

DISTRICT COURT OF QUEENSLAND

CITATION: *R v MLX* [2020] QDC 234

PARTIES: **THE QUEEN**

v

MLX
(accused)

FILE NO/S: Indictment No 1537 of 2019

DIVISION:

PROCEEDING: Judge Alone Trial

ORIGINATING COURT: Brisbane

DELIVERED ON: 18 September 2020

DELIVERED AT: Brisbane

HEARING DATE: 29 June 2020; 30 June 2020 and 1 July 2020

JUDGE: Jarro DCJ

ORDER: **The defendant is acquitted on each count.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – TRIAL HAD BEFORE JUDGE WITHOUT JURY – GENERAL – where the defendant was granted leave to be tried by a judge sitting without a jury – where the accused is charged with two counts of rape – whether the accused is guilty or not guilty of two counts of rape

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – CONSENT – GENERALLY – where the defendant is charged with two counts of rape – where the defendant conceded that an act of sexual intercourse occurred – where the defendant said such intercourse was consensual – whether the complainant did not consent to sexual intercourse

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – IGNORANCE AND MISTAKE OF FACT – AVAILABILITY OF DEFENCE OF HONEST AND REASONABLE MISTAKE – GENERALLY – where the defendant relies on, in the alternative, the defence of mistake of fact – where the defendant argues that the defence has been raised – whether the defendant has raised this defence to the requisite standard outlined in *Makary* - whether the crown

has disproved this defence

Criminal Code Act 1899, s 24, s 349

R v FAX [2020] QCA 139, applied.

R v Makary [2019] 2 Qd R 528, cited.

R v Oliver [2020] QCA 76, applied.

COUNSEL: R J Hood for the Crown
A J Kimmins for the defendant

SOLICITORS: Director of Public Prosecutions (Qld) for the Crown
Jasper Fogerty Lawyers for the defendant

Introduction

- [1] The defendant is charged with two counts of rape alleged to have occurred on 3 August 2018 at Redcliffe. The offences are said to have taken place in his vehicle, a Honda Odyssey. Count 1 is alleged to have occurred when the defendant penetrated the complainant's vagina with his penis in the front passenger seat of his vehicle, without the complainant's consent. Count 2 is alleged to have occurred in the rear of the vehicle after the complainant initially fell asleep beside the defendant.
- [2] For the defendant to be found guilty on any count, it must be proven by the Crown beyond reasonable doubt that the defendant had carnal knowledge with the complainant, without her consent.
- [3] The defendant does not dispute that an act of sexual intercourse occurred on one occasion. However the principal issues in dispute relate largely to the matters of consent and the operation of s 24 of the *Criminal Code* 1899, being the defence of mistake of fact. It is therefore for the Crown to prove, beyond reasonable doubt, that the two acts of penetration occurred as alleged and that at the time of each act, the complainant did not consent to sexual intercourse. Further the Crown must also disprove if necessary s 24 of the *Criminal Code* 1899.
- [4] As is identified in the Benchbook, the term "consent" means consent freely and voluntarily given by a person with the cognitive capacity to give consent. Without limiting this, a person's consent to an act is not freely and voluntarily given if it is obtained by force, threats or intimidation, fear of bodily harm, exercise of authority, false and fraudulent representations about the nature or purpose of the act, or by a mistaken belief induced by an accused person that the accused person was the person's sexual partner.¹
- [5] Further, regarding the issue of consent, I was referred to the decision of *R v Makary* [2019] 2 Qd R 528 to assist me in dealing with the interplay between the matters of

¹ 168.1, referencing s 348 of the *Criminal Code* 1899.

consent and mistake of fact. Sofronoff P (with whom Bond J agreed) said the definition of “consent” required two elements:

- (a) There must in fact be “consent” as to state of mind.
 - (b) Consent must be “given” in the terms required by the section.
- [6] The President noted that 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.²

Complainant’s Evidence

- [7] The complainant is a 27 year old Taiwanese lady. The complainant’s evidence was pre-recorded before Farr SC DCJ on 16 and 17 March 2020. The complainant’s evidence was given through an interpreter.³ The parties did not object to a copy of the transcript of the pre-recorded evidence being given to me as the pre-recorded evidence was played.⁴

Evidence in Chief

- [8] In her evidence in chief, the complainant indicated that she was living in Australia in 2017 and 2018 as part of a working holiday visa. She had recently returned for her second instalment of the visa when she began renting a room in a two storey house located at Caboolture on 29 July 2018. A number of the complainant’s overseas friends also moved into the same house. The defendant owned the house. He was the complainant’s landlord, who lived on the second level with his daughter and mother. The downstairs level was rented out to visa holders.
- [9] As part of her working holiday visa, the complainant worked at a strawberry farm located north of Brisbane.
- [10] These offences are said to have taken place in the early hours of Friday, 3 August 2018. The defendant asked the complainant out for a meal on 2 August 2018. According to the complainant, she received a written message via the social media application, WeChat App. She had only known the defendant for “just a few days”. She told him that she would have a meal with him after she finished work. The complainant finished work at about 2.19pm. She went home, changed and then met the defendant in the garage where his Honda Odyssey was parked. She said she was wearing a casual sporting outfit which consisted of sport shorts and a longer fitting Adidas top.
- [11] The defendant and the complainant drove to Sunnybank to have dinner. Because they arrived early, the restaurant was not yet open so they played poker machines at the hotel.⁵ During the car trip to Sunnybank, they exchanged “some sexy jokes”, which the complainant thought was “very weird”. Her understanding of the purpose

² At [50] per Sofronoff P.

³ See Benchbook 21.

⁴ At the time I stated to the parties that I would treat the transcript as an aid to the pre-recorded evidence. See Benchbook 20.1.

⁵ Exhibit 18

of the trip to the restaurant was “just for a meal”. She was not attracted to the defendant nor did she say or do anything to him to indicate that she was romantically attracted to him.

- [12] They ate at the restaurant and the defendant made a suggestion that they travel to the seaside at Redcliffe “where we can see dolphins”. She agreed. When they got closer to the Redcliffe seaside, a number of alcoholic drinks were bought from a local liquor store. The defendant paid for these drinks.
- [13] As the complainant was in the habit of taking photographs to post on social media, she took a photograph of the drinks which were purchased.⁶ The photograph also included the defendant’s Chinese cigarettes and a tin belonging to the complainant which contained marijuana. The marijuana was brought on the outing as the defendant told the complainant at an earlier time that he wanted to try it.
- [14] The complainant had one beverage. She recalled the defendant consuming more than her. She said that she smoked cigarettes but she did not smoke the marijuana. She had not smoked marijuana for about three or four days prior to the alleged events. The complainant recalled the defendant trying some marijuana. They kept talking and drinking.
- [15] The Honda Odyssey had a sunroof. The complainant recalled the two of them standing on the seats within the vehicle looking out through the sunroof. She recalled seeing some people from a distance who were fishing. They were the only people around. She could not recall what time they were standing on the seats. She recalled the two of them drinking and smoking for “about an hour [/] about half an hour”. After that, the defendant suggested to the complainant that “we have a peek of the video clips” on his mobile phone. So they moved to the back seat of the Honda Odyssey.⁷ She asked the defendant whether they could go home but the defendant said that he needed to wait for the effects of the alcohol to subside before he could drive, so he suggested that they look at the video. The video they watched was pornographic in nature. They viewed the video from the back seat of the vehicle. The seats were initially upright however the defendant changed them to flat seats. The complainant said the back seats were flat. She was “lying halfway down, so halfway up”.⁸ The defendant was on her left. The complainant said that she felt uncomfortable viewing the video. She stopped watching the clip after a few minutes. The defendant started kissing her. He then suddenly rolled his body onto hers.⁹ She was still sitting slightly upright at this point but could not push him away because he was too heavy.
- [16] The complainant recalled the defendant doing a lot of kissing and touching and that “he said he wanted to fuck me”. She declined and was trying to push him away but she could not. She said to him that he should not do this and that he needed to respect her. He tried to remove her clothes by force.¹⁰ When he attempted to do this, she started crawling to the front passenger seat of the car. The defendant pulled the complainant’s pants down but not entirely as she was crawling to the

⁶ Exhibit 8.

⁷ See for instance T1-37 and exhibits 11 and 12.

⁸ See for instance T1-38 and exhibit 13.

⁹ See for instance T1-41.

¹⁰ See for instance T1-42.

front seat to attempt to get away from him. He then “rushed to the front” passenger seat and tried to force her back to the back row. By this stage, the complainant’s pants had been pulled by the defendant “below the knee”. He then forced his way into the front passenger seat and grabbed her so that she ended up on top of him.¹¹ She then described that the defendant was holding and hugging her. She was resisting during the entire process and kept saying “no”.

- [17] The complainant gave evidence that the defendant did not care what he was doing and was trying to force his way onto the complainant. He was able to put his penis into the complainant’s vagina. Intercourse took place over the course of three to five minutes until the defendant ejaculated.¹² The complainant described “collapsing” and “feeling really bad”.¹³ The defendant offered the complainant a contraceptive tablet. The complainant did not immediately take the tablet but took the defendant up on that opportunity after they eventually arrived back to the Caboolture residence.
- [18] The complainant recalled that after the first act of intercourse, the defendant said that he needed to take a nap because he needed to wait for the alcohol effects to subside. She said that she felt “helpless” and was “panicking”. It was at this point that “he started touching me up and down”. He was not going to sleep at all. He was touching her breasts. He started to pull her pants down and he was not going to sleep. The complainant recalled the defendant “trying to pull my pants down” and that the defendant kept touching her breasts and was not intending to go to sleep. She tried resisting him and told him that he had to take a “nap” first, so they both took a nap. She woke up from the nap when he was already on top of her and had inserted his penis into her vagina to the point of ejaculation.¹⁴ She was resisting him prior to that point and repeating the same things to him in the lead up to the first incident which the defendant ignored. She said that the defendant’s penis was already inside her when she woke up from the nap.
- [19] One conversation the complainant recalled after this point was that the defendant apologised for his actions and said “I should take him to jail house”. He told the complainant that he was going to return the rent for the week and also the bond. She declined.
- [20] When arriving back to the Caboolture residence, the complainant took a shower “because she felt dirty”. When she got out of the shower she worried again about the possibility of falling pregnant so she asked the defendant for the tablet that he initially offered to her when they were at Redcliffe. She messaged him via WeChat in order for this to occur.¹⁵
- [21] The following morning, the complainant said that she went to see a friend at Gatton and made a preliminary complaint to that person. That person was *PL*, a Taiwanese person who came over at the same time as the complainant as part of their working holiday visa. *PL* encouraged the complainant to report the matter to police. The complainant “roughly” recalled telling her friend what had happened about the

¹¹ See for instance T1-44.

¹² See for instance T1-46.

¹³ See for instance T1-47.

¹⁴ See for instance T1-49.

¹⁵ The WeChat messages were in evidence at trial: Exhibit 7 (including the translated version).

defendant's offending. During the time that she was with her friend, the defendant was trying to contact the complainant via WeChat. She responded via WeChat to him and informed him that she was visiting a friend in Gatton. He asked her whether she needed a lift. She declined. The complainant then made a complaint to police when she was closer to her residence in Caboolture. She sent a female officer, Purdy Huang, a text message giving her "all the details about what happened on that day".

- [22] At no stage did the complainant consent to having sexual intercourse with the defendant.

Cross-Examination

- [23] The complainant stated in cross-examination that when she first moved into the Caboolture residence on 29 July 2018, her immediate dealing was with the defendant's mother to whom she paid the rent and bond. She met the defendant on the second day after she moved in. This was after she completed a shift at work. The complainant and the defendant introduced themselves. She told him both her Chinese and English names. He reciprocated. She initially called him "landlord" and then he insisted that she call him "Leo". He asked her for her WeChat username details. She provided her contact details to him. He reciprocated and provided her with his WeChat contact details.
- [24] The WeChat messages between the complainant and the defendant were the subject of much cross-examination.¹⁶ It was argued on behalf of the defendant that the true nature of the relationship between the complainant and the defendant "was explicitly displayed in the WeChat messages both before and after" the meal between the two on 2 August 2018. The complainant said in cross-examination that the reason she and the defendant swapped contact WeChat details was in case there were enquiries relating to the payment of rent. Yet despite frequent contact between the complainant and the defendant, none of the relevant messages related to rental enquires. For example shortly after the WeChat details were exchanged between the two, the defendant sent a message to the complainant that "You are beautiful like a fairy" and her response was "I'm always beautiful". The complainant did not accept that any of the messages were flirtatious. Rather they were complimentary because she "had always been getting this kind of compliment"; in other words, "a lot of people would comment about her beauty". She denied that the defendant's messages demonstrated to her that "he was keen". She did not think he was interested, but rather that he just cared about her.
- [25] The WeChat exchanges demonstrated that the defendant offered to collect the complainant from work, on the day they were to have the meal. Further in one WeChat exchange that day, the complainant described herself as "Cinderella at work" and she sent the defendant a photograph of herself picking strawberries.
- [26] The complainant rejected the suggestion that she was having a date with the defendant. Her evidence was slightly different than that contained in her written statement to police where she agreed that "we would go on a date". However, the complainant was unsure as to the nature of the meaning of the word "date". She did not accept the proposition that the defendant was romantically interested in her.

¹⁶ Exhibit 7.

Instead, she thought it was just a “normal invitation for a meal”. She agreed to a meal with him.

- [27] In the lead up to the alleged offending, the complainant finished work at about 2.19 pm on the Thursday afternoon. She arrived back home, got changed and met him in the garage where his car was parked. She then spent approximately 10 hours in the company of the defendant until they returned in the early hours of the following morning (being Friday 3 August 2018). On the journey from Caboolture to Sunnybank, the complainant formed the impression that the way the defendant spoke was “really dirty”.
- [28] The complainant accepted that at the committal hearing, she was asked whether she thought the defendant was flirting with her, to which she responded in the affirmative.
- [29] They played some poker machines for a period of time before the restaurant opened. I viewed the CCTV footage of this.¹⁷ It is unremarkable. The complainant accepted that they were having fun together and the defendant showed her how to play the poker machines. She spent a couple of hours with him at the restaurant and could not remember what they spoke about; although later in her evidence, the complainant described the defendant as being quite easy to talk to. She said the dinner was “boring [because] I was feeling a bit unwell”. The defendant paid for dinner. They drove to Redcliffe and stopped on the way to buy the beverages from a local liquor store. They then went and parked the car.
- [30] The complainant was given a self-incrimination warning when questions were asked about her possession of the marijuana. She accepted that she brought it on the journey for the defendant and refused to answer whether she was quite happy to give it to him.
- [31] For approximately half an hour, the complainant and the defendant stood on the middle seats of the vehicle with their upper bodies protruding through the sunroof. They smoked, drank and talked. The complainant described these interactions as “having a normal conversation and drinking”. She recalled getting back inside the car because it was getting cold and the defendant made the suggestion to watch the video clips. When back inside in vehicle, the complainant recalled the defendant making the seats into a bed. He also provided a blanket and sleeping bag. Once he got them out, he suggested that they lay down on the seats and watch a movie. He sat down first by “sitting down with his feet pointing forward”. She then sat beside him. Both were sitting up with their backs leaning up against the back of the car seat. They were certainly not lying down.¹⁸ However I note the following exchange occurred a short time later in cross-examination:

“INTERPRETER: Yes. We were – yes. The seat is all flat so I was lying on top of that.

MR KIMMINS: Lying with your whole body on top of the seat? Because the seats have been laid down to make a bed; is that right?

¹⁷ Exhibit 18.

¹⁸ T2-61.

INTERPRETER: Yes.”¹⁹

- [32] The complainant said that the defendant asked her to sit down to see the video being played. However in her police statement, no reference was made to this. The complainant then described to police that they were lying there watching a movie and he started to kiss her.
- [33] The complainant accepted that she and the defendant were snuggling together before the video started. They watched the video until the complainant told the defendant that she did not want to watch the video anymore. Then the defendant started pressing against her with his body and kissing her. When he was “pushing and forcing himself upon” her, the complainant was struggling as hard as she could to resist him. She did so for a number of minutes and then she took a break because she was so exhausted from this. She described him as being very strong. All the while whilst she was struggling, the defendant was kissing her passionately and taking off her clothes. It was the first of a number of occasions where she was struggling and attempting to resist him whilst they were in the car. On each occasion that she was struggling and resisting, she tried with “all of her might” to stop him from taking advantage of her. Each time she struggled. She accepted that she became exhausted and stopped struggling. She described running out of energy and also having a cold. There were no physical marks inflicted upon the complainant as she gave evidence that when she arrived home, she had a shower, examined her body and could not see any physical marks by way of a bruise, red mark or any type of indication of physical contact that she had with him. She told police that her vagina was painful because he was using a lot of power when “he was doing it”. She did not consider it necessary to have a vaginal examination with the doctors as she had already taken a shower.
- [34] The complainant recalled that the defendant was trying to take her clothes and pants off as he kissed her. He was on top of her when doing this. She was immobile. She recalled him being able to take off her top. She thought he removed her bra. He also managed to pull her underwear down to the lower part of her lower legs. She said “they were lower to my lower leg”. To me it was unclear where this incident occurred, however there seems to be no reference to these actions having taken place in the front seat where the first act is alleged to have occurred.
- [35] The complainant then described the defendant leaving her momentarily in order to locate a condom. He therefore removed his penis from her vagina.²⁰ He was looking to the left and right side of the vehicle at the back of the vehicle and could not find a condom. And whilst he was doing that, that was when the complainant “made the break to get into the front of the car”. She said he was trying to pull her back to the back seat and “that’s how he got the chance to pull me back into the back seats and that’s how he can come inside me.”²¹
- [36] Further in cross-examination, the complainant recalled details of her pants and underpants being totally removed by the time she got to the front seat. She then described “and so he, then, grabs” she explained “because I rushed to the front.”

¹⁹ T2-62.

²⁰ In other words, I took the complainant’s evidence at this point in cross-examination to be that an act of penetration occurred.

²¹ T2-76.

She said that he penetrated her again in the front seat, being the left passenger side. She explained that he sat in the front passenger seat and grabbed her and put her on top of him. She was facing him and he was holding her body with his hands. Penetration occurred and the complainant recalled the defendant ejaculating about three to five minutes later. By that stage, the complainant was “really weak [because she] had already spent a lot of energy”. She also said in her evidence “stop I don’t want it”. These features however were not detailed in the complainant’s statement to police.

- [37] In response to the complainant having said to the defendant that “it was a very dangerous time” for her and that she “could get pregnant”, the complainant said that the defendant told her that “it was okay” and that he had “tablets”. She said that he then offered her a tablet. The complainant also recalled him saying that he would pay her \$200 a week to have her as his mistress. He also said “I’m sorry I did this [to] you.”²² She understood this apology as referable to him ejaculating into her vagina.
- [38] After the defendant ejaculated, they returned to the back seat. The defendant went there first. The complainant followed him. They laid down. The complainant then recalled falling asleep but felt the defendant touching her breasts. She then told him that if he wanted the alcohol to wear off, he needed to take a nap. They both went to sleep. She woke up when he penetrated her vagina with his penis.
- [39] The complainant was cross-examined about her disclosures made to Queensland Police Service Liaison Officer Purdy Huang. She accepted that she was trying to tell Ms Huang the “full truth” of what occurred in the car. She told Ms Huang that sexual intercourse occurred before they went to sleep and that she told the defendant that he needed to sober up and sleep in the car before driving home.
- [40] The complainant was challenged about the fact that she did not mention to Ms Purdy Huang that an act of sexual intercourse occurred after they both fell asleep. The reason for that was because she provided Ms Purdy Huang with “a very brief summary of what had happened and I did skip that part.”
- [41] The complainant was also cross-examined about what she told her friend *HC*. She only mentioned one incident of sexual intercourse to *HC*.²³ The complainant said that she did not provide the full details to her friend but she gave “more detailed information to another friend called Jun”. “Jun” was the complainant’s friend whom she visited at Gatton and was the person who contacted Ms Purdy Huang.²⁴
- [42] Whilst at Gatton, the complainant kept in contact with the defendant by WeChat on the Friday and Saturday after the alleged events.
- [43] The complainant acknowledged a message between the two included a message from the defendant to her along the lines of “what I can do is only to help you a little in terms of finance and take you out to have fun and I don’t want to lie to you.” He told her that he could not get a divorce from his wife who was living in China.

²² T2-83.

²³ T2-90. This is not the subject of preliminary complaint evidence.

²⁴ T2-90. It was unclear to me and Counsel whether this is the same person as *PL*.

- [44] The complainant made a formal complaint to police on 6 August 2018.
- [45] I consider it convenient at this juncture to make a number of observations about the complainant's evidence. I did not consider the complainant to be deliberately dishonest but I am concerned about her reliability in detailing the events in question. There are some aspects of her evidence which I find unconvincing. For instance, her evidence in chief focussed initially on the first incident alleged to have occurred in the front passenger seat but I remain unpersuaded that an act of intercourse occurred in the manner alleged. The complainant said that she crawled to the front as the defendant was looking for a condom. The defendant then exited the back of the Honda, moved around to the front passenger side and managed to manoeuvre the complainant to the front seat in order for him to be seated so that she ended up on top of him with the defendant holding and hugging her over a three to five minute period to the point of ejaculation. I am not persuaded, to the requisite standard, that an act could have occurred in the manner alleged by the complainant. After this alleged incident, the complainant then, voluntarily, moved to the back seat, laid down beside the defendant, fell asleep for a period of time and was eventually woken when he inserted his penis into her vagina. However in cross-examination, the complainant accepted that she and the defendant were snuggling together before they watched the pornographic video. Furthermore despite all of the struggles, there were no physical injuries apparent on the complainant when she arrived back to the Caboolture residence. The complainant's evidence in cross-examination leads me to find that after one act of penetration in the back seat of the Honda, the complainant then moved to the front passenger seat. The defendant then somehow managed to sit in the front passenger where another act of penetration occurred. They both returned then to the back seat of the Honda. I remain curious as to why the complainant returned to the back seat with the defendant after at least one act of intercourse allegedly took place without consent. Then a further act of intercourse occurred in the back seat.

Preliminary Complaint Evidence

- [46] Regarding the preliminary complaint evidence, it was admitted by the parties by way of admission that on 8 August 2018, PL made a *Justices Act* statement to police in the following terms:
- (a) I have been in Australia since November 2017. I'm here on a working holiday visa.
 - (b) I am friends with [the complainant]. I have known [the complainant] for more than two years. I was aware [the complainant] arrived back in Australia in July 2018 sometime. [The complainant] and I would text each other every other day. We are good friends.
 - (c) I started work on a farm in Gatton on 1 August 2018.
 - (d) I called [the complainant] on Thursday, 2 August 2018 and asked her to come to Gatton because we were not working on this day. [The complainant] came to my house on Friday, 3 August 2018.
 - (e) On Saturday, 4 August 2018 after breakfast we were chit chatting. [The complainant] started to cry.

- (f) [The complainant] told me her landlord had pressed her down and raped her. [The complainant] told me she was struggling with him and it didn't help because the landlord is male.
- (g) [The complainant] also told me, she didn't know what to do about it. I advised [the complainant] to call the police and tell them.
- (h) I called the Taiwan Emergency Liaison Office and they gave me a phone number to a female police officer that spoke Chinese. I remember her name was Officer Huang. I spoke to Officer Huang about what to do next. Officer Huang told me she wanted to speak with [the complainant] first.
- (i) I gave [the complainant] Officer Huang's phone number to speak to her directly.

[47] It was further admitted by the parties that on 28 February 2019 *PL* gave sworn evidence with the assistance of an interpreter in the following terms:

“MR KIMMINS: Did [the complainant] indicate that the landlord ejaculated inside her?

INTERPRETER: Yes, she said that.

MR KIMMINS: And she was very angry with him for doing that?

INTERPRETER: Yes, of course, she was angry. Who wouldn't get angry if she was sexually assaulted?

MR KIMMINS: No, I'm talking about the ejaculation inside her.

INTERPRETER: Yes, of course, she was angry.

MR KIMMINS: Did [the complainant] ever mention that she'd been watching a porno movie with the landlord before he did this?

INTERPRETER: She didn't mention that.

MR KIMMINS: And did [the complainant] ever point out any injuries that she got as a result of what the landlord did? Did she point out bruises, or scratches, or anything like that?

INTERPRETER: She didn't mention that. She only said that he was on top of her, he was pressing her, and she was struggling.

MR KIMMINS: And finally, did she say how the – sorry. I withdraw that. Did she say to the witness how – what part of her clothes were taken off by the landlord?

INTERPRETER: She didn't tell me in detail about that part.

MR KIMMINS: Were any of her clothes ripped?

INTERPRETER: I didn't ask her about this part.

MR KIMMINS: Okay. Nothing further, your Honour. Thank you.

- [48] The parties also admitted by way of admission that the complainant made the following disclosure to a Queensland Police Service Liaison Officer, Purdy Huang, in a text message sent by the complainant to Purdy Huang at 2.63 pm on Sunday, 5 August 2018. The message was subsequently translated to English by Purdy Huang.

“Thursday, 2 August he asked me to dine together after work. At 2.19 pm I went into his car and travelled to South Bank for meal. At 4.00 pm he wanted to drop in Sunnybank Hotel to play pokie machine at 4.00 pm on the way to wait for the restaurant to open. At night he asked me whether to have a walk at the beach or take a view of the night?

We went to an open space which can view dolphins and big bridge. He bought some alcohol. This was about 8.00 pm or 9.00 pm. We were drinking in the car. He put down seats in the HSV and placed blanket. Later he proposed to lie down and watch a video and started to move his hands over me, forced to kiss me, held me down and said he wanted to fuck me. I continued to struggle and said no I don’t want to, you are the landlord, you must respect me. He completely ignored me. After that business he refunded me \$200 rent straightaway and mentioned he would pay me \$200 each week (as maintenance or service to be his mistress). He apologised what he had done to me, said sorry and that he couldn’t give me anything. I rejected him and said that I wasn’t that type of person and not accepting the money. He voluntarily put the money in my cigarette box. At that time I told him I was fertile period and what he had done was very bad. He produced morning after pill (emergency contraception pill) in the car. I didn’t take it. I was exhausted from the previous struggle. He said he needed to sober up and sleep in the car before driving home. At approx. 1.00 am we arrived home, I took shower right away. He went upstairs and said good night to me (something about medication unable to be translated). He said he was really sorry. Next day (Friday) I got up and went to Gatton. I told my friend about this. These days he’s been texting me to ask me out or go upstairs.”

- [49] Regarding the preliminary complaint evidence, that is the evidence of Purdy Huang and *PL*, I direct myself that such evidence may only be used as it relates to the complainant’s credibility. Consistency between the accounts of *PL* and Purdy Huang of the complainant’s complaint and the complainant’s evidence is something I may take into account as possibly enhancing the likelihood that the complainant’s testimony is true. However, I cannot regard the things said in those out-of-court statements by the complainant as proof of what actually happened. In other words, evidence of what was said on that occasion may bolster the complainant’s credit because of consistency, but it does not independently prove anything. Likewise any inconsistencies between the accounts of *PL* and Purdy Huang of the complainant’s complaint and the complainant’s evidence may cause me to have doubts about the complainant’s credibility or reliability. Whether consistencies or inconsistencies impact on the credibility or reliability of the complainant is a matter for me.

- [50] What strikes me is that the complainant made her complaints known to *PL* and Purdy Huang not long after the alleged offending, but the evidence of the witnesses do not corroborate the allegations against the defendant, when viewed in the context of the complainant's evidence. The complainant told no one of both acts, let alone three. Inconsistencies in describing events are therefore relevant to whether or not evidence about them is truthful and reliable, and the inconsistencies are a matter for me to consider in the course of my deliberations. But the mere existence of inconsistencies does not mean that of necessity I must reject the complainant's evidence about the offending. 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.
- [51] All in all though, I am of the view the preliminary complaint evidence detracts from the complainant's credibility and reliability due to the various irreconcilable inconsistencies. That evidence is against the complainant's credibility and reliability in assisting me to find that two acts occurred. To the extent that the evidence corroborates an act of penetration, both witnesses appear to have had relayed to them that an incident occurred in the back seat when the defendant was on top of the complainant. *PL* made reference that the defendant "pressed [the complainant] down and raped her". That was confirmed in her evidence given on 28 February 2019 with the assistance of the interpreter.²⁵ The text message sent to Purdy Huang corroborates a finding that an incident occurred after the defendant put down the seats and watched the video. Indeed the evidence of the complainant in cross-examination revealed that she was subjected to three acts. I consider these features go against an acceptance of the complainant's evidence regarding the two acts with which the defendant is charged.

Defendant's Record of Interview

- [52] The defendant participated in a record of interview with police.²⁶ In the interview, the defendant conceded that an act of sexual intercourse occurred. On multiple occasions he said such intercourse was consensual. I note that during the interview, passages from the complainant's statement were read to the defendant and he was invited to comment. He declined the opportunity on a number of occasions to comment on specific passages put to him by police. The defendant's responses have not been tested on oath and some of his responses in the interview seemed equivocal to me.
- [53] Mr Kimmins sought a *Liberto* style direction despite the defendant not giving evidence or calling any evidence but because the record of interview was tendered as part of the Crown case and there is some material conflict. I was directed to the authority of *De Silva v The Queen* [2019] HCA 48. Mr Kimmins submitted that if the defendant's exculpatory answers in the interview left me with a reasonable doubt as to his guilt, then that is the important feature to return verdicts of not guilty. Having considered the authorities, I consider it appropriate in the circumstances to direct myself that:

²⁵ See admissions.

²⁶ Exhibit 17. Whilst listening to the recording, I was permitted to have access to a transcript: MFI C. See direction given earlier when viewing the complainant's evidence.

- (a) The defendant does not have to give evidence, or call other people to give evidence on his behalf, or otherwise produce evidence. He does not assume any responsibility of proving his innocence. The burden of proof has not shifted to him. The record of interview is added to the evidence called for the Crown. The Crown has the burden of proving each of the elements of the offence beyond reasonable doubt, and it is upon the whole of the evidence that I must be satisfied beyond reasonable doubt that the Crown has proved the case before the defendant may be convicted.
- (b) Often enough cases are described as ones of “word against word”. In a criminal trial it is not a question of making a choice between the evidence of the prosecution’s principal witness or witnesses, and the evidence of the defendant. The proper approach is to understand that the prosecution case depends upon accepting that the evidence of the prosecution’s principal witness (or witnesses) was true and accurate beyond reasonable doubt, despite the defendant’s responses in the record of interview; so I do not have to believe that the defendant is telling the truth before he is entitled to be found not guilty.
- (c) In light of the record of interview, usually one of three possible results will follow:
 - (i) I may think the defence evidence is credible and reliable, and that it provides a satisfying answer to the prosecution’s case. If so, my verdict would be not guilty; or,
 - (ii) I may think that, although the defence evidence was not convincing, it leaves me in a state of reasonable doubt as to what the true position was. If so, my verdict will be not guilty; or,
 - (iii) I may think that the defence evidence should not be accepted. However, if that is my view, I am careful not to jump from that view to an automatic conclusion of guilt. If I find the defence evidence unconvincing, I should set it to one side, go back to the rest of the evidence, and ask whether, on a consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt that the prosecution has proven each of the elements of the offence in question.

[54] All in all having considered the record of interview, although I was not convinced of some of the defendant’s responses, I was left in a state of reasonable doubt as to what the true position was, particularly in view of the inconsistencies in the complainant’s own evidence, in the context of the preliminary complaint evidence and the record of interview. I am cognisant that an act of intercourse occurred. I find that act occurred in the back seat of the Honda. However I am not satisfied that the act of intercourse occurred without the complainant’s consent for the reasons provided below.²⁷ I therefore entertain a reasonable doubt as to the proof of guilt. My verdict must, therefore, be one of not guilty.

Motive

²⁷ See Defence’s Contentions

- [55] For completeness, I note that it was raised on the evidence that the complainant had a possible motive or motives to make a false complaint against the defendant. One was that she was angry with the fact that she had been treated like a prostitute and secondly, the complainant's visa arrangements meant that it would have been easier for her if she were romantically involved with the defendant. I am not persuaded that any motive to lie on the part of the complainant has been established. Whilst this does not necessarily mean that the complainant is truthful, it remains necessary for me to be satisfied that the complainant is truthful.

Submissions/Rival Contentions

- [56] The learned Crown Prosecutor Mr Hood has particularised the acts relied upon as the basis for each count as the defendant penetrating the complainant's vagina with his erect penis. Count 1 is alleged to have occurred in the front passenger seat. Count 2 is alleged to have occurred in the rear of the vehicle after the complainant fell asleep beside the defendant. It was submitted that the evidence of the complainant was capable in each instance of proving the elements of the charged offence. The complainant's account demonstrated that the defendant inserted his penis into her vagina without her consent on two occasions.
- [57] Mr Hood submitted that in light of the evidence, there would be no reasonable doubt as to whether those acts of sexual intercourse actually occurred, and secondly that the complainant did not consent to sexual intercourse with the defendant on that version of events provided by the complainant.
- [58] Mr Hood said there are a number of features pointing to the complainant being a truthful and reliable witness. It was submitted that the preliminary complaint evidence was consistent with the complainant's evidence. It was highlighted that the complainant gave a very short and brief outline of her first complaint to her friend which resulted in the friend contacting Purdy Huang. The fact that the complainant, in her own evidence, concentrated on events surrounding count 1 did not necessarily detract from her reliability in relation to count 2 because, as a matter of common sense, one would not expect a rape complainant to divulge such particularity especially in circumstances where the complaint was reduced to a text message. Mr Hood submitted the disclosures the complainant made were not inconsistent with the complainant's sworn evidence. Whilst I accept the evidence of the preliminary complaint witnesses may assist the complainant's evidence towards supporting a finding regarding count 2, the absence of the relaying of circumstances regarding count 1, particularly within a day or two after the alleged offending, detracts from the complainant's overall reliability and, in turn, proof of both counts on the indictment.
- [59] Mr Hood accepted that the complainant in her evidence did not give all of the details that she subsequently gave to the police, but that it would not necessarily be expected to the level of particularity during the initial complaint, whether it be oral or written in a short text message. Further, it was simply not practical or rational as one would expect in a police statement. It is not surprising therefore that the complainant would focus, in her evidence, on the events relating to the first act. Generally I am not persuaded by this submission in order for the Crown to succeed in demonstrating the requisite standard of proof.

- [60] Mr Hood properly conceded that there are inconsistencies which would attract my attention, but that I would scrutinise carefully because, the ultimate determination of guilt and innocence will turn upon my assessment of the complainant's truthfulness and reliability as a witness. He highlighted that the complainant clearly communicated, on her evidence, her lack of consent to sexual activity with the defendant. He also highlighted that cultural issues were at play and that the complainant was a young woman in a strange land; her English skills were limited; and, it was uncontested that rape or sexual assault is a very shameful, difficult thing for a young woman from her culture to have to deal with.
- [61] Rightly so, Mr Hood submitted that the inconsistencies were ultimately a matter for me to consider in the course of deliberations. He highlighted however that there were no fundamental inconsistencies in the complainant's evidence which would cause me to hold a reasonable doubt as to either her honesty or reliability.
- [62] In determining whether or not the defendant honestly and reasonably held a belief that the complainant consented to sexual activity, Mr Hood submitted that regard must be had primarily to the complainant's evidence, as the WeChat messages, both before and after the alleged offending were silent as to the defendant's subjective belief regarding the complainant's state of mind. It was said that the defendant himself provided no reason for contradiction of the complainant's account. It was the Crown's case that the evidence clearly demonstrated that prior to the alleged offending, the complainant did not do anything, say anything or admit to do or say anything which would cause the defendant to hold a reasonable belief that she was willing to engage in sexual intercourse with him. Rather the messages exchanged between the two demonstrated that the complainant was clearly upset and angry with the defendant. It was Mr Hood's submission that the messages did not permit inferences to be drawn that the defendant held an honest and reasonable belief that the complainant formed a view that she was consenting, or that she actively communicated her consent to him during the course of that sexual encounter.
- [63] Mr Kimmins addressed the following matters:
- (a) The approach to be taken by me, which I respectfully adopt, has been instructively stated in *R v Oliver* [2020] QCA 76 at [97] and [98] per Callaghan J and in *R v FAX* [2020] QCA 139 at [104] – [115] per Boddice J.
 - (b) Any inconsistencies spoke "very loudly" in this particular case.²⁸
 - (c) At the end of the complainant's cross-examination, the Court should be left with a situation that there were two acts of rape, according to the complainant, which occurred prior to falling asleep. One was in the back seat and one in the front seat. Nowhere in the preliminary complaint to Purdy Huang or *PL* was there any reference to the proceedings moving from the back seat into the front seat and where the first particularised act of intercourse allegedly occurred.
 - (d) When viewed as a whole, and if the complainant's evidence were accepted, there were three acts of intercourse which occurred in the car. Yet there are only two charges on the indictment. The charges involve on the

²⁸ Especially Exhibit 19 being the Admissions and moreover admission 3 concerning the preliminary complaint to Ms Huang.

complainant's evidence the second and third acts of intercourse, yet the first act is not the subject of a further count on the indictment. The first act of intercourse, it was submitted, sat "pretty closely" to what the complainant said in her text message to Ms Purdy Huang.

- (e) It was submitted that the complainant was consistently dishonest regarding the romantic nature of the relationship with the defendant having regard to the WeChat messages. I was reminded that I had to draw relevant inferences and if there is an inference which was equally open to the defence, I therefore must draw that inference in the defendant's favour. In his view, the WeChat messages were "quite clear" and the interpretation to be given should favour the defendant. Whilst the complainant indicated that the WeChat details were exchanged primarily to enable her to communicate with the defendant regarding rent (as distinct from personal matters), nothing about rent appeared in the 46 pages of the WeChat messages. Mr Kimmins submitted that "it was all banter" between the complainant and the defendant and discussions between the two of them leading to a reasonable inference that they were quite comfortable with each other, despite the fact that they had only known one another for a couple of days. I was taken to, for example, exchanges such as:
 - (i) "Where do you want to go for fun? Or do you want to go and have something to eat?" The complainant's response was "either is ok".
 - (ii) "You're afraid that your friends find out that we hang out together". The complainant's response "are you afraid?".
- (f) The WeChat messages were insightful as regards both consent and mistake of fact.
- (g) As to mistake of fact, in *Makary* at [90], McMurdo JA's statement was apposite to find that s 24 had been raised in this particular case. His Honour stated:

"To raise the operation of s 24, there must be some evidence of a mistaken belief by the defendant.²⁹ 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,³⁰ 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 Millar*,³¹ 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.³²"
- (h) The prosecution, therefore, have not excluded s 24, let alone consent or proven lack of consent beyond reasonable doubt.

²⁹ *R v Cutts* [2005] QCA 306, [4].

³⁰ *CTM v The Queen* (2008) 236 CLR 440, 447 [8].

³¹ [2001] 1 Qd R 437, 439 [7].

³² Applied in *R v Baldwin* [2014] QCA 186, [21].

- (i) The preliminary complaint to Ms Purdy Haung is only one complaint of an act of intercourse and that was when the complainant and the defendant were in the back seat prior to retiring for a sleep. The preliminary complaint evidence was totally inconsistent with providing credible evidence to support the complainant's evidence.
- (j) No reference is made in the preliminary complaint to Ms Purdy Huang of moving to the front seat. Mr Kimmins highlighted that there was a description in the complainant's evidence that she was trying to get away from him, that there was somewhat of a tussle, but she managed to get into the front seat.
- (k) In addition to the WeChat messages, there were further factors which should be taken into account to demonstrate how the relationship was proceeding. Relevantly, that when they were at the foreshore at Redcliffe, they were in the back seat and irrespective of whether they were lying down or half sitting, they were next to each other and had a blanket over them. They were snuggling together. They watched a movie for about 10 minutes and commenced kissing.
- (l) Mr Kimmins highlighted the notable inconsistencies in the complainant's evidence insofar as the question of consent was concerned to support a finding that the Crown has not established beyond reasonable doubt that any sexual acts that occurred were without the complainant's consent.
- (m) Mr Kimmins sought a *Robinson* direction and provided a list of matters³³ which, it was submitted, either individually or in combination, could lead to a conclusion that a *Robinson* direction was necessary, namely:
 - (i) The complainant constantly played down the nature of her relationship with the defendant.
 - (ii) The complainant testified that at no stage during the WeChat contacts or in person:
 - (A) did she flirt with the defendant;
 - (B) did he flirt with her; and
 - (C) was there any discussion of a personal nature between the two of them.
 - (iii) The true nature of their relationship was explicitly displayed in the WeChat messages both before and after the outing on Thursday afternoon.
 - (iv) The complainant said in cross-examination that the reason she and the defendant swapped WeChat contact details was in case there were enquiries relating to renting of her room and the payment of rent.
 - (v) Despite constant contact between the complainant and the defendant from Wednesday through to Saturday, none of the contact related to rental enquiries.

- (vi) The complainant testified that there had not been any physical contact with the defendant despite them travelling alone to the beach together.
- (vii) This is despite the complainant bringing marijuana with her to supply the defendant during their outing.
- (viii) This is despite the complainant consenting to the purchase and consumption of alcohol whilst alone with the defendant.
- (ix) This is despite the two relating comfortably prior to travelling in the van.
- (x) The complainant voluntarily:
 - (A) followed the defendant to the rear of the van and was present when he reclined the seats to make a bed;
 - (B) positioned herself on the bed arrangement under a blanket with the defendant whilst they “snuggled” together; and
 - (C) whilst in this position watched a pornographic video with the defendant.
- (xi) The conflicting evidence from the complainant as to whether she objected at any stage to the continued playing of the pornographic video.
- (xii) The conflicting evidence of the complainant as to whether she saw a condom at any stage whilst in the defendant’s vehicle.
- (xiii) The conflicting versions of the complainant as to whether she put her clothes on prior to going to sleep.
- (xiv) That the complainant voluntarily slept next to the defendant after allegedly being raped by him twice.
- (xv) Despite her saying that she resisted and struggled with the defendant as hard as she could on a number of occasions, the complainant testified that she had no physical marks or injuries on her body after the alleged incident.
- (xvi) The complainant and the defendant were in each other’s company for a period of approximately 11 hours.
- (xvii) Upon arrival at the defendant’s residence, the complainant did not seek to make a preliminary complaint to any of her flat mates.
- (xviii) The complainant’s preliminary complaints outline only a single act of rape/intercourse as having taken place during the occasion in the van. Under cross-examination at trial, the complainant testified that she was subjected to three acts of rape/intercourse. The indictment alleges two counts of rape.
- (xix) Shortly before a police complaint was made, the complainant was very angry with the defendant as she felt that he had treated her like a “prostitute”.

- (xx) The conflicting versions of the complainant as to whether she provided the witness Huang with a detailed version or only a brief summary of the alleged offending.
 - (n) As far as the particularised acts of intercourse, Mr Kimmins submitted that on Count 2, I would not find that that was in fact committed or I could not, after scrutinising the evidence in giving heed to the warning, that I would find that that act has not been established beyond reasonable doubt. I can then have regard to that finding and also Mr Kimmins' submissions on the preliminary complaint evidence in forming the conclusion that the prosecution has not established beyond reasonable doubt that the particularised act of intercourse in Count 1 has been established.
 - (o) If a finding of lack of consent was made, then in the alternative, it was submitted that the Crown failed to disprove s 24 beyond reasonable doubt.
- [64] In relation to the submissions advanced on behalf of the defendant, I do not consider it necessary to address each of them in turn as I accept the weight of the submissions³⁴, in order to find that the onus of proof has not been established on the evidence sufficient to convict the defendant of the charges.

Conclusion and Verdict

- [65] Therefore for the reasons expressed above, I am not satisfied the Crown has proved, beyond reasonable doubt, that the evidence led at trial warrants a finding of guilt in respect to the offences. The defendant is therefore acquitted.

³⁴ Especially subparagraphs 63(m) and (n).