SUPREME COURT OF QUEENSLAND

CITATION:	*R v Makary* [2018] QCA 258
PARTIES:	**R** **v** **MAKARY, Ashraf Kamal** (appellant/applicant)
FILE NO/S:	CA No 257 of 2015 CA No 162 of 2016 DC No 1688 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 12 October 2015; Date of Sentence: 10 June 2016 (Richards DCJ)
DELIVERED ON:	9 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2017; 9 November 2017
JUDGES:	Sofronoff P and McMurdo JA and Bond J
ORDERS:	**In Appeal No 257 of 2015:** **Appeal dismissed.** **In Appeal No 162 of 2016:** **Leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of one count of rape – where the appellant had sexual intercourse with the complainant at a time when she was highly intoxicated – where police found the complainant unconscious in the company of the appellant – where the Crown case was that the complainant lacked capacity to give her consent to sexual intercourse – where defence counsel at trial submitted that the jury should be directed to consider s 24 *Criminal Code* on the basis that there had been some misunderstanding in relation to a lack of consent between the appellant and complainant – where the appellant elected not to give evidence at trial and the element of belief therefore could only arise by way of inference – where the appellant relied on a number of facts that, it was submitted, could give rise to an inference that he held an honest and reasonable, but mistaken, belief that the complainant had given consent to sexual intercourse – whether an inference arose that the appellant believed that the

complainant had given her consent to having sexual intercourse, such that the learned trial judge ought to have directed that s 24 *Criminal Code* be considered by the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the learned sentencing judge imposed a sentence of five years imprisonment to be served cumulatively upon sentences imposed on the applicant in respect of other sexual offences the subject of a separate trial and sentencing – where the result of this cumulative sentence is that the applicant will serve over 20 years in prison before becoming eligible for parole – where the applicant committed the offence of rape in the instant case while on bail for three similar offences, the subject of the separate trial and sentence, committed against three other victims – where the applicant lacked remorse and did not cooperate with authorities – where the applicant's counsel at sentencing could not put forward a single mitigating factor – whether the cumulative sentence is manifestly excessive and a concurrent sentence should instead be imposed

Corrective Services Act 2006 (Qld), s 182(3)
Criminal Code (Qld), s 24, s 348, s 349
Penalties and Sentences Act 1992 (Qld), s 160D(3)

He Kaw Teh v The Queen (1985) 157 CLR 524; [1985] HCA 43, cited
Larsen & G J Coles & Co Ltd (1984) 13 A Crim R 109, cited
Loveday v Ayre and Ayre; Ex parte Ayre and Ayre [1955] St R Qd 264, cited
PGA v The Queen (2012) 245 CLR 355; [2012] HCA 21, cited
R v Cutts [2005] QCA 306, cited
R v Ewanchuk [1999] 1 SCR 330, cited
R v Lazarus [2017] NSWCCA 279, discussed
R v Millar [2000] 1 Qd R 437; [1998] QCA 276, cited
R v Pryor (2001) 124 A Crim R 22; [2001] QCA 341, cited
R v Shaw [1996] 1 Qd R 641; [1995] QCA 45, cited
R v Sutton (2008) 187 A Crim R 231; [2008] QCA 249, cited
R v Taylor [1967] 2 NSWR 278, cited
Webster & Co v Australasian United Steam Navigation Co Ltd [1902] St R Qd 207, cited

COUNSEL: The appellant appeared on his own behalf in Appeal No 257 of 2015
M J Copley QC for the applicant in Appeal No 162 of 2016
V A Loury QC, with J D Finch, for the respondent

SOLICITORS: The appellant appeared on his own behalf in Appeal No 257 of 2015
Peter Shields Lawyers for the applicant in Appeal No 162 of 2016

Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** On 12 October 2015 a jury convicted the appellant of one count of rape. There was no dispute that the appellant and the complainant had had sexual intercourse. Most of the facts proved at trial were not contested. The appellant's case was that the complainant, whom I shall refer to by the pseudonym "Mary", had consented to sexual intercourse. At the end of the trial the appellant's counsel submitted to Richards DCJ that she ought to direct the jury in terms of s 24 of the *Criminal Code*. He submitted that an issue had been raised by the evidence as to whether the Crown had excluded the hypothesis that the appellant had an honest and reasonable but mistaken belief that the complainant had consented. The trial judge, Richards DCJ, declined to direct the jury in those terms. Although the appellant had originally pleaded two grounds of appeal, at the hearing of the appeal he abandoned all but the ground relating to s 24. This appeal is concerned with a question of whether her Honour's refusal to give the direction was right.

[2] In my respectful opinion her Honour was correct.

[3] As I have said, other than on the issue of consent (or, perhaps, a mistake about consent) the facts sought to be proved by the Crown were not in dispute. The following account is, therefore, based upon the evidence of the complainant and the police officers and a paramedic who encountered her after sexual intercourse had taken place.

[4] Mary was a young Korean woman who had arrived in Brisbane from Korea on 10 April 2012. She had come to study English and to see the country. On a website she found an advertisement offering to teach English to Korean visitors and responded to it in the following terms on 11 April 2012:

> "Hey guy, hi, I'm Korean and female. Now, I live in near Brisbane City Hall. You look so much like soju. L-O-L L-O-L L-O-L. I want to teach Korean for you, but I can't speak English well, are you? Oki. So please send me a reply."

[5] She received a response within 10 minutes in the following terms:

> "Hi, thanks for your interest in exchanging languages, cultures and making new friends, as well as welcome to Brisbane. You seem to be a nice and friendly person. Do you like soju, too? I am very keen on learning not only Korean language, but also the Korean culture such as food, drinks, music and drama. I would appreciate if you could help me teach me some Korean. In exchange, I will be more than happy to teach you English. I can help you improve your speaking, listening, reading and writing. I can also assist you enhance your pronunciation and correct your grammar.
>
> In addition, I am able to introduce you to Australian culture, show you new places and teach you Australian slang. I believe we can help each other and be best friends, too. Would you please tell me a bit more about yourself, e.g. name, age, hobbies, interests, likes and

> studies? I look forward to hearing from you. Enjoy your day. Thanks."

[6] Mary responded as follows:

> "Nice meet you. I'm so happy because of your reply. I'm 20 years old, and my name is [REDACTED]. Just call me [Mary]. L-O-L L-O-L L-O-L L-O-L. And I love to play the piano, and my [indistinct] is painting and take picture, and I love pet. L-O-L L-O-L L-O-L L-O-L. And I hope your information. Please send me a reply."

[7] She received another reply within 10 minutes as follows:

> "Hi [Mary], thanks for your prompt reply. You really seem to be a nice and friendly person. L-O-L. I am looking for someone from Korea to make new friends with and learn about Korean language and culture such as food and music. I can teach you English and introduce you to Aussie culture. I am an easygoing, outgoing and fun-loving person. I like to meet a person who is also easygoing, outgoing, likes to try new things and enjoy life. I have a variety of interests. I like eating, drinking, dancing, partying, travelling, music, movies, swimming, surfing, camping, bushwalking. I enjoy picnics, the beach, road trips and barbecues. I am open-minded and like to try new things too. I also love animals. I have a dog and cat. I am glad you are musical too. I would love to listen to Korean music such as Girls' Generation, Wonder Girls and 21.
>
> I am Ashley, a boy and in 20s. Do you mind exchanging numbers. Mine is 0468 391 249. What are your favourite drinks? Do you like soju? Do you like dancing? I look forward to meeting, studying and becoming friends with you. Have a lovely day. Cheers. X-O, X-O."

[8] The sender's name was not Ashley and he was not in his 20s. The author was the appellant, who was then aged 39 years old. His name was Ashraf Kamal Makary.

[9] There followed an exchange of mobile phone text messages as follows:

Sender	**Delivery Date**	**Delivery time**	**Message Text**
Appellant	11/04/2012	15:51:11	Hi [Mary], ~~this is ashley. I'm glad we've similar interests. We'll have fun n be cool friends. I'll teach you some dance movement too xoxo
Mary	11/04/2012	16:02:48	Oh!! Lol it is very interesting! So … u not student??
Appellant	11/04/2012	16:32:35	Honey, i study n work. I'll teach u english, will u teach me korean? I'll always listen to you n make you happy as you are sweet xoxo
Mary	11/04/2012	16:36:46	Okey. I will take it. :D
Appellant	11/04/2012	16:40:06	Wow you are really nice n outgoing. I'm starting to like you lol will you bring some korean music along when we meet? Can you

			cook korean food? Xoxo
Mary	11/04/2012	16:48:01	I have little song;; sorry ^^ n i cant cook. Im not try.^^
Appellant	11/04/2012	20:15:03	Hey, would you like to meet for dinner, drinks, language swap n chat at 7pm tomorrow? Thanks xoxo
Mary	11/04/2012	20:20:31	Tomorrow dinner? Um … I dont know yet :D um just do u have time?
Appellant	11/04/2012	20:22:13	Honey, yes, i'd like to meet you and have dinner, drinks, study n chat tomorrow at 7pm, ok? Thanks sugarbaby xoxo
Mary	11/04/2012	20:34:30	So … okey. :D do u have a part time job by the way?
Appellant	11/04/2012	20:38:11	Darling, i teach english at school part time. Would you please wait for me tomorrow at 7pm at state library in southbank? Xoxo
Mary	11/04/2012	20:45:40	Oh teacher? im not ur honey :D i will try :D
Mary	11/04/2012	20:58:53	I so so sorry :-(Were did u born?
Appellant	11/04/2012	21:19:04	Honey, i'll b more than happy 2 teach u englis slowly. u'll be fine, u just need time. I'm australian. I'll teach u about australian food, music n drinks xoxo
Mary	11/04/2012	21:23:58	Okey thank u kind guy. but u speak english too much slow :D thank u ur regard
Appellant	11/04/2012	21:33:35	Honey, i've to speak slowly so you can understand. If i speak faster, you won't understand. Do you want me to speak normal? Xoxo
Mary	11/04/2012	21:36:00	No :D its up to u
Appellant	12/04/2012	12:48:35	[Mary], i'm awfully sorry i can't make it tonight. A friend of has just had an accident n been taken to hospital. Is it possible to meet on monday? Sorry again
Mary	12/04/2012	12:52:16	It sound bad. Okay no problem :D
Appellant	12/04/2012	12:54:45	Thanks for being understanding. You seem to be a nice and kind girl. See you monday at 7pm.
Mary	12/04/2012	13:07:39	Okay :D see ya have a good day
Mary	12/04/2012	20:04:41	hi guy. How was ur day today? Is ur friend okay?
Appellant	12/04/2012	21:05:33	Honey, i'm fine n my friend is recovering, thanks for asking. You are really sweet xoxo
Appellant	13/04/2012	18:13:59	Honey, i tried to call you. Are you busy? Thanks xoxo
Mary	13/04/2012	18:15:42	No lol im miss ur call. so so sorry
Appellant	13/04/2012	18:16:26	What are you doing tonight?

Appellant	13/04/2012	18:47:30	Please, meet me at 9pm on corner of Adelaide street n creek street in the city. Thanks
Mary	13/04/2012	18:54:23	Im come here just 3days ago. So i don't know this city like back of my hand.
Appellant	13/04/2012	19:09:36	No worries, sweetie. I understand. I'll show you around new places. We'll drink, study n take photos, n chat. Should be fun, see you at 9pm xoxo
Appellant	13/04/2012	20:47:04	Honey, would you please tell of you are wearing so i recognise you? See you soon xoxo
Mary	13/04/2012	20:51:37	Green Jacket n bleck jean. :D
Mary	13/04/2012	20:55:22	See u soon in front of seveneleven.
Appellant	13/04/2012	21:17:42	Baby, where are you?
Mary	13/04/2012	21:18:45	Im eleven. Where are u:D
Appellant	13/04/2012	21:26:29	Corner of Adelaide street and creek street

[10] The appellant picked Mary up in his car on the evening of 13 April 2012. He gave her a kiss on the cheek. She said that he may have kissed her on both cheeks. She said that she believed that it was "a kind of greeting that is common here" because it was not a greeting of a kind that she was used to in Korea.

[11] The appellant then drove her to a place that he told her was famous for weddings. He drove her to New Farm Park. They went to the pavilion in that park. The appellant had brought a plastic bag from which he produced wine and other drinks.

[12] While sitting at the pavilion in the middle of the park the appellant put his hand around Mary's shoulders. He put his hand on her thigh. She told him, "Well, Korean women don't like this sort of touching." She said that he kept on trying. She said:

> "I wanted to say something but I didn't want to embarrass him so I just – I smiled."

[13] She did not respond physically in any way. The appellant gave her red wine, white wine and vodka to drink. He then kissed her again on the cheek. She thought he might have had too much to drink.

[14] He kissed her on her lips. In evidence she said:

> "… I seem to remember I pushed him away and in telling him I'm just – we're just friends or something like that."

[15] Although she tried to push him away she was unable to do so. She felt she lacked any strength.

[16] Mary has no memory of anything that happened after that until she woke up on a stretcher in hospital dressed in nothing but a hospital gown. She denied agreeing or consenting in any way to having sexual intercourse with the appellant.

[17] In the very early hours of the following morning, 14 April 2012, Detective Senior Constable Chapman and Senior Constable Slatter were on patrol in New Farm. At

about 3 am they observed the appellant's car parked in the Powerhouse carpark. They found the appellant sitting in the rear passenger seat. Mary was lying on her side with her head in his lap. She was covered with a sheet or a blanket. She was whimpering. Detective Senior Constable Chapman observed phlegm and spittle coming out of her mouth. Her head was lolling and she was incoherent. Detective Senior Constable Chapman was concerned for her safety. He attempted to speak to her. Mary did not respond. The appellant told him, "She's sick. She's drunk and sick." He said that they had been at the Powerhouse. This was untrue. The appellant was asked what was the complainant's name. The appellant gave the name by which he knew her. He was asked what was their relationship. He told Detective Senior Constable Chapman that Mary was his girlfriend and that he had known her for two weeks. This was untrue for he had only met her that night and had come to know her through the internet three days before. Detective Senior Constable Chapman asked the appellant Mary's last name. The appellant replied "Kim". This was incorrect.

[18] The two police officers then saw that Mary was thrashing about so that the sheet covering her came off her body. She was naked under the sheet. She was incoherent and was unable to acknowledge their presence. She had a pair of jeans around her ankles. Detective Senior Constable Chapman immediately called 000 to summon an ambulance. He saw that Mary was oblivious to their presence and continued to "trash about and masturbate while we were there". Her eyes were partly open and her eyeballs were rolling.

[19] The paramedic who attended her found her to be neither conscious nor alert. He used "verbal stimulation" to get her to open her eyes.

[20] She was unable to get out of the vehicle unaided to go to the ambulance.

[21] Mary underwent an examination when she arrived at the hospital. She had a 1.5 cm red bruise on the right shin area. She had cracked nipples on both breasts and on her left side there was a 1cm petechial-type bruise near the inner part of the left nipple. There was a series of abrasions on the left scapula between the shoulder blade and the spine. There was a superficial abrasion in the area where the labia meet. She had also suffered a 4 mm split laceration to the lower part of the entrance to her vagina. These injuries to her genitals were consistent with blunt force trauma caused by a blunt instrument such as a finger or by a penis. The laceration was caused by the overstretching of the tissues beyond their natural elasticity and was proof of penetration.

[22] At 8.15 am on the morning of her admission to hospital Mary's blood alcohol level was 116 mgs of alcohol in 100 mls of blood. That equates to a blood reading, as expressed in popular usage, of 0.116. Upon the assumption that Mary was not a heavy drinker, which accorded with her evidence, the medical evidence showed that her blood alcohol level at 1.30 am would have been in the region of 0.184. If Mary had been a heavy drinker then her blood alcohol level at 1.30 am may well have been as high as 0.319. The evidence showed that at blood alcohol levels above 0.12 short term memory would be affected. Muscle coordination would degrade and judgment, perception and comprehension would be reduced. At a blood alcohol level of 0.184 a person unused to alcohol would lose visual perception, would have focusing difficulties and would have difficulty in comprehension.

[23] Swabs taken from within Mary's vagina showed the presence of spermatozoa. The DNA profile of that swab when compared with a sample taken from the appellant showed that there was only one chance in 42 billion that the DNA in the spermatozoa could have come from someone other than the appellant. A swab taken from the appellant's penis revealed the presence of a DNA profile consistent with the DNA of the complainant.

[24] The Crown had therefore proved that the appellant had had sexual intercourse with Mary at some point during the night, that she was very drunk: so drunk that at 3.30 am she was semiconscious and behaving aberrantly.

[25] The Crown's case was that Mary lacked capacity to give her consent to sexual intercourse.

[26] The cross-examination of Mary began with the proposition that she had given her consent to having sexual intercourse with the appellant. She denied this. The cross-examination then developed as follows. The appellant's counsel put to Mary that when the appellant first kissed her at the park she had responded positively and had kissed him back. Mary denied this. It was put to her that she voluntarily joined him in the back seat and that she willingly helped the appellant remove her upper garments including her bra. She denied this. It was put to her that he kissed her and sucked her on her breasts and she responded positively to his doing these things. It was suggested that he unzipped her pants and that she had lifted her hips in order to help him remove them. She denied this. It was put to her that he had then had sexual intercourse with her. She could not remember whether that had happened. It was put to her that intercourse lasted about 10 minutes and that he ejaculated. Again, she had no recollection. It was put to her that they then began to drink more alcohol and both fell asleep. She said that she had no memory of this. It was suggested that she then started vomiting and he helped her wipe the vomit. Mary had no recollection of this happening. It was put to her that she had consented to having sexual intercourse with him. She denied this.

[27] The appellant elected not to give evidence.

[28] The appellant's counsel submitted to Richards DCJ that the jury should be directed to consider s 24 of the *Criminal Code*. He submitted there was evidence that was capable of supporting an inference that the appellant had an honest and reasonable but mistaken belief that Mary had given her consent to having sexual intercourse. He pointed to seven matters that, in his submission, raised s 24 for consideration. First, when the appellant first kissed her on the cheek she responded by turning her cheek and smiling. Second, he called her "pretty" and used the term of endearment "honey" and she did not chastise him for this. Third, the location to which he had driven her was a park that held weddings and had "that romantic atmosphere". It was a Friday night at about 10 o'clock when they arrived at that place and they drank alcohol. Fourth, he put his arm around her shoulder and touched her thigh and she said "Korean women don't like that sort of touching" but, according to her own evidence, he "kept on trying" and she did not feel the need to cry out for help or to ask anybody for help because she did not want to offend him. Fifth, together they translated words such as "I love you" and "beautiful" and when she was touched she did not move away; when they took a picture of themselves he kissed her and she did not respond. Sixth, she could not remember how many times he kissed her but she did remember pushing him away and telling him "we're just

friends". However, when she did push him away she did not have any strength. Seventh, she was found naked in the back seat of the car with her head on the appellant's lap.

[29] Upon the basis of these matters, so counsel submitted, the jury could infer that "there'd be maybe misunderstanding in communications in relation to lack of consent".

[30] To these matters raised by his counsel at the trial, the appellant raised a number of further matters on appeal. There are many particulars of these but they can be distilled to nine distinct facts.

[31] First, he points to the text messages containing "flirtations and emotional symbols such as sugar baby and :D". Second, he says the complainant freely got into his car. Third, he says that he does not speak Korean and Mary spoke limited English. As a result "the situation in which he found himself" was one which could "inhibit his capacity to recognise the complainant's responses and interpret them". Fourth, he points to the consumption of alcohol by the complainant as affecting her reliability as a witness. Fifth, he submits that the complainant's intoxication "has removed the complainant's inhibitions, or inflamed her passion, or reduced her power of self-control". Consequently, he submits that the jury should have considered whether the complainant lost her inhibitions and did consent. Sixth, he says that while it is true that the complainant verbally objected to the appellant's touching of her thigh, in response to his moving away at this objection she then smiled "thus inviting him to touch her again". Seventh, he says the complainant did not call for help or complain when nearby security guards were talking to her while they were at the pavilion. Eighth, he says that while it is true that when he kissed her on the lips she objected by saying words to the effect "we were just friends", she did not tell him to stop or say "no". Finally, he says there was a complete absence of any evidence of the use of force or violence and that the medical evidence of the injuries to her were consistent with "having consensual sex".

[32] Before any consideration can be given to the question whether s 24 should have been left to the jury, it is necessary to state what is required by the Code on the issue of consent in cases of rape.

[33] As originally enacted, the Code defined the crime of rape in s 353 as follows:

> "Any person who has carnal knowledge of a woman, not his wife, without her consent, or with her consent, if the consent was obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape."

[34] It will observed that the word "consent" is used as a noun. The word was not defined, but it undoubtedly denoted the complainant's state of mind. In *R v Shaw*,[1] Davies and McPherson JJA said:

> "Under s 347 [which then defined the crime] consent refers to a subjective state of mind on the part of the complainant at the time

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[1] [1996] 1 Qd R 641 per Davies and McPherson JJA at 646; the *dicta* of Davies and McPherson JJA. *Shaw* was cited with approval in *Stubley v Western Australia* (2011) 242 CLR 374 at [70] per Gummow, Crennan, Kiefel and Bell JJ.

> when penetration takes place. It is not in law necessary that the complainant should manifest her dissent, or strictly even that she should say in evidence at the trial that she did not consent to sexual intercourse…
>
> A complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it. Failing to do so may, however, depending on the circumstances, have the consequence that at the trial a jury may decide not to accept her evidence that she did not consent; or it may furnish some ground for a reasonable belief on the part of the accused that the complainant was in fact consenting to sexual intercourse, and so provide a basis for exemption from criminal responsibility under s 24 of the *Criminal Code*."

[35] That has also been true in assault cases. As Keane JA said in *R v Sutton*:[2]

> "[38] It is to be emphasised that absence of consent as an element of an assault under the *Criminal Code* is concerned with the complainant's state of mind. One must not confuse the fact of the state of mind of the complainant with the evidence by which that fact may be proved. A complainant's state of mind may be proved directly by a complainant's evidence about it, as well as by inference from the complainant's overt acts or statements (or the lack thereof)."

[36] The term "consent", like so many English words, may carry various connotations. The etymology of the word is from the Latin "con", meaning "with" and "sentire", meaning "to feel". Consistently with those roots, the Oxford English Dictionary gives several meanings that are now archaic: accord, harmony, unity of opinion, unanimity and consensus. The Macquarie Dictionary gives as obsolete meanings: "to agree in sentiment, opinion, etc., to be in harmony, accord, concord". Having regard to those bygone meanings, one can appreciate the example in the Oxford English Dictionary of Archbishop Becket's statement in the year 1200: "There was a proverb in England that silence gave consent". Consensus can, after all, arise without words or actions.

[37] In the context of marriage, old ecclesiastical law provided that "marriage was a mere *consensual* contract".[3] This contract imposed duties on the parties. In *The History of the Pleas of the Crown*,[4] Sir Matthew Hale wrote:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

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2 *R v Sutton* [2008] QCA 249 at [38] per Keane JA.

3 *Broome's Legal Maxims*, 1975 reprint, at 326: *consensus, non concubitus, facit matrimonium* (it is the consent of the parties, not their cohabitation, which constitutes marriage). The point was important because a marriage was valid without the intervention of a priest until after the Council of Trent (1545 – 63): *Trent: What Happened at the Council*, John W O'Malley, Belknap Press of Harvard University Press, 2013, pp 226-228.

4 (1736) vol 1, c 58, p 629.

[38] In a time when 'consent' equated to 'consensus', and in a time in which there was a consensus between men and women about the particular position of women in society, one different from any consensus today, a time, indeed, in which the existence of a marriage itself depended upon there being a "consensus" only, a woman's consent to have sexual intercourse with a man might well have been discovered reliably in her silent acquiescence.[5] The search for a woman's consent to sexual intercourse, as a state of mind, was aided by the existence of mutual assumptions about consensus, about a woman's place and about her duties, none of which are any longer valid.

[39] A hundred years before Hale, Sir Edward Coke put the matter differently and emphasised the element of "will":

> "'Rape.' Raptus is, when a man hath carnall knowledge of a woman by force and against her will."[6]

[40] The distinction between "will" and "consent" vexed English judges for some time. The difference was seen to be important because, for example, while sexual intercourse with an unconscious woman could be regarded as having taken place "without her consent" it would not have been "against her will" because, being unconscious, she would have had no will to exert.[7] Consistently with that view, in *R v Sweenie*[8] a majority in the Scottish High Court of Justiciary held that a man who had sexual intercourse with a sleeping woman had not raped her because he had used no force "to overcome the will".[9] The dissenting judge held that the accused had raped her because 'against her will' really meant 'without her consent' and the sleeping woman had not consented.[10]

[41] By 1957 it was accepted in Australia that force was not an element of the common law offence of rape and the element of 'against her will' might be satisfied by an absence of consent.[11] In *Papadimitropoulos v The Queen* the Court was concerned with the common law offence of rape. The appellant had deceived the complainant, a young and illiterate immigrant woman who did not speak English, into believing that he had married her. Acting under that misapprehension, she agreed to have sexual intercourse with him. The High Court held that, despite the fact that the complainant's agreement had been induced by deception, she had nevertheless consented to doing an act the nature of which she understood. As Bowen LJ had said in the context of contract in *Edgington v Fitzmaurice*, "the state of a man's mind is as much a fact as the state of his digestion"[12] and the fact was, the High Court held, that the complainant had actually consented. Upon similar facts, however, about 70 years earlier, in *R v Dee*[13] the Irish Court for Crown Cases Reserved had held that to find, on such facts, that there had been consent was "revolting to common sense" and was "discreditable to any system of

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5 In *PGA v The Queen* (2012) 245 CLR 355 the High Court traced the development of the role of implied consent to sexual intercourse in marriage: see esp. at [59]-[61] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

6 *The First Part of the Institutes of the Laws of England*, section 190.

7 see eg *R v Fletcher* (1859) Cox CC 131; *R v Wright* (1866) 4 F and F 967.

8 (1858) 8 Cox CC 223.

9 *supra*, at 224.

10 *supra*, at 230.

11 *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 255 per Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ.

12 (1885) 29 Ch D 459.

13 *R v Dee* (1884) 15 Cox CC 579 at 595.

jurisprudence". That opposite result was reached by the same inquiry into whether there was "consensus".[14] The criterion constituted merely by an enquiry into a person's state of mind can lead to such outcomes.

[42] In New South Wales the offence is contained s 61I of the *Crimes Act* 1900 which provides:

> "Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years."

[43] Consent is defined in s 61HA(3) of the New South Wales statute, relevantly, as follows:

> "A person 'consents' to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse."

[44] In *R v Lazarus*[15] the New South Wales Court of Criminal Appeal was concerned with the question whether the third element in s 61I, that of the accused's knowledge of lack of consent, had been proved. A sentence from the reasons of the trial judge in this judge-only trial, who found that the complainant had not consented but that the accused had not been proved not to have known that, and which was quoted by Bellew J in the Court of Criminal Appeal, illustrates that the issue of consent under the NSW definition is the subjective state of mind of the complainant:

> "I stress that I do not accept that the complainant, by her actions, herself meant to consent to sexual intercourse and in her own mind was not consenting to sexual intercourse…
>
> … As I have found she did not say "stop" or "no". She did not take any physical action to move away from the intercourse or attempted intercourse, either when they were standing up, or when she was down on the ground on all fours. I stress that by none of that behaviour, in her own mind, was the complainant consenting to sexual intercourse and I have already found that the Crown has proved lack of consent beyond reasonable doubt."[16]

[45] In Queensland, therefore, "consent" was a state of mind, as *Shaw*[17] and *Sutton*[18] demonstrate. At a trial for rape, the inquiry was into whether or not the complainant had a particular state of mind. A complainant's representation to the defendant of a willingness to engage in sexual intercourse will prove that state of mind. If there was no consent, s 24 operated to exculpate a defendant if, notwithstanding that there was no consent as a state of mind, the defendant reasonably believed that there was. Acts or omissions of a complainant might induce such a belief. In some cases a defendant's belief about a complainant's state of mind might be raised by facts other than communications by the complainant to the defendant.

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14 *ibid.*
15 [2017] NSWCCA 279.
16 *supra,* at [134].
17 *supra*, note 14.
18 s*upra*, note 1.

[46] The *Criminal Code* was amended by the *Criminal Law Amendment Act* 2000. That Act made several significant changes to the offence of rape. Previously, the offence was limited to males having carnal knowledge of females. The amendment expanded the scope of the offence so that rape was now defined as follows:

> "S 349 **Rape**
>
> (1) Any person who rapes another person is guilty of a crime.
>
> Maximum penalty—life imprisonment.
>
> (2) A person rapes another person if—
>
> (a) the person has carnal knowledge with or of the other person without the other person's consent; or
>
> (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
>
> (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
>
> (3) For this section, a child under the age of 12 years is incapable of giving consent.
>
> (4) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.
>
> (5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer."

[47] The gender of the victim, the means of penetration and the form of bodily penetration all widened in scope.

[48] In addition, for the first time in Queensland, "consent" became a defined term for the offence of rape.[19] Section 348 now provides:

> "S 348 **Consent**
>
> (1) In this chapter, **"consent"** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
>
> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
>
> (a) by force; or

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[19] The *Criminal Code* was to have been replaced in 1995 by a whole new version which was actually enacted by the *Criminal Code Act* 1995. The term "consent" was defined in that new Code. However, the 1995 Act was never proclaimed and the *Criminal Law Amendment Act* 1997 repealed it, thereby leaving the original, Griffith Code, untouched. Then, the *Criminal Law Amendment Act* 2000 inserted into the Code the definition of consent which had first appeared in the 1995 proposed Code.

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."

[49] "Consent" was thus defined to require two elements. First, there must in fact be "consent" as a state of mind. This is also because the opening words of the definition define "consent" tautologically to mean, in the first instance, "consent". The complainant's state of mind remains elemental. Second, consent must also be "given" in the terms required by the section.[20]

[50] The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing nothing.[21] Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour.

[51] It may be that, prior to the 2000 amendment, the frequent use of "consent" in judgments as both a noun and a verb, without emphasising any distinction between them, means that even under the Code as it stood before 2000, the term required a jury to consider both the complainant's willing state of mind and whether there had been a communication about that state of mind. Thus, in *R v Pryor*[22] Byrne J (as his Honour then was) said of the pre-2000 provision:

> "Both the structure and content of s 347 indicate that "consent" here connotes assent or permission, without the additional incidents that inform the common law concept. In other words, applying the conventional principles of interpretation of a codifying statute, rape involves "carnal knowledge" without permission, or, if intercourse is permitted, where permission is "obtained" in any of the circumstances s 347 proceeds to prescribe."

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20 s 268.14(3) of the *Commonwealth Criminal Code* defines consent to mean "free and voluntary agreement" and gives examples of circumstances in which a person "does not consent"; the *Crimes Act* 1900 (ACT) does not define consent but provides in s 67 for various ways in which a person's consent "is negated"; s 192 (1) *Criminal Code Act* 1983 (NT) defines consent to mean "free and voluntary agreement" and gives circumstances that do not constitute consent; s 319 of the *Criminal Code Act Compilation Act* 1913 (WA) defines consent to mean "a consent freely and voluntarily given"; s 2A of the *Tasmanian Criminal Code* defines consent to mean "free agreement" and then gives examples of occasions that do not constitute free agreement, including when a person "does not say or do anything to communicate consent"; s 46 of the *Criminal Law Consolidation Act* 1935 (SA) provides that a person consents when the person "freely and voluntarily agrees"; the *Crimes Act* 1961 (NZ) does not define consent but s 128A provides a catalogue of circumstances that do not constitute consent; in Canada, s 273.1 of the *Criminal Code* defines consent to mean "the voluntary agreement of the complainant to engage in the sexual activity in question" and provides some circumstances in which consent is not taken to have been "obtained".

21 see eg *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32; *Hardman v Booth* (1863) 1 H & C 803.

22 [2001] QCA 341 at [28]; (2001) 124 A Crim R 22 at 30-31.

[52] On the other hand, the *dicta* from *Shaw* and from *Sutton* quoted above, suggest that it is only the complainant's state of mind that was then in issue.

[53] In most cases it can be expected that proof that consent was not given will thereby prove the necessary state of mind.

[54] It follows that before s 24 can arise for a jury's consideration in connection with the issue of consent there must be some evidence that raises a factual issue about whether the accused believed that the complainant had a particular state of mind and also believed that the complainant had freely and voluntarily given consent in some way. Inevitably, that will require some evidence of acts (or, in particular circumstances, an omission to act) by a complainant that led the defendant to believe that the complainant had a particular state of mind consisting of a willingness to engage in the act and believed also that that state of mind had been communicated to the defendant, that is, that consent had been "given".

[55] Where s 24 arises for a jury's consideration the onus of proof lies upon the prosecution to exclude mistake as an excuse.[23] I have referred to the requirement that the evidence must fairly and realistically raise s 24 for consideration before it can become a matter that the jury must consider. This requirement is sometimes referred to as an "evidential onus" that lies on an accused. That is an expression which is apt to confuse if it is understood literally because an accused bears no onus at all in relation to s 24.[24] The excuse afforded by that provision may have to be excluded by the prosecution even if the accused does not invoke the section. The expression is used to refer to the requirement that there be facts in the case that justify consideration of the issue by the jury. Because it is in the interests of an accused for s 24 to be a matter for consideration and because, in a practical sense, an accused may have to persuade a trial judge that s 24 has arisen for consideration, it is easy to slip into an acceptance of the invalid premise that it is the accused who must raise facts, by way of "discharging the evidential onus", in order to raise the "defence". In truth, the only question is whether there is evidence which raises the issue of mistaken belief for the jury's consideration so that the prosecution must exclude the excuse afforded by s 24.[25]

[56] In *Webster & Co v Australasian United Steam Navigation Co Ltd*[26] Griffith CJ described s 24 (and s 25) as "rules of common sense as much as rules of law". If that is to remain true, it is essential that evidence that is said to raise a requirement for a jury to consider s 24 does indeed raise that issue, both as to the defendant's honest belief and as to the facts that reasonably may give rise to that belief.

[57] It follows that there is a distinction between cases in which an accused charged with rape gives evidence admitting sexual intercourse with the complainant, asserting that the complainant had given consent, and cases in which the accused gives evidence that there was no sexual intercourse at all. In the former class of cases, the accused's evidence that the complainant gave consent is, *ipso facto*, evidence that the accused held a belief that the complainant had consented and had given consent. A conclusion by a jury that the complainant had not actually consented may still require the jury to consider whether the Crown has proved that the defendant's

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23 *Loveday v Ayre and Ayre; Ex parte Ayre and Ayre* [1955] St R Qd 264 at 267-268 per Philp J.

24 see, for example, the reference to "shift the onus to the prosecution" in *Sancoff v Holford* [1973] Qd R 25 at 34.

25 see *eg He Kaw Teh v The Queen* (1985) 157 CLR 524 at 535 per Gibbs CJ.

26 [1902] St R Qd 207 at 217.

belief about state of mind and giving consent was not held mistakenly or reasonably.

[58] In the latter class of case, however, the accused's answer to the charge may preclude any reliance upon s 24 because the denial that sexual intercourse had taken place may imply that the accused held no belief about consent, there being no reason ever to have formed any such belief.[27] However, it is not possible to deny the possibility that cases may arise in which the accused's answer that there was no sexual intercourse will not preclude an issue arising under s 24 for the jury's consideration.

[59] In cases like this one, in which the appellant alleges that the complainant consented but did not give evidence, the raising of s 24 is problematical because the element of the accused's belief can arise only by way of inference.[28] As always, inference must not be confused with speculation.

[60] The appellant argues that he should have been permitted to invite the jury to consider whether the Crown had discharged an onus to prove that he did not believe that Mary had consented and that Mary had given her consent to having sexual intercourse with him and that his belief was honestly and reasonably held by him. This depends upon there being evidence in the case which could give rise to an inference that:

(a) The appellant subjectively believed that Mary was willing to engage in sexual intercourse with him; and

(b) the appellant subjectively believed that consent has been given; and,

(c) those beliefs were reasonable.

[61] In a case like this one, in which the primary answer to the charge is one of consent, it is likely that the very facts relied upon to show consent, being objective facts, will also be relied upon to raise an inference that the accused held a reasonable but mistaken belief about that issue. Still, as Moffit J observed in *R v Taylor*,[29] it will be a rare case in which, while not sufficient to raise a reasonable doubt in the jury's minds as to whether the complainant had given consent, the same acts raise such a doubt as to whether the accused actually held a reasonable belief that consent had been given.

[62] In this case there was nothing to contradict the complainant's evidence that Mary had lost consciousness before having sexual intercourse. The acts of the complainant upon which the appellant relied to advance his case that Mary was consenting and that she had given him her consent are those upon which he now relies to sustain his submissions about s 24. There are two insurmountable problems with the appellant's reliance upon these particular facts.

[63] First, it must be remembered that the appellant's case was that the complainant willingly got into the back seat of his car with him and assisted him in removing her clothes. Although his counsel did not put to the complainant that she had said anything by way of express consent, these actions were undoubtedly capable of being regarded as her giving consent to sexual intercourse. The jury's verdict means that it must have been satisfied that Mary had not done these things. As a

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27 see *R v Cutts* [2005] QCA 306 per Williams JA at [43]-[44].

28 *Larsen v G J Coles & Co Ltd* (1984) 13 A Crim R 109 at 111.

29 [1967] 2 NSWR 278 at 282.

result, the appellant had to rely upon the list of other acts that I have previously set out.

[64] Some of these were his own actions and cannot constitute the giving of consent by the complainant.

[65] Some of them constitute the complainant's omissions to act. Thus, the appellant submitted that, while taking photos, he kissed the complainant and she did not respond and when he used terms of endearment she did not "chastise" him. Those omissions cannot constitute the giving of consent to sexual intercourse.

[66] Two of the facts relied upon were actual and express rejections of his advances by the complainant. In the face of the evidence of these rebuffs it became even harder, to the point of impossibility, for the appellant to argue sensibly that the complainant's omissions to act in the ways he points to constituted the giving to him of consent to sexual intercourse.

[67] To the extent that these matters now raised by the appellant mean anything at all, they show beyond any doubt that the complainant, acting with ordinary politeness and within the bounds of normal social strictures, nevertheless gave him to understand, with as much clarity as could reasonably be required of her, that she was entirely uninterested in him sexually.

[68] There is another obstacle to the appellant's submission. It is that, as defence counsel acknowledged in his address to the jury, and as her Honour observed in summing up, the material time to consider whether consent has been given was the time at which penetration occurred. The acts relied upon by the appellant all occurred early in the evening. None of them were related to the time of removal of the complainant's clothes or the ensuing sexual intercourse. By that time the complainant was drunk to the point of incoherence. The complainant's earlier acts and omissions to act had, by then, become irrelevant to what was happening, if they were ever relevant.

[69] In a passage from the reasons of L'Heureux-Dube J in *Ewanchuk*[30] that was cited with approval by McMurdo P in *Cutts*:[31]

> "…there is, on the record, no evidence that would give an air of reality to an honest belief in consent for any of the sexual activity which took place in this case. One cannot imply that once the complainant does not object to the massage in the context of a job interview, there is 'sufficient evidence' to support that the accused could honestly believe he had permission to initiate sexual contact. That would mean that complying to receive a massage is consent to sexual touching. It would reflect the myth that women are presumptively sexually accessible until they resist."

[70] The appellant's submission is redolent of an implicit assumption to the contrary. An absence of objection is not the same as giving consent. There is no *a priori* consensus to having sexual intercourse by reason of a person's submission to

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30 [1999] 1 SCR 330.

31 *supra* at [14].

unwelcome, but mild, sexual overtures and these do not, by the lapse of time, metamorphose into the giving of consent to sexual intercourse.

[71] The appellant's submission that anything that the complainant said, did, or did not say or do could reasonably have been understood as her giving consent to having sexual intercourse with him so as to generate an inference that he believed that she had given her consent was utterly unreal and in my respectful opinion Richards DCJ was right not to direct the jury in the way invited.

[72] I would reject this ground of appeal.

[73] The appellant also seeks leave to appeal against the sentence imposed upon him by Richards DCJ. Her Honour imposed a sentence of five years imprisonment to be served cumulatively upon the sentences imposed by Clare SC DCJ. She ordered that the appellant's parole eligibility date be 7 September 2032. That order had the effect of postponing by two years the appellant's parole eligibility date that would have applied under the order of Clare SC DCJ.[32]

[74] Mr Copley QC, who appeared for the appellant on his applications for leave to appeal but not on his appeal against conviction, submits that the effect of the sentence in this case, taken together with the sentence imposed by Clare SC DCJ and the period in custody before trial, is that the appellant will have served over 20 years in prison before being eligible to apply for parole. He submits, therefore, that the sentence imposed by Richards DCJ is excessive.

[75] That is so only because the sentence that her Honour imposed was cumulative and, as is acknowledged on behalf of the appellant, an accumulation that was justified. The question is, therefore, whether a cumulative sentence of five years imprisonment with a postponement of the parole eligibility date involved error.

[76] Her Honour took into account five primary factors. First, this offence was committed by the appellant on 14 April 2011 while he was on bail for three similar offences which he had committed against three other victims on 31 March, 1 April and 2 April 2011. Those offences involved gulling three other young women into accompanying him, on a pretext, to a place where he stupefied them with drugs and then took them home, where he raped two of them and attempted to rape the third. The three women were each visiting this country from Korea. They were alone and vulnerable by reason of their lack of command of the local language and local customs. The appellant had set out, in a calculated way that was rightly described as predatory, to take advantage of this vulnerability so that he could place each of them, unconscious, into his power for his sexual gratification.

[77] Having been released on bail to await further proceedings for these offences, of which he was guilty, he speedily enticed a fourth woman to be his victim. If it matters, in order to do so he breached his bail conditions which had prohibited his having access to the internet and had imposed a curfew. It is difficult to imagine a more brazen, a more calculating and a more callous sexual offender.

[78] Second, her Honour took into account his lack of any remorse, which continues to the present, and his lack of any cooperation with authorities.

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[32] Because of the effect of s 160D(3) of the *Penalties and Sentences Act* 1992 and s 182(3) of the *Corrective Services Act* 2006.

[79] Third, her Honour took into account the fact that this sentence, by reason of the circumstances of its commission after arrest and while on bail, had to be cumulative upon the earlier sentences. Accordingly, its length had to be reduced substantially from that which would otherwise have been imposed.

[80] Fourth, her Honour considered that, although the time the appellant had spent in custody awaiting trial had already been taken into account by Clare SC DCJ (although not declared), that period should nevertheless be taken into account again.

[81] Fifth, the appellant had no previous convictions. This might be thought to weigh too much in the appellant's favour having regard to his immediately preceding commission of multiple offences.

[82] It should also be observed that, in the course of submissions at first instance, the appellant's counsel was unable to put forward a single mitigating factor.

[83] The appellant submits that in the event that the appellant's appeal against the sentence imposed by Clare SC DCJ is dismissed, as it has been, then the appropriate sentence should be one of two years imprisonment to be served concurrently with the other sentences.

[84] In my opinion, it has not been shown that the sentence imposed in this case was so excessive as to demonstrate an error in the exercise of discretion. The length of the term of imprisonment that the appellant must serve is a very long one. Its length is due, in part, to the appellant having demonstrated his dangerousness in such a compelling way by the commission of the offence under consideration, such that a merely nominal cumulative addition to the sentences that had been imposed for his earlier similar offending would have been wrong. Certainly, I would not consider that a concurrent sentence would do justice to the need to mark the appellant's exceptional proclivity to offend.

[85] I would therefore refuse leave to appeal.

[86] **McMURDO JA:**

Appeal No 257 of 2015

I agree with the President that the trial judge was right not to direct the jury in terms of s 24 of the *Criminal Code* (Qld) ("the Code") and that therefore the appeal against conviction should be dismissed.

[87] This appeal does not raise any question of law about the offence of rape but I will summarise what I understand to be the established operation of s 24 in relation to it. The offence is defined by s 349(2) of the Code in these terms:

> "(2) A person rapes another person if –
>
> (a) the person has carnal knowledge with or of the other person without the other person's consent; or
>
> (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent."

The term "consent" in s 349 is defined by s 348, as follows:

"(1) In this chapter, ***consent*** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

(2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained –

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."

[88] In every case, it will be for the prosecution to prove, as an element of the offence, the absence of the complainant's consent. The definition of "consent" means that the way in which that element might be proved will vary according to the relevant facts and circumstances. Sometimes it will be the prosecution case that there was no consent, of any kind, which was given, or in other words, that the complainant did nothing to permit the act in question. In other cases, the prosecution will say that a consent which was given, or apparently given, was not given by a person with the cognitive capacity to do so. And in others it will be alleged that the consent was not given freely and voluntarily, such as where the consent was obtained by force or a threat. In turn, the operation of s 24, where that is raised by the evidence, will vary according to the facts by which the prosecution seeks to prove this element of the offence, and it will be for the trial judge to direct the jury about the (possible) nature of the defendant's belief about those facts.

[89] Of course, in not every trial on a charge of rape must or should a judge direct the jury about s 24 on the issue of consent. Where the evidence does not raise the potential operation of s 24, such a direction would unnecessarily complicate the jury's task, and on occasions it could be unfair to a defendant, for example, by distracting the jury from a defence case that the alleged act did not occur.

[90] To raise the operation of s 24, there must be some evidence of a mistaken belief by the defendant.[33] Absent any evidence of a mistaken but reasonable belief, there could be no rational basis for a jury to exculpate a defendant by the operation of s 24. Because the onus of proof remains on the prosecution,[34] I would not describe the requirement as going as far as a need for evidence on which there could be a finding that the mistaken belief was held. I prefer the formulation by McPherson JA in *R v*

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33 *R v Cutts* [2005] QCA 306 at [4] per McMurdo P.

34 *CTM v The Queen* (2008) 236 CLR 440, 447 [8]; [2008] 8 HCA 25.

Millar,[35] which is that there must be evidence on which the jury could legitimately entertain a reasonable doubt about whether the defendant honestly and reasonably believed the complainant had consented.[36]

[91] As the President has said, there was nothing to contradict the complainant's evidence here that she had lost consciousness before having sexual intercourse. The events before the couple arrived at New Farm Park were inconsequential. The events recalled by the complainant at the park are inconsistent with an inclination on her part to engage in any sexual activity. Hours later, when the complainant was found by police in the rear seat of the appellant's car, she was weeping and incoherent and her head was lolling. She had suffered extensive injuries and was unable to get out of the car unaided to go to the ambulance. Once the jury had accepted the complainant's version of events, coupled with that evidence by the police officers and the medical evidence, there was no room for a reasonable doubt upon the basis of the suggested mistaken belief of the appellant. The ground of appeal against conviction should be rejected and the appeal dismissed.

Appeal No 162 of 2016

[92] I agree with the President that there was no error by Judge Richards in sentencing the appellant for this offence in 2012.

[93] However, that sentence should be varied in consequence of the variation to the sentences imposed for the appellant's 2015 offences. As I have explained in Appeal No 157 of 2016, I would reduce the head sentence of 18.5 years for those offences to 16 years. Consequently, the parole eligibility date would be moved forward by 80 per cent of 2.5 years (which is 730 days), so the date fixed by Judge Richards would be varied to 8 September 2030.

[94] **BOND J:** I agree with the reasons for judgment of Sofronoff P and with the orders proposed by his Honour.

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35 [2000] 1 Qd R 437 at 439 [7]; [1998] QCA 276.

36 Applied in *R v Baldwin* [2014] QCA 186 at [21] per Fraser JA.