SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lu* [2018] QCA 193
PARTIES:	**R** **v** **LU, Jiun Jie** (appellant)
FILE NO/S:	CA No 307 of 2017 DC No 1945 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 7 December 2017 (Farr SC DCJ)
DELIVERED ON:	21 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2018
JUDGES:	Fraser and Philippides JJA and Henry J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted of two counts of rape – where the trial judge gave a jury direction as to the defence of mistake under s 24 of the *Criminal Code* (Qld) – whether the trial judge erred in directing the jury regarding s 24 of the *Criminal Code* (Qld) – where the appellant relies on his belief being an evolving belief progressing based on an absence of resistance to sexual acts – where the trial judge did not refer to the evolving belief in the summing up – where no redirection was sought on the issue – whether a new trial ought be ordered *Criminal Code* (Qld), s 24 *Alford v Magee* (1952) 85 CLR 437; [1952] HCA 3, cited *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited *Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13, cited *Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34, cited *R v Davidson: Ex parte Attorney-General (Qld)* [2009] QCA 283, cited *R v Maniadis* [1997] 1 Qd R 593; [1996] QCA 242, cited *R v Mogg* (2000) 112 A Crim R 417; [2000] QCA 244, cited

R v Roberts [2009] QCA 22, cited
R v Theohares [2017] 1 Qd R 211; [2016] QCA 51, cited

COUNSEL: M J Copley QC for the appellant
C W Heaton QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Henry J and the order proposed by his Honour.

[2] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Henry J.

[3] **HENRY J:** The appellant, a masseuse, appeals his conviction by a jury of the digital rape and penile rape of a client committed in the course of massaging her.

[4] The acts of penetration were admitted. The appellant defended the charges on the basis that the complainant consented, or that the appellant honestly and reasonably but mistakenly believed she was consenting, to the acts of penetration.

[5] The sole ground of appeal relates to an alleged inadequacy in the learned trial judge's directions on the defence of mistake of fact. No complaint of such inadequacy was made at trial.

Facts

[6] The appellant was employed to provide remedial massages at a salon occasionally patronised by the complainant, a 55 year old woman.

[7] The complainant had purchased a voucher entitling her to a number of remedial massage sessions at the salon. The first session, performed by the appellant, was generally uneventful. It was the second such session at which the offences occurred.

[8] That session commenced at about 7 pm. It concluded after 8 pm, by which time the rest of the salon's workforce and customers had left.

[9] At the outset of the session the complainant was shown to the massage room by the appellant. He left the room while the complainant removed all of her clothing except for her underpants. She covered herself with a towel and sheet and lay on the massage table. The appellant re-entered the room and commenced the massage.

The complainant's account

[10] On the complainant's account of the ensuing events, the back of her body was massaged progressively from her feet to her head. She testified the appellant then told her to roll over, after which he left the room for a short period and returned.

[11] The complainant testified the appellant then massaged her arms before lowering the towel and then massaging her breasts. She explained the massage of her breast area was not of the underlying muscle, but of the breast tissue and nipple area. She

explained she started to think what was occurring was strange but she stayed motionless and silent with her eyes closed.

[12] The complainant felt the appellant was leaning alongside her against her arm and could feel what felt like his erect penis pressing against her arm. She felt him lean over and briefly kiss her left nipple.

[13] Nothing was said. The complainant remained motionless with her eyes closed. She testified she was in a state of disbelief and stunned.

[14] The complainant explained the appellant then entirely removed the remaining sheet and pulled her leg aside. She described him massaging her inner thigh, working his way to her bikini line, rubbing outside her panties against her clitoris and vagina and then pulling her underpants to her knees. She testified variously that she thought she clenched or did clench the sides of the table in panic.

[15] The complainant testified the appellant then inserted his fingers inside her vagina for a while, during which time she was in a state of disbelief, rigid, with her eyes closed.

[16] The complainant thereafter heard the sounds of the appellant removing his pants and testified he then entirely removed her underpants.

[17] She described him moving her knees out, climbing atop the massage table and inserting his penis into her vagina, moving it in and out for a short time before ejaculating. She explained she only opened her eyes after he had finished, at which time she saw him wiping his penis with a towel. He thereafter moved to beside her, saying, "Finished, thank you". She described him bowing with his hands at her at this stage.

[18] After the appellant had left the room the complainant testified she "couldn't move" and "was frozen", however she eventually moved from the table, wiped herself and dressed.

[19] The complainant left the room and found the appellant was the only person present at reception. He enquired if she was okay. She said she was. He told her she did not need to pay because she had a voucher, then she left.

Aspects of the case

[20] The following afternoon the complainant visited her doctor and announced what had occurred. She then made further disclosures to friends. She made a complaint to police who attended upon her later in the afternoon when she attended hospital, on her doctor's referral, for a sexual assault examination. The persons with whom she spoke and dealt that afternoon were also witnesses at the trial.

[21] Other evidence was led at trial, including evidence of post offence conduct by the appellant which, it was open to the jury to infer, exhibited a consciousness of guilt of the charged offences.

[22] The prosecution's case was that the complainant had not consented to the appellant's digital and penile penetration of her and had not said or done anything to indicate she was consenting. The defence case, based on the appellant's testimony

at trial, was that, despite the setting of a purportedly professional remedial massage session, there occurred an accumulation of indicia during the session to indicate, or at least cause the appellant to believe, that the complainant was sexually aroused and consenting to his actions.

The appellant's account

[23] On the appellant's account of events, which was translated by an interpreter at trial, when he was massaging the complainant's foot she arched her body up and off the table at least twice. He testified that in so doing she revealed the full side of her breasts. After each such movement he allegedly asked, "Do you feel anything uncomfortable?" He testified he did not understand her response, thought she was feeling discomfort and asked her to roll over. However, he also testified that from the second time the complainant arched up, revealing the side of her breasts, he thought the complainant was giving "like sexual invitation".

[24] On the appellant's account, after the complainant rolled over and he continued massaging her feet, he noticed her eyes were twitching and she had a large, wet area on her panties near the vaginal area. He testified he thought she was "quite aroused" and having a "sexual orgasm".

[25] On his account, he thereafter massaged her inner thigh, her abdomen and then put his hand under her panties, penetrating her digitally. When asked what gave him the idea that such an action was welcome, he answered:

> "From the – a point that she dropped a hint about the breasts and the twitching eyes and, also, the black panties is actually – the whole period was a long time. I actually was not sure, so I was doing testing. And I make the – I thought she was actually enjoying the whole process. That's why I did that action."

[26] He went on to testify that at this time, "Her hands were quite relaxed, and eyes shut, and eyes twitching".

[27] He thereafter described massaging her breasts and kissing her right breast on the nipple.

[28] On his account he then removed the remaining towels and the complainant's underpants. He explained it was not hard to lift her legs to aid the removal of her underpants, which indicated, on his account, that she was assisting with her own strength to raise her legs to aid the process.

[29] On his account, he then removed his pants, climbed onto the table, lifted up the complainant's legs and inserted his penis into her vagina. He described detecting no resistance in moving her legs and testified that she "was assisting". He explained her eyes were closed and he described her hands as "quite relaxed".

[30] When asked in evidence-in-chief what made him think he had the complainant's permission to have so behaved, he responded:

> "Actually, on the first occasion of the massage I think she was quite satisfied with my service. And that's why after the first massage she actually bought the three times passage tickets and asking me to perform the services. On the second occasion – not only for once, for many times she revealed her breasts to me. When I was doing

> the normal massage she actually had reactions like eyes shut but eyes twitching. Also, the panties were wet. And when I was lifting up her legs she was assisting. Every action, it took me a long time to assess, to test, and then I made the decision. After revealing her breasts I think it's a sexual hint. For eye – for her eyes twitching, I thought she was having reactions. The panties were wet. I felt she was aroused. Lifting – when I lifted her legs she was assisting. She did not resist at all. So it took me a long time to do the testing, even caressing, then I made the decision. So I was very sure that she wanted this service."

[31] In cross-examination he went on to say, "I was very sure she needed it". When asked why, he responded:

> "I saw that from several body reactions and she did not have any verbal or physical resistance and her body was, like, working with me. That's why I actually spent a long time to do these things."

The direction on mistake of fact

[32] At a stage of the learned trial judge's directions to the jury after he had explained the elements of the offences and noted that the elements of penetration were not in dispute, his Honour observed:

> "There are really two issues that are live issues for your determination in this matter, and that relates to the element that covers both the charges, that is, that the event occurred without the complainant's consent. That is, has the prosecution proved beyond reasonable doubt that the event occurred without the complainant's consent? If, of course, you are not satisfied that that element has been so proved then you would acquit.
>
> If you are satisfied that that element has been proved beyond reasonable doubt that is not the end of the deliberation process though because you then need to turn your mind to one further consideration. This is the second of the considerations that are open or live for your determination, and that relates to what lawyers often refer to as mistake of fact. So if you are satisfied beyond reasonable doubt that the complainant did not consent then there is this other matter for you to consider."

[33] Having so transitioned to discussing mistake of fact, his Honour proceeded to direct the jury as follows:

> "Now, our law provides that a person who does an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist.
>
> In the context of this case this means that you must consider, even though the complainant was not consenting, did the defendant in the circumstances honestly and reasonably believe that the complainant was consenting. <u>The defendant himself refers to, in his evidence, these features in that regard. He says there was a lack of resistance either verbal or physical on the part of the complainant; that her eyelids were twitching, which he said was indicative to his mind of</u>

her having sexual pleasure and wishing to engage further; her exposing her breasts to him on two occasions when she arched her back; and he could see that there was a moist area in the crotch area of her underpants.

Now, in respect of this consideration a mere mistake is not enough. The mistaken belief in consent must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant. To be reasonable the belief must be one held by the defendant in his particular circumstances on reasonable grounds. Of course, the complainant gave evidence that she did not consent. You should remember the onus of proof. It is not for the accused, or the defendant to prove that he honestly and reasonably believed the complainant was consenting, but for the prosecution to prove beyond reasonable doubt that the defendant did not honestly and reasonably believe that the complainant was consenting.

Accordingly, if you conclude that the complainant was not in fact consenting you must ask yourselves, can I be satisfied beyond reasonable doubt that the defendant did not have an honest and reasonable belief that she was consenting? If the prosecution have satisfied you beyond reasonable doubt that the defendant did not have such a belief then you must find the defendant guilty of the charge under consideration. If you are not so satisfied, even though the complainant was not consenting, you must find the defendant not guilty of the charge under consideration." (emphasis added)

The alleged deficiency

[34] The ground of appeal is:

> "A miscarriage of justice occurred because the jury was not adequately instructed about how the evidence related to s 24 of the *Criminal Code*".

[35] The inadequacy complained of is a failure to include reference in the above direction to the appellant's evidence of:

1. his belief being an evolving belief, formed tentatively and then with progressively greater certainty as he thought about the significance of the complainant's physical responses and absence of indication that what he was doing was unwelcome;
2. the absence of resistance to the digital penetration and breast touching;
3. the complainant's assistance in the appellant's removal of her underpants.

[36] No re-direction was sought concerning the now complained of failure to direct on those factual features. The appellant can consequently only rely on the alleged failure if it constituted a miscarriage of justice.[1] The dual obligation on an appellant in these circumstances was explained by McHugh and Gummow JJ in *Dhanhoa v The Queen*:[2]

> "No miscarriage of justice will have occurred in such a case unless the appellant demonstrates that the direction should have been given

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1 *Dhanhoa v The Queen* (2003) 217 CLR 1, 13.

2 (2003) 217 CLR 1, 13; citing *Simic v The Queen* (1980) 144 CLR 319, 332.

> and it is "reasonably possible" that the failure to direct the jury "may have affected the verdict".

Discussion

Should the direction have been given?

[37] As to whether the direction should have been given, s 620(1) *Criminal Code* provides that after the evidence and addresses at a trial are concluded:

> "[I]t is the duty of the court to instruct the jury as to the law applicable to the case, with some observations upon the evidence as the court thinks fit to make."

[38] It is well established that duty requires an explanation of how the law applies to the facts of the case.[3] Thus, as McHugh J explained of s 620(1) in *Fingleton v The Queen*:[4]

> "The court does not discharge that duty by merely referring the jury to the law that governs the case and leaving it to them to apply it to the facts of the case. The key term is "instruct". That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts."[5]

[39] The fulfilment of the above requirement does not oblige the trial judge to refer to all matters of evidence or argument raised, the determinant being whether reference to an evidentiary matter or argument is necessary to ensure the jury is properly equipped to discharge its duty to determine the case according to the evidence.[6] On this point the plurality in *Domican v The Queen*[7] observed:

> "Whether the trial judge is bound to refer to an evidentiary matter or argument ultimately depends upon whether a reference to that matter or argument is necessary to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence. Consequently, the conduct of the case necessarily bears on the extent to which the judge is bound to comment on or discuss the evidence. Discussion or comment which is justified or required in one case may be neither required nor justified when a similar case is conducted in a different way."[8]

[40] It is true that the omissions complained of here were features of the appellant's evidence of relevance to his purported mistaken belief which could correctly have been included in that part of the summing up which dealt with the defence of mistake of fact. However, it does not follow that his Honour was bound to so include them.

[41] A selection of features of the appellant's evidence of relevance to his purported mistaken belief was included in the part of the summing up in contention. That selection was adequate to the purpose then at hand. That purpose was to equip the jury with sufficient knowledge and understanding of how the legal defence of mistake of fact potentially applied to the facts of the case. Fulfilment of that

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3 *Alford v Magee* (1952) 85 CLR 437, 466; *Mogg* (2000) 112 A Crim R 417, 427, 430.
4 (2005) 227 CLR 166.
5 (2005) 227 CLR 166, 197 (citation omitted).
6 *Domican v The Queen* (1992) 173 CLR 555, 561; *Mogg* (2000) 112 A Crim R 417, 430.
7 (1992) 173 CLR 555, 560, 561.
8 (1992) 173 CLR 555, 560, 561.

essentially educative purpose did not require a recitation of every feature of the appellant's account of potential relevance to the operation of the defence.

[42] The features of his account which were mentioned were of a kind which comfortably met the educative purpose of this part of the summing up. The members of the jury would have well understood those features were not an exhaustive list. They had, after all, seen the appellant give evidence and heard his account analysed extensively in closing addresses. They would well have appreciated the way in which other features of the appellant's account, if accepted, also provided support for the potential operation of the defence.

[43] Further, the first two of the three factual omissions complained of were to some extent implicit in the selection which was included. That selection reflected the cumulative quality of the events influencing the appellant's belief and included a reference to absence of resistance.

[44] Moreover, following the above complained of direction, the learned trial judge proceeded to remind the jury of some of the evidence to, as he put it, "refresh your memory as to what it was that each witness relevantly said". In his Honour's ensuing summary he canvassed much of the appellant's evidence, including those three features of it which the appellant complains were omitted in the direction about mistake of fact.

[45] There was sufficient reference to the appellant's testimony in the summing up generally, and in that part of the summing up relating to the defence of mistake of fact, to ensure the jury's proper understanding, in determining the case according to the evidence, of how the appellant's testimony if accepted supported the potential operation of that defence.

[46] That conclusion is sufficient to dispense with the complaint about the allegedly omitted features of the direction and, thus, to dismiss the appeal.

Is it reasonably possible the omission may have affected the verdict?

[47] Even if such a conclusion were not reached, the matters canvassed above would also be relevant to the question whether it is reasonably possible the complained of failure may have affected the verdict. The broader conduct of the trial, including the closing address of the appellant's counsel, would similarly inform the determination of that question.

[48] The appellant's trial counsel addressed the jury clearly and thoroughly on how the evidence given by the appellant, and the complainant, supported the conclusion there had been an honest and reasonable mistake of fact or that at least that possibility had not been excluded by the prosecution. This included submissions which highlighted the progressive nature of the events informing his belief, the absence of resistance throughout and the complainant's physical co-operation in the removal of her underpants.

[49] Having regard to that address and the above discussed content of the summing up, the jury would have been well aware of the facts the appellant complains were omitted from the summing up on the defence of mistake of fact. They would have understood the significance of those facts in supporting the operation of that defence and to their determination of whether the defence had been excluded by the prosecution.

It follows it is not reasonably possible that the complained of failure may have affected the verdict.

Order

[50] I would order:

1. Appeal dismissed.