consenting adults was made absolutely legal in all Australian jurisdictions with the enactment of the Criminal Code Amendment Act 1997 (Tas).

8 See, e.g., Criminal Code 1899 (Qld), s. 349; Criminal Code Act Compilation Act 1913 (WA), s. 319 (which defines sexual penetration) and s. 325 (which makes sexual penetration without consent a crime): Crimes Act 1900 (NSW), ss 61H–61I. Although in New Zealand rape is defined as:

‘... the penetration of person B’s genitalia by person A’s penis,—
(a) without person B’s consent to the connection; and
(b) without believing on reasonable grounds that person B consents to the connection’.

See the Crimes Act 1961 (NZ), s. 128(2).

9 Repealed in Victoria by the Crimes Act 1958 (Vic), s. 62(2).

10 Repealed in Victoria by the Crimes Act 1958 (Vic), s. 62(1).

11 Repealed in the relevant jurisdictions by Kaitamaki v The Queen [1984] 2 All ER 435: Crimes Act 1961 (NZ), s. 128(3)(c); Crimes Act 1900 (NSW), s. 61H(1)(d); Criminal Law Consolidation Act 1935 (SA), s. 5; Crimes Act 1958 (Vic), s. 38(2)(b) and (3)(b).


13 Consent having the meaning of free and conscious permission, as noted above: R v Wilkes and Bryant [1965] VR 475 at 480.


15 Ibid. at 210.
The relevant factor to be considered by the jury in determining whether such a belief was actually held by the accused.\textsuperscript{16}

The principle enunciated in \textit{Morgan} was widely accepted for some 36 years, albeit not uncritically.\textsuperscript{17} One such criticism is that carnal knowledge of a woman without her consent should suffice to convict for rape irrespective of whether the accused is aware that the complainant is not or might not be consenting. Under this view, the complainant has been intractably violated and it is simply no answer that the accused acted with an honestly held, though not necessarily reasonable belief, that the complainant was consenting to the sexual penetration. Nonetheless, until the 2012 decisions of the High Court and Victorian Court of Appeal in \textit{The Queen v Getachew}\textsuperscript{18} and \textit{NT v The Queen}\textsuperscript{19} respectively, the \textit{Morgan} principle was reaffirmed in a long line of appellate court decisions in Victoria\textsuperscript{20} and elsewhere.\textsuperscript{21}

The discussion to follow will examine Victoria’s rape provisions and the extent to which the recent decisions of the High Court and Victorian Court of Appeal have altered the \textit{Morgan} principle insofar as it relates to the crime of rape at both common law and under Victoria’s statutory analogue to the same.\textsuperscript{22} Further, special attention will focus on the Crimes Amendment (Rape) Act 2007 (Vic) which has profoundly impacted the law of rape in Victoria, most notably through the introduction of s. 37 and s. 37AA(b)(i) of the Crimes Act 1958 (Vic)\textsuperscript{23} which require that juries receive certain directions in rape prosecutions, particularly when the accused adduces evidence that he or she acted with a genuine belief that the complainant was consenting to the sexual penetration at issue.\textsuperscript{24}

In particular, special attention will focus on whether the wording of s. 37AA(b)(i) can be reconciled with a recent line of Victorian Court of Appeal decisions construing this subsection as it relates to ss 35–38 of the Crimes Act 1958 (Vic) which set forth the elements of rape and the

\textsuperscript{16} Above n. 14 at 214.
\textsuperscript{18} \textit{The Queen v Getachew} (2012) 286 ALR 196 at [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
\textsuperscript{19} \textit{NT v The Queen} [2012] VSCA 162 (6 September 2012).
\textsuperscript{21} See, e.g., \textit{R v Satnam} (1983) 78 Cr App 149; \textit{R v Kimber} [1983] 1 WLR 1118 (extending the \textit{Morgan} principle to charges of indecent assault); \textit{R v Brown} (1975) 10 SASR 139.
\textsuperscript{22} These decisions would also apply in the same manner to the common law and Victorian statutory offence of indecent assault under s. 39 of the Crimes Act 1958 (Vic). Readers should be reminded that the discussion applies with equal force to the statutory crime of indecent assault under s. 39 of the Crimes Act 1958 (Vic) that, with one notable variation, codifies the common law offence of indecent assault. The noteworthy difference will be addressed below.
\textsuperscript{23} \textit{The Queen v Getachew} (2012) 286 ALR 196 at 201.
\textsuperscript{24} Crimes Act 1958 (Vic), s. 37AA.
directions that juries must receive in relation to the elements of consent and the accused’s awareness that it was or might have been lacking at the time of the sexual penetration at issue.

The impact of The Queen v Getachew and NT v The Queen on the Morgan precept

A clear understanding of the High Court’s *obiter dicta* in *The Queen v Getachew*, its subsequent adoption by the Victorian Court of Appeal in *NT v The Queen* and its impact on the offence of rape at both common law and under the current statutory regime in Victoria, is indispensable to an understanding of the enormous confusion which the Crimes Amendment (Rape) Act 2007 (Vic) has visited upon the law of rape in Victoria. The extant statutory offence of rape, as with other sexual offences in Victoria, must be examined in the context of the general provisions set out in subdivision 8 of Division 1 of Part 1 of the Crimes Act 1958 (Vic):

38. Rape

(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; 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 creates a statutory definition of ‘consent’ as well as a list of circumstances in which the complainant’s consent will be deemed as lacking. This section provides:

27 Crimes Act 1958 (Vic), ss 35–38.
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.

The High Court in Getachew, addressing the impact and contextual import of s. 36, highlighted the following considerations:

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 section 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.\footnote{28}

Against this contextual background, the court examined the new version of s. 37 that was enacted as part of the 2007 Act. 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.

The court then evaluated the purpose and effect of s. 37AA. The relevant section states:

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.

In commenting on s. 37AA, the court emphasised 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”’. 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, 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 longstanding 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. 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.

The following passages from the court’s judgment in Getachew serve well to further illustrate this point:

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...

31 Ibid. at [29]–[37].
32 Ibid. (emphasis not in original source).
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 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.

As the mens rea for rape at both common law and under s. 38 of the Crimes Act 1958 (Vic) requires knowledge or awareness rather than 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 Morgan principle. Therefore, an understanding of the clear distinction between the mens reas of knowledge and belief is essential to an understanding of the above-quoted passages from Getachew. This distinction was explained 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’.

Thus, by definition the mens rea of belief denotes a state of mind in which the accused entertains some measure 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. If a person acts or omits to act (where there is a legal duty to act) with an honest belief as contrasted with actual knowledge or awareness concerning the existence of a fact or circumstance that makes the relevant conduct criminal, he or she is acting with an acceptance that there is a degree of doubt with regard to the existence of that fact or circumstance. In legal parlance, that acceptance constitutes a mens rea that is commonly referred to as recklessness. It is therefore apparent that an accused’s mere belief that the complainant was consenting will not necessarily preclude the prosecution from proving that mens rea.

Several months subsequent to the High Court’s obiter dicta comments in Getachew, the Victorian Court of Appeal elevated those obiter dicta to

33 Above n. 30 at [26] and [27].
binding precedent by rejecting the applicant’s claim, based upon 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.\textsuperscript{34} Citing the High Court’s obiter dicta in Getachew, the Court of Appeal reaffirmed the High Court’s view 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 of one another.\textsuperscript{35} In \textit{NT}, 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 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 s. 37AAA(d) or (e) circumstances], whether the accused took steps to find out whether the complainant was consenting and any other relevant factors …\textsuperscript{36}

Though the Court of Appeal spoke of what it termed ‘belief’ at opposite ends of a scale that is predicated upon the strength of conviction with which a belief is held, it is the writer’s view that a belief held so fervently that it excludes any possibility of doubt amounts to nothing more than a convoluted description of the mens rea known as knowledge or awareness. Irrespective of whether one opts to characterise such a state of mind as knowledge/awareness or the type of belief depicted above by the Court of Appeal, 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.

\textsuperscript{34} \textit{NT v The Queen} [2012] VSCA 213 (6 September 2012) at [11]–[12].
\textsuperscript{35} Ibid. at [12]–[13], citing \textit{The Queen v Getachew} [2012] HCA 10, (2012) 286 ALR 196 at [26]–[27].
\textsuperscript{36} \textit{NT v The Queen} [2012] VSCA 213 (6 September 2012) at [15] (footnote omitted).
On the other hand, if a state of mind contemplates the possibility of error, however slight, it is descriptive of the *mens rea* that is commonly termed as ‘belief’. Belief, therefore, 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, contemplates the possibility or 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. The literal wording of the above-quoted passages from *NT*, when read in conjunction with *Getachew*, leads inexorably to the conclusion that the *Morgan* precept which has been reaffirmed by the High Court of Australia and other appellate courts on numerous occasions in recent years, has now been abolished under the current Australian common law doctrine.

There is a very fine, but clearly discernible distinction, between a strongly held belief and one that precludes any possibility of error. The principle espoused in *Morgan* was ostensibly sound because the legal community accepted it uncritically and failed to draw the critically important distinction between knowledge/awareness and belief. In hindsight, however, both *Getachew* and *NT* have correctly noted that this distinction is not a mere formality, but one that has literally forced the courts to rethink the *Morgan* principle. The logical consequence of this rethinking process is that the *Morgan* principle has been reshaped rather than abrogated in its entirety.

The Victorian Court of Appeal’s attempts to reconcile s. 37AA with the consent and *mens rea* elements of rape

Notwithstanding the fact that *Getachew* and *NT* have significantly reshaped the *Morgan* precept in a manner that will necessitate the repeal or amendment of s. 37AA(b)(i) of the Crimes Act 1958 (Vic), it is apparent that even prior to these cases, the wording of this subsection could not be reconciled with the consent and *mens rea* elements of rape at common law or under Victoria’s statutory regime. Readers will recall that the first sentence of s. 36 of the Crimes Act 1958 (Vic) defines consent as free agreement, but the following sentence of s. 36 augments that definition with what appears to be an exhaustive list of circumstances in which consent will be deemed as lacking. Under s. 38 of Crimes Act 1958 (Vic),

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39 Readers will recall that 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. As Victoria is a common law jurisdiction and the language of the first sentence of s. 36 is somewhat ambiguous in defining consent as ‘free agreement’ rather than ‘free and conscious permission’, arguably s. 36 would be construed as consonant with the common law definition expressed in *R v Wilkes and Bryant*.
41 Crimes Act 1958 (Vic), s. 36(a)–(g).
rape can be committed in three different scenarios, all of which require a lack of consent on the part of the complainant and an awareness on the part of the accused that the complainant is not or might not be consenting\textsuperscript{42} or, alternatively, without giving any thought as to whether the complainant is consenting.\textsuperscript{43} Thus, according to the unambiguous language of ss 36 and 38, an accused who sexually penetrates, continues to sexually penetrate or compels a person to sexually penetrate another while aware that the complainant is not consenting, has satisfied the elements of rape under any of the provisions of s. 38. It is axiomatic, therefore, that an accused who partakes in any of the aforementioned types of sexual penetration or compels another to do so while aware that free and conscious permission is lacking, or that one of the consent negating circumstances enumerated in s. 36 is operating—has committed the offence of rape.

Yet if that is so, how does one explain the arcane and circular language of s. 37AA(b)(i) which provides that an accused’s awareness that one or more of the s. 36 circumstances is operating at the time of the alleged penetration is merely a factor for the jury to consider in deciding whether the accused was aware that the complainant was not consenting or might not be consenting? Indeed, the only plausible construction of s. 37AA(b)(i) is that a jury’s finding that the \textit{mens rea} for rape is satisfied is merely a factor for them to consider in making its determination as to whether the \textit{mens rea} for rape has been satisfied. Cognisant of the nonsensical wording of this subsection, I have previously offered the following explanation:

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 \textit{mens rea} to convict for the crime of rape is whether the accused did in fact possess such a \textit{mens rea} ...

Notwithstanding that the Victorian Court of Appeal has reaffirmed the \textit{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 \textit{Morgan} precept and the degree of clarity with which the lack of consent and \textit{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 ...

\[W]\]hile 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 \textit{Morgan}

\textsuperscript{42} Crimes Act 1958 (Vic), s. 38(2)(a)(i) and (b), (4).
\textsuperscript{43} Crimes Act 1958 (Vic), s. 38(2)(a)(ii), (3)–(4).
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 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 …

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 longstanding rule of interpretation that legislation should not be construed as superfluous.44

Aware of the presumption that legislation is not to be construed as redundant as well as its duty to give effect to the intention of Parliament,45 would such an approach to resolving these conflicting provisions truly give the legislation its intended effect? Is it plausible that Parliament intended to destroy the storied maxim that ignorance of the law is not a defence in prosecutions for rape, a crime that evokes as much, if not more passion and revulsion than any offence with the possible exception of murder? Is it plausible that in so doing, Parliament also intended to impose an impediment to convictions for rape that could rarely be surmounted? As the answers to these questions are patently obvious, and in the absence of any remedial legislation to deal with this chaotic state of the law, the Court of Appeal made another futile attempt to give s 37AA its intended effect.46

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44 Arenson, above n. 40 at 344–7 (footnotes omitted).
45 In opining on its intended effect, the High Court in *Getachew* noted that when read in conjunction with s. 37, s. 37AA directions are required whenever ‘evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act’: *The Queen v Getachew* (2012) 286 ALR 196. In other words, s. 37AA, like its predecessor (s. 37(1)(c)), was intended to direct juries on what was then the *Morgan* precept that although an accused’s genuine belief in consent need not be based on reasonable grounds in order to necessitate an acquittal, the reasonableness of the putative belief is a relevant factor for the jury to consider in its determination as to whether the belief was actually held. The now repealed s. 37(1)(c) of the Crimes Act 1958 (Vic) provided: ‘[I]n considering the accused’s alleged belief that the complainant was consenting to the sexual act, it must take into account whether the belief was reasonable in all the relevant circumstances …’ (emphasis added).
46 GC v The Queen [2013] VSCA 139 (14 June 2013).
GC v The Queen

In GC v The Queen, the trial judge declined to follow a long line of Victorian authority by directing the jury that the mens rea for rape is satisfied if the prosecution proves that the accused was aware that any of the circumstances stipulated in ss 36(a), (b) or (c) existed at the time of the relevant sexual penetration. The accused was convicted and appealed on the ground that the judge’s direction constituted an error amounting to a substantial miscarriage of justice.

In rejecting the appellant’s contention and affirming the conviction, Buchanan, Harper and Tate JJA went to great lengths to distinguish the s. 36 deeming provisions relied upon by the prosecution (s. 36(a), (b) and (c)) from all of the others. In drawing this distinction, the following passages from the court’s unanimous opinion are most instructive:

The complainant in R v Getachew was asleep when the accused sexually penetrated her. Accordingly, the circumstance negating her free agreement to sexual intercourse with the accused was that found in paragraph (d) of s 36 of the Act. Establishing that circumstance, that the complainant was asleep, did not involve proof of any effect of sleep upon the complainant’s state of mind. In the present case, the relevant s 36 circumstances were those contained in paragraphs (a) to (c), which do require proof of a causal connection between the conduct directed at the complainant and the complainant’s submission to the act of penetration. In order to negate consent in this case the Crown was obliged to establish that the complainant submitted because of force or fear of force exerted by the appellant or fear of harm by the appellant or because she was unlawfully detained by the appellant.

If an accused person is aware that the complainant’s submission is due to force or fear of force or fear of harm or unlawful detention, the accused must be taken to be aware of the complainant’s lack of consent. This is because of the significant differences in the statutory language between paragraphs (a)–(c) of s 36 and the other circumstances identified in s 36. Paragraphs (a)–(c) require that the submission of the complainant was ‘because of’ force or fear of force or fear of harm or unlawful detention. On an ordinary understanding of the terms of paragraph (a), if a person submits to an act ‘because of’ force, then but for that force he or she would not have consented. Submitting to a sexual act ‘because of’ force is not consistent with submitting freely. This is to be distinguished from those circumstances where a complainant freely agrees to a sexual act in which force is involved; in those circumstances we do not consider that the complainant is submitting ‘because of’ force. A jury which finds that the circumstance under paragraph (a) of s 36 is made out has in effect rejected any version of the events that there was free agreement to sexual activity

47 Above n. 46.
49 GC v The Queen [2013] VSCA 139 at [20].
coupled with force or violence. The same reasoning applies to the circumstances identified in paragraphs (b) and (c) of s 36.\textsuperscript{51}

While it is certainly true that the words ‘because of’ in s. 36(a), (b) and (c) denote the requirement of a causal nexus between the accused’s conduct directed at the complainant and the fact of his or her submission, conspicuously absent from the justices’ analysis is any explanation as to why that alone should place those paragraphs in a different category than the other four deeming provisions; namely, that an accused’s awareness of the existence any of the circumstances enumerated in s. 36(a), (b) and (c), if proved to the satisfaction of the jury, should require the jury to find also that the accused was aware that the complainant was not or might not be consenting. Although s. 36(d)–(g) do not employ the ‘because of’ language, s. 36 is conspicuously devoid of the distinction drawn by the court and expressly states that ‘circumstances in which a person does not freely agree to an act’ include these paragraphs. Furthermore, as indicated in the clear language of ss 35(1)(a) and (b), 36 and 38, the provisions which collectively define the elements of rape in Victoria, all that is required to satisfy the \textit{mens rea} of s. 38 is that the accused be aware that one or more of the circumstances stipulated in s. 36(a)–(g)—or some other factor that would negate free and conscious permission under the first sentence of s. 36—existed at the time of the sexual penetration in question.\textsuperscript{52}

In addition, the very wording of the Court of Appeal’s judgment in \textit{GC v The Queen} is inherently paradoxical. In particular, the court’s pronouncement that ‘It follows that if the submission of a complainant is obtained “because of” force, and an accused is aware that the submission was obtained “because of” force’,\textsuperscript{53} the accused must be aware that the submission was not obtained by the complainant’s free agreement is rather inane. In particular, the word ‘submission’ is defined as ‘the state in which someone has to accept the control of another person’.\textsuperscript{54} Ipso facto, the word ‘submission’ can never be reconciled with the notion of free and conscious permission; that is to say that because a person’s ‘submission’ can never be obtained by the complainant’s free agreement, the above-quoted sentence from the Court of Appeal’s judgment is utterly superfluous.

Finally, it is certainly arguable that despite the absence of the words ‘because of’ in paragraphs (d)–(g) of s. 36, the same ‘but for’ causal nexus could be found between the factors set out in these provisions and the fact that sexual penetration occurred. Regardless of whether one’s actual will is overcome or not, the express language of s. 36 leaves no doubt that consent to sexual penetration is deemed to be negated when any of the s. 36 provisions are operating at the relevant time. While the judiciary has both the duty and inherent authority to develop the common law

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51 \textit{GC v The Queen} [2013] VSCA 139 at [19]–[20] (emphasis added).
52 Alternatively, and on the questionable assumption that one could properly categorise it as a \textit{mens rea}, s. 38(2)(a)(ii), (3) and (4)(b)(ii) provide that an accused (who lacks an awareness that the complainant is not or might not be consenting) can also be convicted if the prosecution is able to prove that the accused gave no thought as to whether the complainant was consenting.
53 \textit{GC v The Queen} [2013] VSCA 139 at [21].
incrementally, especially in cases where there are statutory ambiguities, a very fine line exists between the incremental development of the common law and the usurpation of legislative power embodied in the s. 36 deeming provisions that fall exclusively within the province of the legislative branch of government. In the writer’s view, the Court of Appeal crossed that line in GC by construing the unambiguous deeming provisions of s. 36 in a manner that comports with what it considered to be a fair and just result.

For all of the reasons noted, therefore, the Court of Appeal’s analysis and holding in GC cannot withstand careful scrutiny. Rather, it represents yet another attempt to placate the long line of Victorian Court of Appeal authority that has steadfastly and unsuccessfully attempted to reconcile the unfortunate language of s. 37AA(b)(i) with ss 35(1)(a) and (b), 36 and 38 of the Crimes Act 1958 (Vic). These unsuccessful attempts are reminiscent of the old aphorism, ‘One cannot fit a round peg into a square hole’.

Conclusion

The foregoing discussion has demonstrated that even prior to the decisions of the High Court and Victorian Court of Appeal in Getachew and NT respectively, the arcane and circular language of s. 37AA(b)(i) could not be reconciled with ss 35(1)(a) and (b), 36 and 38 which collectively define the elements of rape in Victoria. This has been exacerbated by the fact that the obiter dicta in Getachew that was adopted by the Court of Appeal in NT requires that s. 37AA be repealed or amended to reflect that the Morgan principle has been reshaped to mandate, as a prerequisite to procuring an acquittal, that the accused must have acted with knowledge/awareness, and not merely an honest belief, that the complainant was consenting to the relevant sexual penetration. The time is long overdue for the Victorian Parliament to take the necessary remedial measures not only to bring s. 37AA in line with Getachew and NT, but also to eliminate

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55 The Full Court of the Federal Court of Australia noted that ‘[i]n many instances the generality of the statutory language is deliberate and allows the courts to develop a body of law to fill the gaps’: Telstra Corp. Ltd v Treloar (2000) 102 FCR 595 at 603. See also Dietrich v The Queen (1992) 177 CLR 292 at 309: ‘In modern times, the function of the courts in developing the common law has been freely acknowledged’ (Brennan J), citing Myers v Director of Public Prosecutions [1965] AC 1001 at 1021; Mutual Life & Citizens’ Assurance Co. Ltd v Evatt (1968) 122 CLR 556 at 563; Geelong Harbor Trust Commissioners v Gibbs Bright & Co. [1974] AC 810 at 820–1. For an explanation of the separation of powers principle, see generally J. E. Novak and R. D. Rotunda, Constitutional Law, 4th edn (West, 1991) 126–8.

56 GC v The Queen [2013] VSCA 139.

57 See Marbury v Madison, 5 US (1 Cranch) 137 (1803). ‘[I]t is emphatically the province and duty of the judicial department to say what the law is’: ibid. at 177.

58 [2013] VSCA 139.

59 (2012) 286 ALR 196.


63 (2012) 286 ALR 196.

the erroneous and circular wording of s. 37AA(b)(i). Decisions such as GC represent a clear manifestation that the language of this subsection has catapulted the law of rape in Victoria into such a chaotic state that unless remedial legislation is immediately forthcoming, both the County Court judges and the Court of Appeal justices will be forced to resort to one form of sophistry after another in order to make that round peg fit into the square hole.


[2013] VSCA 139.