

# DISTRICT COURT OF QUEENSLAND

CITATION: *R v APB* [2020] QDC 141

PARTIES: **THE QUEEN**

**v**

**APB**  
(defendant)

FILE NO/S: Indictment No. 236 of 2020

DIVISION: Criminal

PROCEEDING: Trial

ORIGINATING COURT: District Court of Queensland

DELIVERED ON: 19 June 2020

DELIVERED AT: Cairns

HEARING DATE: 17 & 18 June 2020

JUDGE: Morzone QC DCJ

ORDER: **1. Count 1: Not Guilty.**  
**2. Count 2: Not Guilty.**  
**3. Count 3: Not Guilty.**  
**4. The defendant is discharged in respect of counts 1, 2 and 3 in the indictment No. 236 of 2020.**

CATCHWORDS: CRIMINAL LAW – JUDGE ALONE TRIAL – serious indictable offence – rape – the defendant elected a trial to a judge sitting without a jury - verdict in respect of counts 1-3 not guilty

## **Legislation**

*Criminal Code* 1899 (Qld), ss 349  
*Criminal Law (Sexual offences) Act* 1978, s4A  
*Evidence Act* 1977 (Qld)

## **Cases**

*Papakosmas v The Queen* (1999) 196 CLR 297

*R v AW* [2005] QCA 152  
*R v E* (1995) 89 A Crim R 325  
*R v Foster* [2014] QCA 226  
*R v NM* [2013] 1 Qd R 374  
*R v PAS* [2014] QCA 289  
*R v RH* [2005] 1 Qd R 180  
*R v Schneider* [2000] 1 Qd R 546  
*R v Van Der Zyden* [2012] 2 Qd R 568

COUNSEL: R Boivin for the Crown  
J Jacobs for the Defendant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown  
Osborne Butler Lawyers for the Defendant

### Summary

- [1] While sharing a prison cell with the 19 year old defendant, the complainant claims that he was repeatedly and systematically orally and anally raped by the defendant during a period of about 22 days from 11 March 2019 to 2 April 2020. The complainant who was in his late forties with an aged appearance describes that he was violated with the use force, or by threats or intimidation, or by fear of bodily harm with razor blades. On 2 April 2020 the demonstrably exasperated complainant sought to garner the attention of the unit manager by reporting, not any sexual assault, but a plot by other prisoners to harm two officers. He bizarrely resisted intervention by intermediate prison officers by smashing a television and purporting to swallow razorblades, which necessitated higher intervention of the unit manager. The complainant later complained of sexual assault in general terms to the unit manager, which resulted in his separation from the defendant, movement from the cell and eventually from the facility.
- [2] The defendant was charged with 8 separate counts of rape, and pleaded not guilty to each count at the commencement of trial. The mode of trial was by a Judge sitting without a jury.
- [3] The crown adduced evidence from the complainant, several prison officers and a prisoner over two days. At the conclusion of the crown case the prosecution discontinued counts 4 to 8 for want of sufficient proof of evidence from the complainant. This left counts 1 to 3 for determination. The defendant elected to give evidence to the effect that he did not orchestrate his cohabitation with the complainant, never exposed himself and never sexually assaulted the complainant as alleged or at all. I found the complainant's account unreliable, implausible and uncertain. In contrast, the defendant impressed me as being credible and reliable so as to provide a satisfying answer to the prosecution's case.
- [4] For count 1 and 2 the prosecution allege that on this first occasion the defendant inserted his penis into the complainant's mouth and then his anus while in the cell. For court 3 the prosecution allege that the defendant inserted his penis into the complainant's anus without his consent in the shower of the shared cell. I am left with a reasonable doubt as to the occurrence of the conduct alleged to constitute the offending of rape subject of counts 1, 2 and 3, respectively.
- [5] Consequently, I am bound to find the defendant not guilty of each of counts 1, 2 and 3. The defendant will be discharged in respect of counts 1, 2 and 3 in the indictment.

## Rape

[6] Section 349 of the *Criminal Code* provides for the offence of rape, relevantly here, as follows:

“349 Rape

(1) Any person who rapes another person is guilty of a crime.

Penalty: 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.

....”

[7] Consent means consent freely and voluntarily given by a person with the cognitive capacity to give consent.<sup>1</sup> Without limiting that definition, a person’s consent to an act is not freely and voluntarily given if it is obtained: by force; or by threats or intimidation; or by fear of bodily harm; or by exercise of authority; or by false and fraudulent representations about the nature or purpose of the act; or by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner. Consent does not need to be communicated verbally, consent can be communicated non-verbally and can be inferred from all of the circumstances. Cognitive capacity in this context means that at the time of the alleged offence, the complainant had sufficient understanding to know what was occurring in order to be able to give consent to it.

[8] The burden rests on the prosecution to prove the guilt of the defendant. Of course, there is no burden on a defendant to establish any fact, let alone his innocence. The defendant is presumed to be innocent. For the prosecution to discharge its burden of proving the guilt of the defendant, it is required to prove beyond reasonable doubt every element that goes to make up the offence charged and similarly exclude any possible defence.

[9] Since there are three remaining charges, I will consider each charge separately, evaluate the evidence relating to that particular charge and decide whether I’m satisfied beyond reasonable doubt that the prosecution has proved its essential elements. Any doubt concerning the truthfulness or reliability of the complainant’s evidence in relation to one count, will be taken into account in assessing the truthfulness or reliability of other counts and his evidence generally.

[10] The circumstances of the alleged offending are different, but my general assessment of witnesses will be relevant to all counts, so that if I have a reasonable doubt about one aspect of evidence that will be relevant to the other counts.

[11] The evidence comprises the witnesses’ testimony, exhibits and express admissions. For the most part the facts can be proved by direct evidence, as well as circumstantial evidence capable of providing a proper basis for the court to draw inferences. The court must only

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<sup>1</sup> *Criminal Code* 1899 (Qld) s 348.

draw reasonable inferences from basal facts proved by the evidence, where there is a logical and rational connection between those facts and the inferences or deductions or conclusions.

### **Complainant's Testimony**

- [12] The complainant's testimony comprised of his oral testimony heard in closed court. He gave evidence by an audio/visual link between a separate room and the courtroom. There was no other person sitting in the room, and the defendant was present in the court room at the time. All of these measures used for the complainant's evidence were in accordance with the standard and routine procedure of the court. I assess this evidence in the same way as the other probative evidence in the case.
- [13] The complainant is a man in his late forties. He testified that he had been introduced to the defendant about two weeks before the defendant moved into the same cell. He described that the defendant then had habitually come to the door of his unit daily or every second day seeking out the complainant. When asked by an officer about sharing a cell he described the defendant to the officer as being "*a friend of the family*" and that he "*didn't care*" if he shared the cell. The complainant also speculated about why the defendant was not allocated a "*spare cell next door*" or with the defendant's uncle, but these seem to be borne out of impermissible assumption on his part and I give them no weight.
- [14] The photographs of the cell showed two bed bunks to the right of the entry door, a desk and television, and a shower, toilet and sink on the left side. The complainant described that he slept on the bottom bunk bed, and the defendant slept on the floor using the mattress taken off the top bunk bed.
- [15] During the first night in shared accommodation the men made small talk to make their acquaintance. The complainant recalled that this included talking about the complainant's "nephew" and the defendant querying rumours about that man and the complainant "*were gay and all that*". The complainant described that night as being "friendly". As to the second night, the complainant described:  
*"I was sitting on my bed and then he came up and he pulled down his pants and flopped his penis out in front of me and told me to suck it. I told him to wake up to himself and he punched me in the face twice, and then he – [indistinct] dazed, and I – and then he made me suck him off and then next minute I was just down on my knees on the floor and over the bed with my knees on the floor and he started fucking me."*
- [16] He clarified that he was he was initially sitting on the bed while the defendant was standing, and he described the defendant's penis was "*not long*" in his mouth. He initially identified that "*he hit me*" as happening first, but then described:  
*"I know he stuck his penis in my mouth and then he – then he hit me – or he hit me. The next minute I was down on the floor with my knees on the floor, over the bed and he had my pants down and he was---*".
- [17] He also recalled the defendant saying in effect - "*you and Travis were like that*". The complainant described that while the defendant had his penis in the complainant's mouth, the defendant had his hands "*one on my butt, I think, and one around my neck*". He also described that when the defendant inserted his penis into the complainant's anus - "*I was over the bed and he was – he was behind me with his hand around my neck, at the back*". The complainant testified that the defendant did not use a condom and ejaculated into his

anus; he then laughed, told the complainant to “*stay there*” and then had a shower. When prompted, the complainant described that he “*felt scared*” because the defendant afterwards “*saying he had HIV and – and he could get me bashed*”. The complaint said: “*He told me to have a shower. I had a shower, and then I just laid in bed and we both went to sleep*”.

- [18] The complainant recalled that on the next day – “*I had a bruise on the side of my face that people were asking me about*”, and admitted describing to an officer “*I think a basketball – tennis ball hit me in the face or something*.” The complainant remarked that the defendant “*made sure I wasn’t near the office*”.
- [19] On the next (third) night in shared accommodation, the complaint described that – he was naked and having a shower when he “*felt a whack in the back of my head, I think, and I was dazed*” later describing that “*I fell to the ground and was, like – it went – everything went all white and everything went blurry*,” He recalled “*I woke up on the ground and he was on top of me*.” The complainant described that he was - “*flat down on the ground*” - “*face down*” - “*in the shower*” and he “*felt his penis inside of me. He had [indistinct] a sharp object, said he was going to cut me*.” He said that he thought the defendant ejaculated on his back, then “*He just laughed, had a shower – finished, I’ve had my shower, then I went and got into bed*.”
- [20] The complainant recounted a later conversation and the defendant’s reaction saying – “*I think I said, ‘I’ll move out,’ or something, and that’s when he started to get a bit violent again; said if I move out, he’s got cousins and like that, he’ll get me – get me bashed and – like, I seen him talking to other people, you know, ...*”.
- [21] The complainant went on to describe that the defendant would often “*hit around the legs, around my chest area*”, and in the last night of the shared accommodation - “*He hit me and placed me on the bed, hit me around the torso, had my head in the corner of the bed*”. He also asserted that he was penetrated in his “*backside*” and that this sort of thing happened “*nearly every night*”, and without his consent, after the officers walked around to do the evening muster count between 7 or 8 o’clock.
- [22] During cross-examination, complainant accepted that he’d had a sexual relationship with the man subject of rumour and had characterised himself as bi-sexual but denied propositioning the defendant or having sexual relations with other prisoners in return for drugs. The complainant placed the offending as variously occurring in light and dark in the confined area of the cell. Yet he was unable to be sure whether the defendant was circumcised or not, saying “*I believe so. Every time I seen it, it was – it was hard*” ... “*Every time I seen it, it was – it was hard, so I didn’t see no foreskin*”. The complainant accepted that there were events when the two men had disagreements resulting in a physical altercation.
- [23] The complainant also portrayed the defendant as controlling. He described that the defendant told him to tell others that he was a friend of the family and like a cousin, and recalled telling one officer that “*I don’t do anything unless my cousin tells me to*”. He described the defendant as being ‘close by’ anytime he approached an officer’s desk. I do not accept that the complainant was so controlled by the defendant. The complainant had already represented the complainant as a friend of the family when initially approached about the shared cell arrangement.
- [24] In any event, the complainant testified about his elaborate efforts to get the attention of his unit manger to effect his move out of the shared cell arrangement which did put him at risk of

retribution – but not regarding the defendant. On 2 April the defendant threw a note over to an officer to the effect that the “*two officers were going to get attacked*”. He was taken outside, to an office, and spoke to the officers before returning to the cell to effect a move to another single cell. However, the complainant later actively resisted any move by staying in his cell, throwing and smashing a television on the cell floor, holding a shard of the appliance and feign swallowing a razor blade. The complainant explained that he was concerned about moving to a proximate cell and feared retribution by the defendant. The complainant’s escalating behaviour attracted the attendance of the unit manager, Officer O, who calmed the situation to enter the cell restrain and follow the escort of the complainant to the medical unit.

### **Other evidence**

- [25] I heard evidence from prison officers and a former prisoner who occupied the neighbouring cell. There was no evidence of anyone seeing, hearing or otherwise being alerted to the offending complained of by the complainant. The prisoner testified that: “*I couldn’t hear anything. Nothing*” and he agreed that the complaint and defendant were friendly and “*Just – just mates, really.*” Whilst he saw the complainant with a graze on his face he did provide further context of time or direct conversation.
- [26] The defendant’s conduct of 2 April 2019 was generally consistent with the observations of prison officers who gave evidence. Officer O gave evidence of the preliminary complaint made by the complainant during a conversation after he was cuffed on the bed inside his cell, and later in the medical unit. He recounted the preliminary complaint made by the complainant as follows:

*“Can you tell me what conversation you had with him when you were sitting on the bed?---Yep. So, once he was on the bed, I – I said to [complainant] – I said, “So what’s really going on? You’ve got something to tell me?” And he said, “Oh”. He said, “[the defendant] signed all of his property over to me.” And I said, “What do you mean he signed all of his property over to you?” He said, “Oh, he was advised by his legal team that he needed to sign over his property.” And I said, “Do you know what that was all about?” And he said, “No. I didn’t know what that was about.” I said, “Okay.” He said, “But I need to tell you that I’ve been – that – that I’ve been sexually assaulted.” And I said, “You’ve been sexually assaulted by who?” And he said, “By [the defendant].” And I said, “But you’ve just said to me that he’s family.” And he said, “Yeah. He is. But he’s been sexually assaulting me.” And I said to him – I said, “Okay.” I said, “So now we need to look at this a different way, and we need to manage this a different way. So, as a result of that, I now need to get you seen by the nursing team and also by the psychologist team as well.” ...*

*Once [the complainant] was in the medical unit, did you have any further conversations with him?---Yeah. Myself and Acting Correctional Supervisor Nicholas Lee made our way over to the medical unit, just to make sure that he was receiving that he required. We also inquired further as to the allegations to what had occurred. And [the complainant] went on to say that it all started within only a matter of a couple of nights of [the defendant] and himself sharing a cell together that he would request sexual favours and sexual acts to be performed on him. ...*

*Who would request the sexual acts to be performed on whom?---That would be [the defendant] – had – had been requesting [the complainant] to perform sexual acts on [the defendant].*

*Did he describe in any more detail what that involved?---No. He didn't go into any details of what the sexual acts were. I didn't inquire as to what the sexual acts were, in the off chance that it may bring back memories or also upset the prisoner at the time.*

*And, after you did that, what happened?---The medical team contacted Mareeba District Hospital. And the medical team were advised that he needed to attend Mareeba Hospital to be seen by their nursing team. With that, [the complainant] turned around and said that he didn't wish to attend Mareeba District Hospital, but it was advised that it was best that he did attend, and, if he didn't wish to receive treatment by the medical staff in Mareeba Hospital, that he was then able to advise the nursing staff at Mareeba Hospital. With that, [the complainant] then turned around and said that he wished to have [the defendant] charged as well.”*

- [27] I have considered this evidence of the preliminary complaint for the limited purpose of assessing consistency or inconsistency of the complainant's statement or conduct<sup>2</sup> to buttress or otherwise erode the complainant's credibility about the commission of the offence,<sup>3</sup> but it has no probative value or capacity to independently prove anything.<sup>4</sup> The mere existence of inconsistencies does not mean that, as a matter of necessity, I must reject the complainant's evidence. Some inconsistency is to be expected, because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time, to tell a slightly different version each time, and likewise for recipients of a complaint to relay slightly different versions drawing on recollection.

### **Consideration**

- [28] For the most part, the complainant was demonstrably disordered, vague and unreliable in his account, which stood in stark contrast to the particulars and opening of the crown case.
- [29] The complainant's account lacked realism and detail which was incongruous with his portrayal of the defendant's violent, sustained and overbearing offending in a periods of about 3 weeks in the confinement of a prison cell. His description of the first occasion comprising the conduct for counts 1 and 2 seemed to me improbable, having regard to the placement of the defendant's hands, gaps between critical movements and lack of audible disturbance. There is a similar lack of disturbance and improbability in the second occurrence comprising count 3.
- [30] There was no testimony by the other witnesses about the dynamic between the complainant and defendant before or during their period of cohabitation, nor did any officers or others apparently see or hear anything of the goings on described by the complainant. There was no evidence of report of any observed behaviour or noise in the account of officers or other prisoners in nearby cells. It strikes me as implausible that the defendant engaged in the

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<sup>2</sup> *R v AW* [2005] QCA 152; *R v Foster* [2014] QCA 226.

<sup>3</sup> *R v NM* [2013] 1 Qd R 374; *R v PAS* [2014] QCA 289.

<sup>4</sup> *Criminal Law (Sexual Offences) Act* 1978, s 4A; *R v Van Der Zydén* [2012] 2 Qd R 568; *R v Schneider* [2000] 1 Qd R 546; *Papakosmas v The Queen* (1999) 196 CLR 297; *R v RH* [2005] 1 Qd R 180.

forced and frequent offending alleged by the complainant. Officer O as the unit manager was able to be more specific about the muster times occurring on an ad hoc basis four times during the night. I think it implausible that the defendant has exerted any significant power or control to sustain any offending conduct. The defendant was relatively physically smaller and younger, in comparison to the more experienced and larger defendant.

- [31] The crown led the evidence of the defendant's conduct before cohabitation, subsequent other unspecified incidents of sexual conduct during cohabitations and the uncharged conduct of the last night as proof that the defendant had a sexual interest in the complainant and was prepared to act upon it.
- [32] I do not accept the complainant's assertion, absent any direct knowledge, that the defendant specifically sought or somehow orchestrated the double-up arrangement in the complainant's cell. The officers who gave evidence could not assist in this regard, and the only direct evidence on the point came from the defendant himself. It seems to me that the evidence of uncharged conduct relied upon by the prosecution lacks sufficient detail and precision to show a sexual interest by the defendant in the complainant. I am not satisfied beyond reasonable doubt that the defendant did the unspecified and uncharged acts as that complainant's evidence suggests, or that the conduct demonstrates that he had a sexual interest in the complainant that he was willing to pursue. Having said that, it does not follow that the defendant is not guilty of the offence of rape in this case. I must still decide whether, having regard to the whole of the evidence, the offence has been proved to my satisfaction beyond reasonable doubt.
- [33] After making a preliminary complaint to the unit manager, the complainant was transported to the local public hospital where he was medically and psychologically examined. The defendant submitted that the crown failed to call a material witness, being those who might have been able to give some relevant evidence of the complainant's medical or psychological presentation and further compliant in the medical unit. I do not speculate about what others who were not called might have said if they had been called. I act on the basis of the evidence that has been called and only that evidence.
- [34] I also do not accept that the complainant made earlier attempts to disclose his predicament or that his efforts to do so were thwarted by the defendant's constant presence. There were likely many opportunities over a period of 22 days to alert others of his predicament. However, there is no right or wrong way for a victim to complain and it is not for me to glean anything from missed opportunities. There could be many reasons for not complaining earlier including fear of retribution that may be at play in a prison setting.
- [35] In the end, I found the complainant's account unreliable, implausible and uncertain, leaving me in a state of considerable doubt.

### **Defendant's Evidence**

- [36] The defendant was not obliged to give evidence, or call witnesses to testify or otherwise produce evidence. That does not shift any evidentiary burden to him. The prosecution retains the burden of proving each of the elements of the offence beyond reasonable doubt, having regard to the whole of the evidence.
- [37] This is a case often described as one of "word against word". But this does not call for a choice of the competing evidence as between the complainant and the defendant. Indeed, it is

not a pre-requisite to an acquittal for the defendant to be believed.<sup>5</sup> If his evidence is found credible and reliable so that it provides a satisfying answer to the prosecution's case, he ought to be acquitted. Similarly, he should be acquitted if his evidence is found unconvincing yet I'm left with reasonable doubt. Of course, if I'm unconvinced by the defence evidence, I'll set it aside, and consider on the rest of the evidence I accept, whether I'm satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence.

[38] The defendant testified that he "*had troubles in the unit I was in over drugs and – well, I asked the unit off – I told the unit – unit officers that I need to be moved. And the only o – unit off – the only unit they could place me in was S23.*" He denied any request or orchestration to share a cell with the complainant. He recalled early limited interaction with the complainant, particularly a conversation of the complainant providing contacts for hotels to accommodate the defendant's flood affected family in Townsville. The defendant testified that on the first night of sharing cell with the complainant, the complainant had disclosed having sex with another prisoner, and performing sexual acts on other prisoners in return for the substance "Suboxone" to use and supply to others.

[39] The defendant described the complainant propositioning him saying:  
*"Was there any occasion, [defendant], when [the complainant] asked you to perform any sexual act on him?---Yes, approximately two – two or three days before he made them allegations, he asked me in the room if he could suck my dick.*

*What did you say to him?---I told him go f – like, 'Get fucked. I don't do that shit.'*

*What did he say in response, if anything?---Not much. Sort of went quiet. Said sorry. And – yeah. It just went awkward."*

[40] The defendant testified about three distinct events when he had disagreements resulting in a physical altercation, including physically assaulting the complainant. However, the defendant denied any sexual conduct with the complainant. During cross-examination the defendant affirmed hearing of the complainant's sexual conduct with others, affirmed the complainant's indecent propositioning, maintained his denials of engaging in any sexual conduct with the complainant and asserted that the defendant had never seen his genitals. He denied any sexual, power imbalance or overbearing conduct towards the complainant. The defendant was not challenged as to the uncircumcised appearance of his genitals.

[41] The defendant impressed me as being credible and reliable so as to provide a satisfying answer to the prosecution's case.

[42] I am left with a reasonable doubt about the alleged conduct and penetration to any extent.

## **Verdict**

[43] For these reasons, I find the defendant not guilty of count 1, not guilty of count 2, and not guilty of count 3. The defendant is discharged in respect each of counts 1, 2 and 3 in the indictment.

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<sup>5</sup> Cf. *R v E* (1995) 89 A Crim R 325 at 330 per Hunt CJ.

**Judge D P Morzone DCJ**