SUPREME COURT OF QUEENSLAND

CITATION:	*R v De Silva* [2018] QCA 274
PARTIES:	**R** **v** **DE SILVA, Neranjan Agrajith Kalubuth** (applicant/appellant)
FILE NO/S:	CA No 177 of 2018 DC No 244 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 27 June 2018; Date of Sentence: 27 June 2018 (Farr SC DCJ)
DELIVERED ON:	16 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2018
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted.** **3. Appeal against sentence allowed.** **4. The applicant's sentence is set aside.** **5. The applicant is sentenced on Count 2 to 18 months imprisonment, suspended after six months for an operational period of 18 months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was acquitted of one count of rape and convicted of another count of rape against the same complainant – where the appellant neither gave nor called evidence at the trial – where the appellant's account of events was contained in a recording of his police interview that was tendered by the prosecution – where, in summing up, the trial judge addressed the evidence of the appellant's interview with police – where the appellant submits that the directions failed to distinguish between satisfaction beyond reasonable doubt and choosing between two contradictory stories – whether the trial judge's failure to tell the jury that, even if they did not positively believe the appellant's account, they could not find

against him if his answers gave rise to a reasonable doubt, amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the evidence was that the appellant had had a few drinks but that he was not intoxicated – where the trial judge invited the jury to consider whether intoxication may have affected the reliability of the appellant's account of events and whether it may have explained behavioural disinhibition on his part – where the evidence was that the complainant was very intoxicated – whether the direction concerning intoxication distracted the jury from the issues in the case and deprived the appellant of a chance of acquittal that was fairly open

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was sentenced to two years imprisonment, to be suspended after eight months, for an operational period of two years – where, as a direct result of being charged, the applicant spent six months in immigration detention after having been released on bail – where the date on which the applicant's sentence was to be suspended was reduced by only four months for the six months he spent in immigration detention – where the sentencing judge did not give reasons for not allowing for the full six months – whether the sentencing judge erred by not reducing the time that the applicant is to spend in actual custody by the full period spent in immigration detention

Islam v The Queen [2014] ACTCA 2, cited
Liberato v The Queen (1985) 159 CLR 507; [1985] HCA 66, distinguished
R v Booth [2005] QCA 30, distinguished
R v Callaghan [1994] 2 Qd R 300; [1993] QCA 419, cited
R v Dadash [2012] NSWSC 1511, cited
R v George [1980] Qd R 346, distinguished
R v Johnson & Honeysett [2013] QCA 91, distinguished
R v NT [2018] QCA 106, applied
R v Zainudin & Ho (2005) 190 FLR 149; [2005] NTSC 14, cited

COUNSEL: P Callaghan SC, with B P Dighton, for the applicant/appellant
D L Meredith for the respondent

SOLICITORS: Robertson O'Gorman for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **GOTTERSON JA:** At a trial over three days in the District Court at Brisbane, the appellant, Neranjan Agrajith Kalubuth De Silva, was acquitted on Count 1 in a two-count indictment and convicted on Count 2. Each count alleged an offence against s 349 of the *Criminal Code* (Qld) in that on 30 May 2016, the appellant raped the complainant.

[3] The trial concluded on 27 June 2018. On the same day, the appellant was sentenced on Count 2 to two years imprisonment to be suspended after eight months for an operational period of two years.

[4] On 5 July 2018, the appellant filed a Form 26 by which he appealed against his conviction and applied for leave to appeal against his sentence. I propose to consider first the appeal against conviction.

Circumstances of the alleged offending

[5] The complainant, whose first name is Kim, testified that she first met the appellant on 25 March 2016 through a mutual friend, Neil. At that time, she was 23 years old and worked as an adult dancer at a nightclub. She and the appellant met two or three times thereafter.

[6] On Sunday 29 May 2016, the complainant had been working throughout the day. She had organised to stay the night at Neil's unit in Fortitude Valley because she was to meet up with friends at the Paddock Bar at Bowen Hills where a friend of hers was to sing.

[7] The complainant arrived at the Paddock Bar at about 5 pm. She was wearing a skirt, a long sleeved white t-shirt and a cardigan. In evidence, she said that she was wearing black underwear and a bra. She was using a tampon at the time because she was having her period.

[8] At the Paddock Bar, she met her friends. She drank white wine. They moved to a venue called Capulet where she began drinking Red Bull and vodkas. From there they visited several other venues before returning to Capulet. She described herself as a little bit drunk but still coherent.

[9] The complainant had agreed to meet Neil at a venue known as X&Y. They met up and as they were about to leave in a taxi, the appellant joined them. He had independently arranged with Neil to stay at his unit. They arrived at Neil's unit at about 3 am. Neil's partner, Olivia, was there.

[10] The complainant said that she was a little bit sad because she had been fighting with her partner. At the unit, she spoke to Neil, Olivia and the appellant about her feelings. The conversation took place in the area comprising the living room and kitchen of the two bedroom unit.

[11] The complainant decided to get ready for bed. She took off her white t-shirt and put on a black long sleeved collared t-shirt. She took off her skirt but kept her underwear on. She was to sleep on a couch. She got onto it and placed a blanket over herself. Neil and Olivia went to bed.

[12] The complainant and the appellant continued their conversation. He was clothed and sitting on the couch with her. He bought her a glass of water and gave her a hug in a comforting manner. She then lay down to go to sleep.[1]

[13] In her evidence in chief, the complainant gave the following account of the events which ensued:[2]

> "Right. What's the last thing that you remember then, before you lay down and went to sleep, about where Neran was?---I don't know. I don't know where he was when I went to sleep.
>
> Okay. What's the next thing that you remember?---I was awoken by the feeling of my underwear being removed – the feeling of somebody putting their fingers inside my vagina.
>
> All right. Can I stop you there. Could you see who was doing it at that point?---At that point, I was still slightly asleep, so - - -
>
> Okay?---My eyes were still closed.
>
> You were still on the futon that we saw in the photograph?---Yes.
>
> All right. How were you positioned in terms of how you were lying?---I was laying on left-hand side, facing towards the black cabinet that was to the left of the couch.
>
> Your Honour, I might just have those photographs back - - -
>
> HIS HONOUR: Yes.
>
> MS KELSO: - - - just to make sure that we're all on the same page.
>
> Now, you've mentioned lying on your left-hand side facing the black cabinet?---Yes.
>
> So that's - - -?---Yes.
>
> - - - what we can see here?---Yeah.
>
> Okay. You said you had your eyes shut?---Yep.
>
> And you said you could feel fingers?---Yes.
>
> Are you able to be specific about how many?---Two.
>
> All right. And could you feel if they were doing anything?---They were going in and out of my vagina.
>
> Okay. When you felt these things happening, did you do anything or say anything?---I tried to move a little bit forward, and, as I was still asleep, I wasn't completely coherent just yet. So I – like, I groaned a little bit to kind of trying to communicate, like, that I'm trying to wake up – trying to communicate that I'm, like, not okay, that this is not – that I'm not comfortable. I tried to move forward a little bit. And I was just trying to wake myself up, trying to bring myself completely conscious to comprehend what was going on.

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1 Tr1-11 l11 – Tr1-20 l26.

2 AB2 20 Tr1-20 l28 – AB2 21 Tr1-21 l42.

> All right. When you did those things, did anything change with respect to what you could feel?---For a moment, everything stopped. And – so I was laying there by that stage conscious – very still, trying to comprehend what I thought I had just felt. And then it started again. I felt the fingers go inside me again at what – at which point I became really angry. And I jumped up out of the – off the couch. And I started yelling.
>
> Okay. And you said you could feel two fingers inside you?---Yes.
>
> Whereabouts could you feel them?---Inside my vagina.
>
> Okay. Up until the point that you jumped up, had anyone else said anything or had you heard any noises up until that point?---No.
>
> Okay. What did you see once you jumped up off the bed?---I saw Neran there."

I mention at this point that the first occasion of alleged digital penetration of the complainant's vagina was the subject of Count 1, and the second, the subject of Count 2.

[14] In cross-examination, it was put to the complainant that the appellant did not put his fingers into her vagina. She insisted that he did.[3] She had given the following evidence immediately before that proposition was put to her:[4]

> "Okay. And how were your legs positioned? Do you remember?---Yes. I pretty much sleep in the same position every night. I was laying with my left leg quite straight down, with my right leg slightly curved over – bent up a little bit – tucked up a little bit.
>
> Okay. And then, when you felt that, you didn't tell him to stop, did you?---I was slightly unconscious and not quite aware at that point in time as to what was going on.
>
> All right. So you were slightly unconscious, you say; yeah? And you gave evidence earlier that you made a sound?---Yes.
>
> You said you groaned?---Yes.
>
> Groaned, to communicate with him?---Yes.
>
> Yeah?---Yes.
>
> Yeah?---I was – as I said, I was still partially asleep so, at that point, it was a bit difficult for me to comprehend what was going on.
>
> And how long did it – how long was the touching going on inside your vagina, would you say?---It was very quick. It was very brief.
>
> And then what happened next?---And then, after it stopped, I became fully coherent. I lay there coherent trying to understand what I thought I had just felt. And then – at which it started again. By that point, I was completely awake, and I got up, and I said that.
>
> So it stopped, did it, did you say? And you just lay there?---Sorry?

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3 AB2 32 Tr1-32 ll38-42.

4 AB2 31 Tr1-31 l45 – AB2 32 Tr1-32 l36.

> It stopped, did you say?---It stopped after I groaned to try and – try and communicate that I was becoming coherent, trying to communicate that I was becoming awake, at which point it stopped.
>
> And then you say you just lay there. Is that right?---I was just laying there. I wa – at that point, I wasn't sure whether or not I was – whether or not it was real or if I was dreaming or if I was - - -"

[15] At the trial, the prosecutor tendered a statement that Neil had given police before his death in November 2016. The complainant appeared to him "to have had a fair few drinks" whereas the appellant "seemed okay".[5] Olivia was called as a witness. She said that the appellant seemed to be fine but that the complainant "was very out of it – very drunk".[6]

[16] The appellant neither gave nor called evidence at the trial. However, the prosecutor had tendered an audio-visual recording of an interview conducted by police with him on 31 May 2016.[7] The recording was played to the jury.

[17] In the interview, the appellant gave the following account of events at Neil's unit:

> "KALUBUTH DE SILVA: So we pretty much finished the night, and just wanna you know, it was like, oh get back, so we went back. And um yeah, Neil and, went to sleep, and he [INDISTINCT], and I, I went to the other room, he's got ah two rooms. Um and then so I was in the second room, um and then Kim um, Kim came in and she, well not, didn't come in, but she's like oh, ah, she started talking to me about certain things, and she broke up with her boyfriend two days ago, and there's no one sort of you know, obviously ah, well her life story and whatnot. Um yeah, basically that's it, and then yeah, and then she will, or, so it went from there so, and she wanted me to comfort her, so I was [INDISTINCT], I was like, ah I hugged her, and then she just stayed a while. Um and then she starts, she, she, there's like a couch outside, like a sofa bed um on the living area.
>
> SCON BRIGGS: Yep.
>
> KALUBUTH DE SILVA: In his house. So and then she obviously, she was naked, and well, and she just basically was telling the story and crying and stuff. And then um, well I didn't do anything, but I h-, well ah cuddled her, ah pretty much just comforting her, 'cause she's like, can you cuddle me? I was like, yeah, okay. I was there and then, I was full dressed, I didn't take my clothes off. But and then, suddenly she just s-, started like saying things that, that I, if I like her or and, [INDISTINCT] blah, blah, blah, that like, you know like, do I like her, how do, how do I find her, do I find her attractive and things like that, and would I date her and things. And I said I've got a girlfriend and, and I went this and that, and then she sort of freaked out. Like I don't know if she freaked out or did what and she just sort of started yelling and things, and, and now I, and I s-, I called

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5 Tr1-40 ll33-34; Exhibit 3 at [9].
6 Tr1-47 l22.
7 Exhibit 5.

> my mate Neil, and I just said I can't stay here and I left, and I don't know what happened after that, until you guys just, yeah said so."[8]

[18] Later, the appellant was asked about the complainant's dress. He said she was naked from the waist down and that she commented to him that he had seen her like that before.[9] He was then asked about touching the complainant apart from hugging her. He gave the following answer to that question:[10]

> "SCON BRIGGS: Okay. Um, and you've said apart from the hugging, there's been no other contact?
>
> KALUBUTH DE SILVA: No, nothing at all.
>
> SCON BRIGGS: No other kissing?
>
> KALUBUTH DE SILVA: Nuh.
>
> SCON BRIGGS: Touching?
>
> KALUBUTH DE SILVA: Nuh.
>
> SCON BRIGGS: No?
>
> KALUBUTH DE SILVA: Well I hugged, well I hugged that--
>
> SCON BRIGGS: Yep.
>
> KALUBUTH DE SILVA: That's, well I cuddle, I cuddled obviously."

He specifically denied digital penetration of the complainant's vagina.[11]

[19] As to his having drunk that evening, the appellant said that he was quite sober. He was not at a point where he could not remember anything. He described the complainant as having been pretty drunk.[12]

[20] As the prosecution had opened to the jury, DNA evidence was adduced in the Crown case. It was to the effect that the appellant's DNA was not located on swabs taken from the complainant's vulva and vaginal areas and her tampon.[13]

The course of the jury deliberations

[21] The summing up by the learned trial judge concluded at 12.45 pm on the second day of the trial. At 4.52 pm, the jury provided a note in which they asked for further clarification of reasonable doubt and a copy of the transcript of a part of the complainant's evidence. They retired for the day at 4.57 pm.

[22] The trial resumed at 9.30 am on the following day. The learned trial judge addressed both questions, the latter by having his associate read a mutually agreed marked up copy of parts of the complainant's evidence. The jury resumed deliberations at 10.04 am. At 10.58 am, they provided a note indicating that they were unable to reach

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8 Transcript of Interview, Exhibit MFI A: AB2 113 ll9-44.
9 AB2 125 ll19-27.
10 AB2 125 ll40-60.
11 AB2 130 l50 – AB2 131 l10.
12 AB2 121 ll1-10; AB2 131 ll40-60.
13 Tr2-10 l23 – Tr2-11 l22.

a unanimous verdict on either count and that they felt that further deliberation would be futile.

[23] The jury returned at 11.00 am and learned trial judge gave them a "*Black* direction". At 3.11 pm, they provided a further note which asked for Neil's statement to be re-read and that certain parts of Olivia's evidence be re-read to them. As his Honour was discussing this note with counsel, a yet further note arrived from the jury. It indicated that they had made a unanimous decision on Count 1, but not on Count 2.

[24] At 3.19 pm the jury returned. They indicated that they still required the evidence to be re-read. The acquittal verdict was taken on Count 1 and the evidence was then re-read. The jury retired at 3.40 pm. They returned at 4.29 pm and delivered the guilty verdict on Count 2.

The grounds of appeal – conviction

[25] At the hearing of the appeal, the appellant was granted leave to amend his grounds of appeal against conviction to the following:

1. A miscarriage of justice occurred by reason of the directions given as to how the jury should approach the evidence contained in the appellant's interview with police.
2. A miscarriage of justice occurred by reason of the directions given about intoxication.
3. A miscarriage of justice occurred by reason of the failure by the learned trial judge to direct the jury as to the terms of section 24 of the *Criminal Code*.

[26] It is convenient to consider each ground of appeal separately.

Ground 1

[27] In summing up, the learned trial judge gave conventional directions to the jury with respect to the onus of proof and the standard of proof. It was for them to decide whether they were satisfied beyond reasonable doubt that the prosecution had proved the elements of each offence. If they were left with a reasonable doubt about guilt in respect of either charge, it was their duty to acquit in respect of that charge. The jury were told that the defendant was entitled to insist that the prosecution prove the case against him. That the defendant did not give evidence was not an admission of guilt; nor did it fill any gaps left in the prosecution evidence.[14]

[28] His Honour specifically addressed the evidence of the appellant's interview with police. He said:[15]

> "You have also before you the evidence of the defendant's interview with the police officers and the prosecution relies on some of the answers said to have been given by the defendant in that interview as supporting its case against him. The prosecution have referred you

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14 AB1 33-34.

15 AB1 35 l27 – AB1 36 l22.

> specifically to the statements that he made that you can hear on the recording, where he speaks about his close proximity to the complainant in the lead-up to the incident the subject of the charges.
>
> As I said, that recording will be with you when you retire to consider your verdicts and you can play it again as often as you wish. There are two issues, I suppose, that arise from that recording, insofar as those statements that the prosecution rely upon as suggesting it is in some way supportive of its case against him on the issue that I have just identified.
>
> The first thing, of course, is that you must accept that the defendant said such things. That is, gave answers about his proximity to the complainant in the lead-up to these two alleged events. Well, this is a recording. You can listen to that recording and that is a matter that you can work out for yourselves by simply listening to the tape.
>
> The second part of that is that you would have to, of course, conclude that what he said in those statements were accurate and true. So it is up to you to decide whether you are satisfied that those things said by the defendant, which the prosecution says – or submits to you are supportive of its case against him – were said by the defendant, and secondly, whether they were accurate and true. And, of course, it is a matter for you as to whether you – as to what weight you give to them. That is, whether they do support the prosecution case in any way, whether they do not, that is entirely a question of fact for yourselves.
>
> And during the course of the interview a number of questions were asked by the police officers of the defendant. The same reasoning applies here as I told you about in relation to questions by counsel of a witness. So if the defendant in that interview did not agree to or in some way accept the contents of a question asked of him by a police officer, the question cannot become evidence against him. So again you must focus on the answer, rather than the question.
>
> Now, in that interview he also gave answers which you might view as indicating his innocence. You should know, ladies and gentlemen, that you are entitled to have regard to those answers, if you accept them, and to give them whatever weight you think appropriate. Bearing in mind, of course, that they have not been tested by cross-examination.
>
> So in relation to both the answers which the prosecution relies upon as being supportive of its case against him, and those which point to innocence, it is entirely up to you what use you make of them and what weight you give to them."

It is on the latter three paragraphs of this part of the summing up that Ground 1 is focused.

[29] **Appellant's submissions:** The appellant submitted that, consistently with authority of this Court, the appellant's account of events in the interview became evidence in the trial. The contrast between the two versions characterised the trial as a "word on word" one.

[30] The appellant's complaint centred upon the summing up with respect to answers that might indicate the appellant's "innocence". Although that term was used in the standard direction,[16] an unqualified reference to innocence, it was submitted, was unlikely to assist the jury. They were not required to consider a verdict of "innocent".[17]

[31] More telling, the appellant submitted, was the failure to tell the jury that even if they did not positively believe these answers, they could not find against the defendant on an issue if the answers gave rise to a reasonable doubt as to that issue. The answers were evidence for the defence. Consistently with the observations of Brennan J in *Liberato v The Queen*,[18] such a direction must be given. The failure to give it occasioned a miscarriage of justice. That it was not sought could not be characterised as a rational tactical decision made to avoid a forensic risk.[19]

[32] **Respondent's submissions:** The respondent submitted that no case had gone so far as to hold that the direction of which Brennan J spoke need be given in a case where neither the defendant, nor someone else, had given sworn evidence that contradicted sworn evidence that supported the prosecution case. In both *R v George*[20] and *R v Booth*,[21] the accused had testified, giving an account contrary to the prosecution case. In *R v Johnson & Honeysett*,[22] the evidence of the complainant was contradicted by that of another witness called in the Crown case.[23]

[33] It is conceded by the respondent that it would have done no harm, and would have assisted the appellant's case, had the jury been told that even if they rejected the appellant's version, they should not "jump to convict but should rather then consider the rest of the evidence".[24] However, no miscarriage of justice ensued because that did not occur here. It is clear that the jury did not jump from a rejection of the appellant's version to conviction. They asked for relevant parts of the evidence to be re-read and evidently considered it before convicting.[25]

[34] **Discussion:** I accept that when a record of interview of an accused is tendered in the prosecution case, the jury may accept any statement of fact in it by the accused as evidence of the truth of the fact. That that is so with respect to exculpatory matter in such a record of interview is affirmed by the decision of this Court in *R v Callaghan*.[26] In that case, Pincus JA and Thomas J observed:[27]

> "When a mixed statement is tendered by the prosecution exculpatory parts go in with the incriminatory. That presents no problems in relation to the law of evidence. … Similarly, if a prosecutor chooses to put into evidence a version which is in substance exculpatory, he makes it evidence in the case, and subject to the matters of weight, it can be acted on as showing or tending to show the truth of its contents."

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16 Benchbook No 36.4: "Use of the Interview".
17 Appellant's Outline of Submissions ("AOS") at [11].
18 (1985) 159 CLR 507 at 515.
19 AOS at [12]-[15].
20 [1980] Qd R 346.
21 [2005] QCA 30.
22 [2013] QCA 91.
23 Respondent's Outline of Submissions ("ROS") at [9].
24 ROS at [11].
25 ROS at [12].
26 [1994] 2 Qd R 300.
27 At 304, citing *R v Higgins* (1829) 3 C&P 603 at 604; 172 ER 565 per Parke B.

[35] I turn next to consider whether the observations of Brennan J in *Liberato* to which the appellant has referred, were directed at exculpatory matter in such a context. In that case, the majority (Mason ACJ, Wilson and Dawson JJ) considered that special leave to appeal ought to be refused because no question of law was involved. The applicants for special leave sought to challenge the conclusion of the Court of Criminal Appeal of South Australia that no miscarriage of justice had occurred at their rape trial notwithstanding a number of defects which that court had correctly identified in the summing up of the trial judge. Brennan and Deane JJ would have granted leave to appeal. Each made observations *obiter* as to the adequacy of the directions.

[36] At the trial in *Liberato*, the complainant and each accused gave evidence relevant to whether the accuseds had a guilty state of mind. There were conflicts in the evidence of the complainant on the one hand, and the evidence of the accuseds on the other. The jury were told that in many ways, the case boiled down to "who do you believe".

[37] Brennan J noted that the directions failed to distinguish between satisfaction beyond reasonable doubt and choosing between two contradictory stories. It was in that context that his Honour observed:[28]

> "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make that clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification".

[38] Deane J agreed with the reasons of Brennan J. On this topic, his Honour said:[29]

> "The above misdirections about onus of proof must be considered against the background of a number of passages in the learned trial judge's summing up in which he carefully and correctly explained to them the requirements of the criminal onus and standard of proof. They must, however, also be considered against a background where, on a number of occasions, his Honour directed the jury in terms which indicated that the overall question for them essentially involved the making of a "choice" between prosecution and defence evidence: "in many ways this case boils down to who do you believe"; "You may well think that the attitudes are so far apart that

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28 At 515.

29 At 519.

> you have to make a choice"; "The case may well be one as I have put to you before, where the real question is who do you believe on the whole of the evidence, [the complainant] or the accused?" Provided that they are accompanied by clear and unequivocal directions about the criminal onus and standard of proof, express or implied references in a summing up to a "choice" between particular witnesses are, no doubt, sometimes unavoidable and commonly unobjectionable. The main significance of the directions about having to make a "choice" lies, in the present cases, in their clear suggestion that the "real question" in the cases turned upon a mere "choice" between the evidence of the complainant and that of the accused and in the possible contribution of that suggestion to the overall effect of the misdirections about onus of proof…".

[39] It may be noted that the circumstance that both Brennan J and Deane J addressed was one where the trial judge sums up the case to the jury as one of choice between prosecution and defence evidence. In that circumstance, the jury must be told that even if they do not positively believe the defence evidence on a particular issue, they need consider whether that evidence gave them cause for reasonable doubt with respect to that issue.

[40] Here, the learned trial judge did not describe the case to the jury as one in which they had to make a choice who to believe. It was not suggested to them that there was a conflict between the evidence of a prosecution witness and the evidence of a defence witness which required such a choice to be made. That is unsurprising because there was no such conflict. The appellant did not testify; nor did he call any witness in his defence.[30]

[41] I pause here to say that whilst the appellant's exculpatory answers in the record of interview were evidence in the case in the sense explained in *Callaghan*, the appellant did not become a witness in the case on that account. The jury were not presented with oral testimony given by the complainant and conflicting oral testimony given by the appellant as would have characterised the case as one in which it was her word against his word.

[42] There was, therefore, in my view, no need for the learned trial judge to have instructed the jury specifically, and in the terms suggested by Brennan J, as to the implications of the range of conclusions they might reach in making their choice between the evidence of a prosecution witness and the conflicting evidence of a defence witness. Thus, the directions that were given were not deficient on account of directions in those terms not having been given.

[43] Nor do I consider that the directions that were given with respect to exculpatory answers in the record of interview were otherwise deficient. The reference to answers "indicating his innocence" was descriptive of them as exculpatory. It did not convey that the jury's task was to determine innocence.

[44] Further, when the learned trial judge spoke of the jury accepting the answers, he evidently meant accepting that they were given. So much is clear from the

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30 Contrast *Murray v The Queen* (2002) 211 CLR 193 and *R v Zurek* [2006] QCA 543, referred to at AOS footnote 25, in both of which the accused testified.

preceding directions with respect to incriminatory answers in which his Honour spoke of the jury accepting them as made on the one hand, and concluding whether they were accurate and true on the other.

[45] The direction given was that if the jury accepted the exculpatory answers as having been made, they could give them whatever weight they thought appropriate, bearing in mind that there had been no cross-examination on them. The learned trial judge then concluded that part of the summing up by directing the jury that it was entirely up to them what use they made of the answers and what weight they gave to those answers. Those directions aligned with the antecedent general directions that had been given that the jury were to decide on the whole of the evidence whether the prosecution had proved the elements of each offence charged beyond reasonable doubt. The summing up as a whole thus conveyed that the jury could not convict if the appellant's exculpatory answers left them with a reasonable doubt about the appellant's guilt.

[46] For these reasons, I have concluded that the miscarriage of justice alleged in Ground 1 has not been established.

Ground 2

[47] The learned trial judge included the following observations and direction in his summing up:[31]

> "There was also some evidence, I think really from the defendant himself in his interview with police, where even though he said that he was not intoxicated on the night in question but he had had a few drinks and there was no real evidence beyond that stage. But nevertheless, I think it appropriate that you be given this direction, in any event.
>
> Intoxication does not relieve a person of responsibility for committing a crime. So intoxication may help when you are considering the state of the defendant's memory about the events surrounding the alleged events which give rise to the charge when he was being questioned by the police. It may offer some explanation for conduct, but intoxication does not entitle one to an acquittal."

This direction was not foreshadowed. Nor was it sought by counsel. However, no objection was taken to it.

[48] **Appellant's submissions:** The appellant submitted that there was no basis for giving this direction.[32] The offences charged did not have an element of intention. The appellant told police that he was not drunk. Neither Neil nor Olivia thought that he seemed to be.[33]

[49] The giving of the direction exceeded the role of the trial judge because it was inappropriate.[34] The direction invited the jury to consider whether intoxication may have affected the reliability of the account that the appellant gave to police and

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31 AB1 38 l39 – AB1 39 l2.
32 AOS at [17].
33 Ibid at [18].
34 Ibid at [22], citing *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 per Gaudron, Gummow, Kirby and Hayne JJ at [50].

whether it may have explained behavioural disinhibition on his part. In that way, the direction distracted the jury from focusing on the issues in the case.[35] The appellant was thereby deprived of a chance of acquittal that was fairly open.[36]

[50] **Respondent's submissions:** The respondent referred to the decision of the Queensland Court of Criminal Appeal in *R v Kusu*[37] as affirming that for non-intentional offences, an accused's state of intoxication is often relevant, for example, as to state of memory of events.[38]

[51] Since the appellant himself had answered police questions about what he had had to drink and witnesses had given evidence about whether he seemed drunk to them, it was appropriate that the jury be directed as to what use they could make of that evidence.[39]

[52] **Discussion:** There is force in the appellant's complaint that the direction was unnecessary in view of the appellant's statement to police and the evidence of Neil and Olivia on the topic. The remark of the learned trial judge in the subsequent sentence hearing that there was no evidence that the appellant was intoxicated tends to confirm that there was insufficient reason for giving this direction.[40]

[53] It does not, however, follow that the giving of the direction occasioned a miscarriage of justice. It must have been obvious to the jury that the direction as to consequences and implications of intoxication were relevant to their deliberations only if they concluded that the appellant had been intoxicated. Here, however, the jury were reminded of what the appellant told police and that notwithstanding that he had had a few drinks that evening, there was "no real evidence beyond that stage". The jury were told, in effect, that there was no evidential basis for a finding that the appellant had been intoxicated.

[54] It is quite unlikely then that the jury would have concluded that the appellant was intoxicated. In the absence of such a conclusion, it is just as unlikely that they would have resorted to the direction for guidance in their deliberations.

[55] On the other hand, in the unlikely event that they did conclude that the appellant had been intoxicated, then it was entirely proper for them to have had regard to the direction given. As a direction on intoxication, it was unobjectionable.

[56] For these reasons, I am unpersuaded that the giving of the direction deprived the appellant of a fair chance of acquittal that was fairly open. There was no miscarriage of justice. This ground of appeal has not been made out.

Ground 3

[57] The appellant contended that the jury might reasonably have been satisfied beyond reasonable doubt that the alleged digital penetration the subject of Count 2 did occur. However, it was submitted, they might also have found on the evidence that prior to that occurring, the appellant touched the complainant on the vagina without

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35 AOS at [19], [23].
36 Ibid at [26].
37 [1981] Qd R 136 per WB Campbell J at 142 (Matthews and Macrossan JJ concurring).
38 ROS at [14], [15].
39 ROS at [16], [17].
40 AB1 85 l26.

penetration; she reacted by groaning; she moved forward a little; and then lay there. That, it is suggested, might have grounded a mistake of fact defence for the appellant under s 24 of the *Criminal Code*, namely, that he honestly and reasonably believed that the complainant was consenting to the penetration that followed.

[58] This contention fails at the outset. The appellant denied ever touching or penetrating the complainant's vagina. There was nothing in the complainant's account suggesting consent, or the possibility of mistake about it. In these circumstances, it would not have been reasonable for the jury to have made a finding or findings that could have grounded a s 24 defence. It is unsurprising that defence counsel did not ask for such a direction. Moreover, on the state of the evidence, such a direction would have risked harm to the defence case. It would have invited the jury to consider whether the touching and penetration that he denied did in fact happen.

[59] This ground of appeal is without merit.

Disposition

[60] As no ground of appeal has succeeded, this appeal against conviction must be dismissed.

Sentence application

[61] This application may be dealt with briefly. No issue is taken with the head sentence of two years or that, conventionally, one half of it should be spent in custody.

[62] As a direct result of being charged, the applicant spent approximately six months in immigration detention after having been released on bail. At the sentence hearing, counsel submitted that the time in detention should be taken into account. The learned sentencing judge observed that the applicant should serve half the head sentence in custody and then stated that "taking into account, though, that period of immigration detention, it should be reduced further".

[63] It will be recalled that the sentence imposed was two years imprisonment suspended after eight months. The applicant's complaint is that the sentence allows only four months for the time spent in immigration detention – 12 months (one half of two years) less eight months.

[64] As the applicant has submitted, for all practical purposes, immigration detention is comparable with custody on remand as far as the detainee is concerned.[41] Courts have acknowledged that by treating pre-sentence immigration detention as equivalent to pre-sentence custody.[42]

[65] No reason was given by his Honour for not allowing six months for the immigration detention. Not to allow it in full required some explanation. His Honour appears to have erred, perhaps by oversight, both in not allowing the full six months and in not giving any reasons for why that period was not allowed. The respondent has not seriously argued to the contrary.

[66] In these circumstances, the sentence should be varied so that it is suspended after six months. That will reduce the time that the applicant is to spend in actual

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41 As was recognised by Mildren J in *R v Zainudin & Ho* (2005) 190 FLR 149 at [59].

42 See for instance, *Islam v The Queen* [2014] ACTCA 2; *R v Dadash* [2012] NSWSC 1511 at [28] and *R v Assad* (Unreported, District Court of Queensland, Bowskill QC DCJ, 12 May 2016).

custody by the period spent in immigration detention. In accordance with the usual practice as described in *R v NT*,[43] the head sentence should also be varied by reducing it by the time spent in immigration detention. The applicant should be resentenced accordingly.

Orders

[67] I would propose the following orders:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence granted.
3. Appeal against sentence allowed.
4. The applicant's sentence is set aside.
5. The applicant is sentenced on Count 2 to 18 months imprisonment, suspended after six months for an operational period of 18 months.

[68] **MORRISON JA:** I agree with the reasons of Gotterson JA and the orders his Honour proposes.

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43 [2018] QCA 106 per Atkinson J at [28], [29] (Gotterson and Morrison JJA concerning).