

Content Notice: This document involves discussions of rape. Should you want to talk to a counsellor, Monash University provides free counselling services for all students available 24 hours a day on 1800 350 359 (toll free).

Disclaimer: This is an average answer on case law that has now been overturned, and statute that has been amended. Do not use it as a model answer or a guide to current criminal law.

Criminal Law Assignment – Case commentary

INSTRUCTIONS

1. You may submit an assignment, **maximum 1500 words** (this limit does not include citations and references contained in footnotes) on the topic specified below. You should also include a bibliography (not included in the word limit).
2. This is a research assignment that requires you to make reference to materials beyond those mentioned in the Criminal Law Reading Guide.

ASSIGNMENT

The research assignment requires you to provide a Case Commentary in relation to the case of *Getachew v The Queen* [2011] VSCA 164 (Court of Appeal). This case involved the mental element of rape when the victim is asleep.

Your commentary must include the following:

1. A brief account of the factual background to the case. This should involve no more than 500 words (and would normally be less).
2. A consideration of the major issues in the case and an articulation of the legal context of the decision.
3. A critical analysis of the court's decision in the case
4. Issues of policy and possible reform (if any) arising from the case
5. Use the Australian Guide to Legal Citation (version 3) for style and citation.

Sample student answer

Case note – Getachew v R

Facts and reasoning

The facts of *Getachew v R* ('Getachew')¹ involved a very drunk complainant who was sharing a bed with the applicant on 9 November 2007, an acquaintance, after a night of drinking champagne, bourbon and whiskey with her friend at two bars in the centre of Melbourne. The complainant left the bar with her friend, a friend of Mary's called Bothin and the applicant. In the early hours of the next morning, the four left the bar. The complainant said she was getting 'very drunk', and decided not to drive home in her car, but to go to Bothin's house, where she was driven by Bothin.² Bothin drove to a bungalow at the rear of a house in which Bothin's parents lived.³ The bungalow

¹ BC201103856 (1, 2 June 2011).

² Ibid.

³ Ibid.

Commented [FS1]: A case note is a document that provides a description of the facts and reasoning of the judgment, and an analysis of the judgment's impact. The term 'case note' can be confusing. Sometimes it means a summary of the case. However, it can also mean a summary plus a critical commentary. All of these terms can be used to mean both a summary of the judgment, and a summary of a judgment plus a critical commentary. Be sure to check your assignment instructions to ensure that you know exactly what you are being asked to do.

Commented [FS2]: In a case note assignment, the job of the student is to convince the marker that they understand the case and the legal issues. This would normally mean referring relevant legal rules, both legislative and common law, and explaining what the ambiguity or legal issue was before the court.

Commented [FS3]: When doing a case note assignment, it is important to understand your marker's expectations. There are many ways to inform yourself about these: marking criteria or rubrics (if provided), the unit guide, your lecturer's instructions in class and on Moodle, as well as Moodle discussion forums, among others.

Commented [FS4]: The simplest expectations will pertain to explicit instructions given in your assessment information document, such as the word count and formatting. If your word count is too far over the limit, marks will be deducted. Conversely, if your word count is too low, it could detract from the quality of the assignment. It would be a shame to lose marks simply for neglecting to follow clear instructions!

Commented [FS5]: Note that some assignments will be on recent cases with little to no commentary, whereas others might require a lot of research using existing sources. Remember that there is no one format or form for case notes, and therefore your instructions and what your marker expects will vary from unit to unit.

Commented [FS6]: When reading the question, make sure the direction words. This [list](#) will help

Commented [FS7]: You need relevant and authoritative information to better understand your assigned case and to make compelling arguments about its impact. How do you go about finding such information? As a start, look for the case in a case citator such as CaseBase (LexisNexisAU) or FirstPoint (WestlawAU). There are also some freely available case citators, such as LawCite (AustLI) and Jade (BarNet). Case citators are useful because they may link to the full text of the judgment, if it is available from the citator's publisher. ...

Commented [FS8]: This citation is incorrect. It uses a database's (in this case, LexisNexis AU) internal numbering system rather than the

Commented [FS9]: It is not necessary to cross-reference the case every time that you mention it, as a succession of "ibid"'s, particularly in the section where you outline the facts of the case, can look clunky. However, it is essential to provide pinpoints when you discuss the legal issues and reasoning of the case.

contained only one bed, but Bothin placed a mattress on the floor for the applicant and complainant.⁴

The complainant was wearing a short skirt, a top and a coat. As the applicant was going to sleep, the applicant touched the complainant's leg, to which the complainant told him to go away. The applicant touched her again, and she responded that if he did not stop touching her, she would sleep in the car. Just before falling asleep, the applicant offered to sleep somewhere else. The complainant said "Don't worry about it. Just don't touch me and let me go to sleep" to the applicant. The complainant awoke later lying on her left side with the applicant behind her. She found that her clothing was dishevelled and the applicant penetrating her. The complainant said that when she awoke she realised what the applicant was doing and removed him. The complainant pushed the applicant away and went to her car, in complete shock. The applicant also got into the car and asked the complainant what was wrong. When the complainant prompted him to explain his behaviour, he responded that he "was just freezing". The complainant told the applicant to get out of her car, which he did. The complainant then went into the bungalow and got Mary and Bothin to come with her. The three sat in the car, and then the complainant drove Mary home. The complainant reported the matter to the police who interviewed the applicant, who exercised his right to remain silent.

The applicant was convicted at trial, then appealed to the Court of Appeal, presided over by Judge of Appeals Buchanan, Bonjiorno JA and Lasry Acting JA. The applicant appealed on the grounds that the trial judge erred in directing the jury that the mental element of rape would be satisfied if Getachew was aware that the complainant was, or might be, asleep.

Buchanan JA found that the facts that the complainant brought up on appeal were capable of founding an inference that Getachew believed that the complainant was consenting at the time of penetration, because the complainant did not protest the manoeuvres that the defendant made directly preceding penetration. In other words, a defendant who has a belief that a complainant is consenting will be entitled to an acquittal, owing to significant judicial authority.⁵ This could have led the jury to conclude that Getachew believed that the complainant had finally consented. The majority held that the error was a miscarriage of justice, and allowed the trial to go ahead.

The judges didn't adequately consider the legislative framework in this case, and I believe that the contradiction in the law should be reformed so that an injustice like this doesn't happen again.

The nature of belief in consent

In Getachew, the legal issue was whether the trial judge had erred in precluding the possibility that the applicant could be aware that the complainant might be asleep, but at the same time believe that the complainant was awake and consenting.⁶ The Victorian Court of Appeal, comprising of Bonjiorno, Lasry, and Buchanan, found that

⁴ Ibid.

⁵ *Director of Public Prosecutions (UK) v Morgan* [1976] AC 182; *Worsnop v R* [2010] VSCA 188.

⁶ *Getachew v R* (2011) VSCA 164, 23.

Commented [FS10]: This summary of the facts and procedural history takes up 435 words of the 1500 word count. Even though the number of words is lower than the specified word count for these components, the level of detail is not necessary to explain the reasoning and outcome of the judgment. The facts section should be short in comparison to the rest of the document. When deciding what facts to include when you have a tight word limit, work backwards from the decision and legal reasoning to determine which facts are most relevant. In this example, the appeal judges decided that the appeal could go ahead because there was a possibility that the complainant might have been consenting since she did not protest, even though she was asleep. From this point of view, the description of what the victim was wearing and drinking, the descriptions of the house, the actions after the rape, and the direct quotes have little relevance.

Commented [FS11]: The student should have made sure that they were giving the judges their correct titles, and appropriately abbreviated those titles. Refer to the AGLC on this point.

Commented [FS12]: This is a section outlining the procedural history of the case. Procedural history is the information about what has been decided by which court (or courts) prior to the case that you are reading...

Commented [FS13]: You might notice that the author has focused solely on the case law here. However, the case note does not identify clearly enough the central legal issue, which is linked...

Commented [FS14]: It is essential to provide a summary of the appellate court's reasons in order to build a good base from which to discuss your case critique. You will see that this student has placed the...

Commented [FS15]: It is preferable to use 3rd person.

Commented [FS16]: It is ok to include your opinion as long as it is supported by evidence. A mere statement that you agree with the answer will not suffice to be a thesis statement, nor does it constitute analysis

Commented [FS17]: This thesis statement is descriptive and overly broad. It is not specific enough because it does not tell the reader what the position of the author is with clarity, and is so broad that a reader...

Commented [FS18]: If there is a number of issues being addressed, you could structure your answer so that the most important issue is discussed first, and then the following issues in order of priority. In addition...

Commented [FS19]: The student's position could have been supported by a deeper level of analysis, going into more depth regarding why, or how, the decision was made, and the legal impact of the case. For a case note...

Commented [FS20]: To analyse a case you will need secondary sources (eg journal articles) to expand your thinking about the impact of the case. As well as any journal articles listed in the case citators, databases...

Commented [FS21]: In any assignment, ensure that you spell Judge's names correctly and abbreviate their titles with capitals. Here, Bongiorno is spelled wrongly. The following...

the accused must have held an honest but not necessarily reasonable belief that the complainant was not consenting or might not be consenting to penetration. Therefore, according to Buchanan, the trial judge had erred because a defendant could believe that the person was asleep, but at the same time believe that they were consenting. The Victorian legislature has adopted law that highlights free agreement as meaning consent, and that honest mistake as to consent can still satisfy the mental element for rape. This contradicts the reasoning adopted by the Court.

Commented [FS22]: A pinpoint citation of the case here is desirable to lend the student's statement weight.

The first question of appeal in the case required the court to examine the nature of belief in the fourth element of rape. The fourth element of rape is the accused's belief in consent. The problem was whether the judge had erred in precluding the possibility that the applicant could be aware that the complainant might be asleep but at the same time believe that the complainant was awake. Buchanan JA said that the judge had made a mistake because these two states of mind could co-exist.⁷ Lasry AJA and Bongiorno JA agreed. The construction of the concept of belief arising from this conclusion is troubling as it contravenes past cases and strong logic.⁸

In another case that was decided one year earlier, the Victorian Court of Appeal held that two mutually exclusive beliefs as to consent could not coexist. Inherently considered in that finding is that a belief in relation to a certain matter is singular and inalienable. In Getachew, the terminology of "awareness" rather than "belief" was used, rather than belief in relation to whether the complainant was asleep, but this should not make Getachew different from the earlier case because an awareness of a fact necessarily becomes a belief in what facts are. The earlier case should be followed because it protects the assumption that is fundamental to the criminal law: that is, people are rational actors.⁹ For rational actors to have intention as to consequences of their actions, they must have firm and singular beliefs regarding the facts that would facilitate the consequences of their actions.

Buchanan JA's reasoning splits intention from belief by anticipating that conflicting ideas may exist in a mind. But he does not give reasoning as to how this could be. Instead of this conception of belief, an assumption that people are rational actors should be preferred. This is because it protects a central pillar of criminal law – the concept of mens rea.

The nature of consent in belief, the fourth element

The model of consent that has been instituted through the introduction of s36 makes clear that the legislature intended consent to be procured through a positive model of consent.¹⁰ In other words, consent should be effectively communicated between sexual partners.¹¹

Commented [FS23]: These headings are not effective. They do more to obscure rather than clarify the order of the author's argument, and they do not indicate the order of the author's argument. Headings should be concise and let the reader follow the structure of your argument. Using rhetorical questions as headings can often be useful.

⁷ Ibid.

⁸ *Worsnop v R* [2010] VSCA 188, 22.

⁹ Stephen J Morse 'Craziness and Criminal Responsibility' (1999) 17 *Behavioural Science and the Law* 147, 151-152.

¹⁰ *Crimes Act 1958* (Vic) s 36.

¹¹ Lois Pineau 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217, 233-237.

Under this model, particular and positive indications as to consent must be manifested to constitute consent. Therefore an honest mistake in relation to it nears being an absurdity. It is then a question as to whether s38 of the Crimes Act requires the defendant to honestly believe that communication about consent occurred, because the more narrowly that consent is defined within the fourth element of rape, the more likely that consideration of reasonableness will lead juries to find a lack of honest belief, particularly where the complainant was asleep.

This model can be seen in Lasry AJA's judgment. This judgment has a more enlightened conception of sexuality compared to the other judgments, and is more in line with the positive definition of consent that s36 outlines. A final question, however, is whether the law ought to be **changed**.

Law reforms

The general argument against relaxing mens rea requirements for rape is that it causes the conviction of those without guilty minds, such as the "stupid".¹² Objectivists fight against the generality of that argument by analysing the specific nature of rape and mistaken consent. Firstly it is argued that because the harm involved in non-consensual sex is very great and the burden involved in ensuring consent is very low, mistake as to consent can be taken to be the same as criminal negligence.¹³

Secondly, objectivists argue that consent is so uncomplicated a concept that mistake as to it will only ever be self-serving or reckless.¹⁴ If the Victorian criminal law does not punish this form of criminal negligence, rapists may be acquitted under *R v Morgan* because subjectivism sets a higher burden for the prosecution.

These arguments show that moving from an approach that privileges a subjectivist approach, and that an approach that makes rapists answerable to objective standards is necessary.

Conclusion

A positive theory of consent should be approved because it is weighted appropriately to the interests of the person who has not yet given consent. A positive theory of consent presents is the most feasible and does not rely on statements such as "She asked for it" or "yes means no".¹⁵ The law is better to the extent that it embraces positive consent, and the judgment of Lasry AJA in *Getachew* was the better judgment for doing so. Perhaps the majority would have joined his decision upon a better conception of belief in consent. However, the common law itself poses the greatest threat to free consent, not protecting complainants against recklessness

¹² Glanville Williams, 'Lords' Decision on the Law of Rape', *London Times* (London), 8/5/1975, 15.

¹³ Jennifer Temkin and Andrew Ashworth 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' (2004) *Criminal Law Review* 328, 340.

¹⁴ Temkin, above n 13, 15-16.

¹⁵ Pineau, above n 11.

Commented [FS24]: Providing a description or summary of the case is not enough to do well in a case note assignment, unless your assignment instructions specifically state that you should only summarise the case. Therefore markers will look for evidence of your ability to analyse the case. To analyse a case is to ask what the case *means*, or *how* the judges decide, or *why* the decision has been made in that way. In the context of the case note, analysis requires breaking down the judgment and considering how some or all of its parts are related to each other, and the larger legal and/or social context.

The student's position could have been supported by a deeper level of analysis, going into more depth regarding why, or how, the decision was made, and the legal impact of the case. For a case note assignment, use effective case reading strategies and synthesise your understanding of the case with secondary sources.

The following questions may help you to analyse the impact of your case.

- How does this case sit with prior cases?
- How does this case sit with subsequent cases? Does it contradict or support them?
- What is the difference between the minority and majority opinion? What reasoning was relied on by the judges to come to these conclusions? Is the reasoning logically consistent?
- How does this case sit with the legislation? Has there been any legislative amendment since the case?
- What do academics say about the case? What do they say about the legal issue? Do they agree/disagree or are they neutral? Do they make any suggestions about how the law should be changed? Do you agree?
- Has there been any policy change since the case was handed down?
- What effect does the case have on social phenomena?

Commented [FS25]: Whether or not you include recommendations for reform depends on your instructions and the research you have done. In some cases, your instructions will specifically ask for recommendations. In other cases, consider including them if they arise from your research.

whilst over-protecting blameworthy defendants. The better balance is struck by legislating that reasonable steps must be taken in order to raise a defence of honest mistake.