SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAU* [2019] QCA 73
PARTIES:	**R** **v** **KAU** (appellant)
FILE NO/S:	CA No 246 of 2018 DC No 2655 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 24 August 2018 (Jones DCJ)
DELIVERED ON:	3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2019
JUDGES:	Fraser and Gotterson JJA and Bradley J
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was charged with four counts of rape as a domestic violence offence – where the four counts were alleged to have been committed on the same occasion, against the appellant's then wife – where the jury reached verdicts of guilty on two counts and not guilty on the other two counts – whether the guilty verdicts were inconsistent with the not guilty verdicts CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where it is alleged that the learned trial judge ought to have directed the jury to consider whether they were satisfied beyond reasonable doubt that the appellant did not act under a mistake of fact as to the complainant's consent in relation to the two counts upon which the appellant was convicted – where mistake of fact was not raised by counsel at trial – whether the learned trial judge ought to have given a mistake of fact direction – whether any failure to give such a direction is likely to have affected the verdicts *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, cited

R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited

COUNSEL: C F C Wilson for the appellant
C N Marco for the respondent

SOLICITORS: Martin Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **GOTTERSON JA:** I agree with the order proposed by Bradley J and with the reasons given by his Honour.

[3] **BRADLEY J:** On 28 September 2018, the appellant was convicted on two counts of rape as a domestic violence offence and sentenced to five years imprisonment, suspended after two and a half years in custody. The sentence followed a three day trial, which concluded on 24 August 2018 when the jury reached verdicts of guilty on the two counts and verdicts of not guilty on two other counts of rape.

[4] The complainant was the appellant's wife. The four counts were alleged to have been committed on the same occasion and in sequence at their then home. Counts 1 and 3, the subjects of the guilty verdicts, were particularised as vaginal rapes. Counts 2 and 4, the subjects of the not guilty verdicts, were alleged anal rapes.

[5] The appellant appeals against his conviction. Following amendment, there are two grounds: first, that the convictions should be set aside as unreasonable because the guilty verdicts were inconsistent with the not guilty verdicts on the other counts; and second, that there was a miscarriage of justice because the learned trial judge ought to have directed the jury to consider whether they were satisfied beyond reasonable doubt that the appellant did not act under a mistake of fact as to the complainant's consent on the two counts the subject of the guilty verdicts.

Inconsistent verdicts

[6] To succeed on the first ground of appeal, the appellant must prove the verdicts are inconsistent as a matter of logic and reasonableness.[1] The test is commonly stated: no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion.[2]

[7] Respect for the role of the jury means that:

> "if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted."[3]

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1 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366 (Gaudron, Gummow and Kirby JJ).
2 The phrase of Devlin J in *R v Stone* (unreported 13 December 1954), cited in *MacKenzie* at 366.
3 *MacKenzie* at 367.

[8] Verdicts may rationally differ in a number of ways, including where the quality of the evidence on each count varies and where there is corroboration on some, but not all, counts.[4]

Quality of the evidence

[9] Here, there were three differences in the quality of the evidence considered by the jury.

[10] First, there was a difference in what the complainant told her confidantes before she reported to the police. The jury heard the evidence of two such witnesses. The complainant told each of them details of the appellant's conduct that were consistent with the complainant's account of the vaginal penetrations in counts 1 and 3. However, the complainant did not tell either of these witnesses anything about the alleged anal penetrations. As the appellant's counsel put it to the jury, "no mention of fisting, no mention of anal sex, of anal anything."

[11] Secondly, there was a difference in her report to the police. In cross-examination, the appellant's counsel put to the complainant that she told the police she could not tell that the appellant's penis had penetrated her anus, but had concluded it occurred "because of the bleeding afterwards." The complainant resisted this contention. The appellant's counsel invited her to clarify what she meant. She responded:

> "What I meant was after the – the initial entry, after he finished ramming his penis into my – my vagina and he did the initial entry into my anus, the pain was so excruciating it just all blended into – into one and then – then I just – I just couldn't tell then, like, where the pain was coming from because it just all blended into one."

[12] Thirdly, the jury heard a recording of a conversation between the complainant and the appellant. As the appellant's counsel pointed out to the jury, in the recording the complainant made "Not a mention", "no suggestion" and "no hint" of anal penetration. The appellant's counsel told the jury this omission was "curious".

[13] Drawing on these three points, the appellant's counsel told the jury, "So there is no evidence to accept, asides from her word, on at least those two counts that deal with that", i.e. counts 2 and 4. Counsel concluded his address by noting the complainant "never said anything about anything to do with the anus to anyone."

[14] In these three respects, the complainant's evidence on counts 2 and 4 was less consistent, more inferential and more equivocal than her evidence as to counts 1 and 3.

Corroborative evidence

[15] There was evidence that might have corroborated counts 1 and 3.

[16] In the recording of the conversation between the complainant and the appellant, the complainant described the vaginal rapes in graphic terms and the appellant said he was "sorry it happened" and "things got carried away."

[17] The recording also included this exchange:

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4 *R v Smillie* (2002) 134 A Crim R 100 at 106-107 [28] (Holmes J), summarising the matters identified and considered in *R v Markuleski* (2001) 52 NSWLR 82.

> "Complainant: Just answer the f***ing question. Hurt me how?
>
> Appellant: I hurt you physically. I put my hand in your vagina.
>
> Complainant: And tore me up.
>
> Appellant: Well I didn't know that.
>
> Complainant: How would you when you're holding me down?
>
> Appellant: I --
>
> Complainant: And then you proceeded to ram me with your penis after you'd finished ripping my insides out. Thank you for acknowledged [sic] what you'd done.
>
> Appellant: Sorry."

[18] The Crown's counsel drew this evidence to the jury's attention in the address.

[19] The jury could have considered the appellant's statements to be inconsistent with the vaginal penetrations not occurring. The jury could also have considered the statements amounted to an admission of count 1 (vaginal penetration with his hand) and a failure to deny count 3 (vaginal penetration with his penis).

[20] The jury had no corroborative evidence of this kind about count 2 or 4.

[21] The possibility of different verdicts on the four counts was identified at the trial. The appellant's counsel sought a *Markuleski* direction, which the learned trial judge gave.

[22] It appears the jury simply followed the judge's instruction to consider separately the case presented by the prosecution on each count and to apply to each count the requirement that all of the elements must be proved beyond reasonable doubt.[5] The jury saw and heard the complainant and the confidante witnesses give evidence, including under cross-examination. They had the recording of the complainant and the appellant.

[23] It was open on the whole of the evidence for the jury to be satisfied beyond reasonable doubt of the appellant's guilt on counts 1 and 3. The differences in the quality of the complainant's evidence and appellant's corroborative evidence provide a logical and reasonable basis for the jury to arrive at different conclusions and return different verdicts for counts 1 and 3 and counts 2 and 4.

Mistake – section 24

[24] The second ground of appeal is that the jury ought to have been directed to consider whether the Crown had satisfied them beyond reasonable doubt that the appellant had not acted under an honest and reasonable, but mistaken, belief that the complainant had consented to the vaginal penetrations. To succeed on this proposed ground, the appellant must demonstrate that the learned trial judge should have given a mistake direction and that it is reasonably possible that the failure to do so may have affected the verdict.[6]

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5 *MacKenzie* at 367.

6 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38], 15 [49].

[25] The appellant's counsel explained that no such direction was requested at the trial because it could not have been contended that the appellant honestly and reasonably believed the complainant had consented to the alleged anal penetrations. The unchallenged evidence was he had never penetrated the complainant's anus in the course of sexual encounters before the night in question. So, the mistake direction could only have applied to counts 1 and 3. The complainant's evidence was that the four rapes occurred in an uninterrupted sequence. It was said the direction would have been awkward, given the interposing of counts 2 and 4, to which it could not apply.

[26] The appellant's counsel submitted, had it been clear that the anal rape counts would be rejected by the jury, then he would have asked the learned trial judge to give the mistake direction limited to the complainant's consent to the vaginal penetrations.

[27] Of course, had the appellant been able to predict the verdicts the jury would return on counts 2 and 4, he might have crafted his defence differently, so as to maximise the chances of an acquittal on the other counts. However, forensic decisions in the course of a trial must be made without such wished for insights.

[28] The appellant's defence could have embraced some of the early report evidence, in part, to suggest there was reasonable doubt that the appellant did not honestly and reasonably believe the complainant had consented to the vaginal penetrations. Instead, the appellant's counsel used that early report evidence to attack the complainant's credibility.

[29] The decision not to raise the topic of mistake, and instead to ask the jury not to accept the complainant's evidence at all, was a forensic choice. The choice is explicable. Each piece of evidence that might possibly support an honest and reasonable belief (that the complainant was consenting) was mixed with evidence that the complainant told the appellant to stop and resisted him. The risk involved in attempting to extract the helpful — and exclude the harmful — parts of this evidence is obvious.

[30] A mistake direction would have involved the learned trial judge reminding the jury that the complainant said she did not consent and made that very clear to the appellant. His Honour would have instructed the jury that, if they accepted the complainant's evidence that she said "No" and told him to stop, then the jury might think that the appellant could not have honestly and reasonably believed the complainant was consenting.

[31] In cross-examination, the appellant's counsel had adduced evidence from a witness who overheard a conversation between the appellant and the complainant in which the complainant said, "I told you to stop and you were hurting me badly. No means no. What you did – what did you think I meant by no?" This was consistent with the complainant's words in the recorded exchange with the appellant, heard by the jury.

[32] The appellant's counsel put to the jury that the overheard conversation was "an awful lot like" and "entirely consistent" with the subject of the complainant's report to another confidante witness. That witness recalled the complainant told her: "she had sexual intercourse against her will with [the appellant]"; and "it was consensual sex and then I believe she asked [the appellant] to stop". The witness thought the complainant used the word "rape". The witness said she did not remember "the

exact detail of the conversation" and only remembered "the general gist of the conversation."

[33] In his address to the jury the appellant's counsel summarised this evidence as: "We were having consensual sex. Started to hurt. I said 'no' and you kept going." He told the jury:

> "That is not a particularised rape, ladies and gentlemen. That is not something he's charged with. You can't find him guilty on the basis of what's particularised here before you of something like that."

[34] In this Court, the respondent suggested the defence address had urged the jury to find the complainant had described an encounter with the appellant on a different occasion — not any of the rapes alleged on the indictment. It is clear that this part of the address was about the difference between the complainant's evidence and what the witness recalled the complainant had said in the overheard conversation. The appellant's counsel was using the witness's evidence to discredit the complainant's evidence given at the trial. This was consistent with the defence case at trial, namely that the rape allegations were entirely untrue and the complainant had manufactured them because she was angry when she learned the appellant was having an affair.

[35] A mistake direction could have weakened, if not defeated, the main thrust of the defence case — that the alleged rapes did not occur at all, but were invented by the complainant.

[36] There is another feature affecting a possible mistake direction.

[37] The jury had heard the complainant's evidence that the appellant had never penetrated her vagina with "what felt like a fist" on any other occasion during their relationship. While there was evidence that sometimes the appellant had inserted his finger or perhaps fingers during sexual intercourse, the complainant's description of the nature of the penetration on the night in question was profoundly different. In this respect, count 1 was as unprecedented as the anal penetrations alleged in counts 2 and 4. The evidentiary basis for an honest and reasonable mistake about consent to count 1 was little better than for counts 2 and 4.

[38] If the mistake direction were to be given as to count 3 alone, it would involve the jury considering whether, having penetrated the complainant in an unprecedented and painful manner with his hand, the appellant honestly and reasonably thought she was consenting to a subsequent penetration with his penis. The awkwardness for the appellant in embracing such a submission would be little different to the potential awkwardness arising from the alleged interposed anal penetrations, which the appellant's counsel says explains not seeking the mistake direction at the trial.

[39] In light of the whole of the evidence, there was a negligible prospect of the jury, having accepted the vaginal penetrations occurred, having a reasonable doubt about whether the appellant acted under an honest and reasonable, but mistaken, belief as to the complainant's consent. Proposing such a scenario would have weakened the appellant's defence that none of the alleged acts occurred. In the circumstances, the defence was justified in not seeking the direction and the learned trial judge was not under a duty to give it.

[40] It also follows that the appellant was not deprived of a real chance of an acquittal by the failure of the learned trial judge to give a mistake direction to the jury.

Conclusion

[41] I would dismiss the appeal.