SUPREME COURT OF QUEENSLAND

CITATION:	*R v V* [2002] QCA 124
PARTIES:	**R** **v** **V** (appellant)
FILE NO/S:	CA No 321 of 2001 DC No 525 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	5 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2002
JUDGES:	McMurdo P, Williams JA, Muir J Judgment of the Court
ORDER:	**Appeal against conviction allowed.** **New trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER JURY WOULD HAVE RETURNED SAME VERDICT – MISDIRECTION AND NON DIRECTION - where appellant convicted of three counts of indecent assault with a circumstance of aggravation – where prosecution case turned solely on the unsupported evidence of the complainant – where complainant's evidence contradicted by evidence of the appellant and another witness – where trial judge summarised case as a denial by the appellant of the complainant's allegations and did not direct jury to other witness' evidence about the evening of the offence – where trial judge had an obligation to adequately and fairly put the defence case to the jury – whether failure to properly direct jury created a substantial risk of miscarriage of justice *Festa v The Queen* (2001) 76 ALJR 291, applied *Jones v The Queen* (1997) 191 CLR 439, considered *Longman v The Queen* (1989) 168 CLR 79, considered *M v The Queen* (1994) 181 CLR 487, considered

R v Mogg [2000] QCA 244, CA No 317 of 1999, 20 June 2000, considered
Robinson v The Queen (1999) 197 CLR 162, considered
RPS v The Queen (2000) 199 CLR 620, considered

COUNSEL: A J Kimmins for the appellant
S G Bain for the respondent

SOLICITORS: Twohill Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** The appellant was convicted after a two day jury trial of 3 counts of indecent assault with a circumstance of aggravation. He was sentenced to 18 months imprisonment on each count. He appeals against his conviction and seeks leave to appeal against his sentence on the ground that it is manifestly excessive.

[2] He contends that the verdict is against the weight of the evidence and that the primary judge erred in his directions to the jury.

[3] It is convenient to first review the evidence. The prosecution case turned solely on the complainant's evidence. The appellant was his mother's close friend for eight or nine years and the complainant's brother worked for him. In December 1998 when he was 16 years old the complainant and his friend D visited the appellant at the appellant's Gold Coast home, not far from where he lived with his mother. Tony, who lived with the complainant, and a male friend of his were also present. The appellant gave the complainant a bourbon and coke and the group passed the evening drinking and talking. The complainant remembered drinking "quite a few" tequilas with tabasco. Late in the evening, probably close to midnight, he felt sick and he went upstairs to the appellant's en suite bathroom and vomited in the toilet several times. He fell asleep on the toilet floor.

[4] He next remembered seeing the appellant kneel down beside him, pull down the front of his shorts, remove his penis and suck it for a short time. The complainant just lay there, too sick and drunk to move. The appellant stopped abruptly and pulled up the complainant's shorts. (Count 1)

[5] His next recollection was lying on the toilet floor and hearing male voices making fun of his drunken, sick state.

[6] He next recalled awakening on the ensuite floor to feel his shorts again being pulled down. He saw the appellant again suck his penis. The appellant once more stopped abruptly, adjusted his clothing and left. The complainant said nothing because he was still feeling ill. (Count 2)

[7] He remembered waking again during the night to find the appellant sucking his penis; the appellant then abruptly stopped his conduct. (Count 3)

[8] His next recollection was lying in the appellant's bed and being woken by the appellant's hand moving upwards on his thigh. The appellant touched him on top of his boxer shorts in the groin area and on the penis. He rolled over. He was feeling very sick. He woke up again to feel the appellant's hand brush against his penis on the outside of his shorts. He climbed over the male asleep next to him in the bed so

that he was not next to the appellant and went back to sleep. He woke in the morning feeling very ill and uncomfortable about what had happened the previous night. He did not complain to the other male in the bed. He left later that morning.

[9] He made no complaint to police until 10 January 2000.

[10] In cross-examination he agreed that he and D often drank heavily and, although underage, had purchased alcohol at the casino. He regularly went to the appellant's home and sometimes stayed overnight. He continued to visit the appellant at his home after these events. The appellant lent him his car, paid for a service on his mother's car (which was mainly used by the complainant) and bought him items of clothing for his school formal.

[11] He did not confront the appellant about this incident until December 1999. He told the appellant he knew a young man who had taken an offender to court over similar conduct. He denied that he asked for $15,000 compensation. He said the appellant responded "'What do you want? Do you want money?' Like, that was the reason that I was there and I said, 'I don't know what else happened but I won't (*sic*) something done about it.' And that's when I said, 'You can do whatever you want. You can do nothing or you can do something about it'."

[12] He does not get on with his brother who is friendly with the appellant.

[13] As the complainant gave evidence of only three episodes of indecent assault, at the close of the Crown case the prosecution endorsed the indictment that it would not proceed on count 4

[14] The appellant both gave and called evidence. He has known the complainant's family for about 10 years. He had an affair with the complainant's mother for about 5 years. He treated the complainant and his brother like his own children. The complainant's mother and brother worked for him and the complainant sometimes worked part-time after school. The complainant visited him weekly or fortnightly. He shared his house with another male person, Tony, who had his own room.

[15] The appellant often looked after the complainant when he was vomiting as a result of drinking alcohol to excess. Sometimes the complainant stayed at his home with his friends who also drank alcohol, watched TV and spent the night. On occasions three people would sleep in one bed.

[16] Because the complainant vomited after drinking to excess on a number of occasions, he could not identify the specific evening related by the complainant. He denied indecently touching the complainant in the bathroom or elsewhere on any occasion.

[17] After December 1998, the complainant continued to visit him regularly. He paid to rectify a spark plug problem in the car used by the complainant. The complainant borrowed clothes from Tony for the school formal and tried them on without embarrassment in front of the appellant.

[18] On 15 December 1999 the complainant phoned him about 7pm and asked if he could come and speak confidentially. He asked Tony to go upstairs before the complainant arrived. The complainant said "Do you remember the night you gave me a head job?" The appellant denied that this occurred and they argued . The

complainant said he went to schoolies week and one of his mates told him he received $15,000 compensation for a similar act. The complainant said "Well, don't you think I'm worth something for it?" He replied "Come off it" and the complainant said "Well you'd better talk to your solicitor" and left.

[19] In cross-examination the appellant agreed that he did not tell police that Tony was upstairs when the complainant had the conversation with him in December 1999. Eight or nine years earlier he took the complainant's brother, who was then aged about 14 or 15, on a trip to Europe.

[20] Tony Wilson gave evidence that the appellant is a close family friend with whom he shared living arrangements for a time, which included the period when this offence was alleged to have occurred. He also knows the complainant and his family. The complainant would often spend the night at the appellant's home and drink alcohol. There was only one evening in December 1998 when the complainant was vomiting in the upstairs toilet. On that evening the complainant, the appellant, D and he were drinking downstairs. The complainant became ill from excess alcohol and D and he took the complainant upstairs to the toilet. They lay on the appellant's bed talking to and joking with the complainant whilst he was being sick into the ensuite toilet. They wanted to ensure the complainant was alright as he kept passing out. They put him to bed in the appellant's king size bed after about half an hour. The appellant was downstairs cleaning up at this time. About 15 minutes later the appellant, D and he joined the complainant on the appellant's king size bed and fell asleep for the evening. They all slept in the appellant's bedroom as it was the coolest room in the house. He noticed no untoward sexual behaviour during the evening.

[21] About a year later, on 15 December 1999, he was home when the appellant received a phone call. Just before the complainant arrived the appellant asked him to go upstairs. He overhead the complainant saying "I need to talk to you about what you did with me on that night". The appellant said "I don't know what you are talking about." The complainant replied "Don't you think that I deserve something for what you've done to me?". The appellant said "I don't know what you're talking about". The complainant responded "Well when I was at schoolies I was talking to a mate of mine. He settled out of court for $15,000 for what you have done." The appellant was irate and bewildered and said "I don't know what you're talking about." The complainant said "Well you see a solicitor and you get back to me".

[22] The complainant's brother gave evidence that at the time of the alleged offence the complainant regularly drank to excess and spent nights at the appellant's house. He has never observed any sexual activity on the part of the appellant with anyone other than his mother. At about Christmas 1999 the complainant said that he would take the appellant to court and get enough money to buy a motorbike. Until then the complainant had made no allegations against the appellant. In cross-examination he admitted his convictions for attempted stealing, wilful damage, stealing, entering premises and committing an indictable offence for which he was placed on a community service order.

[23] The complainant's evidence was unsupported, he was very drunk when the alleged offences occurred and his evidence was contradicted by the evidence of the appellant and Mr Wilson. Despite these concerning aspects of the prosecution case, a properly instructed jury could still have rejected the defence evidence, accepted the complainant's evidence beyond reasonable doubt and been satisfied of the

appellant's guilt: *Jones v The Queen*[1] and *M v The Queen*.[2] The real concern in this case is whether the jury were given adequate directions.

[24] Mr Wilson gave evidence that, on the only evening in December 1998 when these offences could have occurred, at the time when the complainant was vomiting in the ensuite toilet where he alleged the assaults took place, the appellant was downstairs cleaning up. Whilst acknowledging that Mr Wilson was a close friend of the appellant, his evidence was important because the case otherwise turned on the sworn evidence of the complainant and the contradicting sworn evidence of the appellant.

[25] His Honour in his jury directions summarised the defence case as a denial by the appellant of the complainant's allegations; the judge did not mention Mr Wilson's evidence about events on the night of the offence. A trial judge has an obligation to adequately and fairly put the defence case to the jury: *RPS v The Queen*[3]and *R v Mogg*.[4] His Honour failed to do that here.

[26] This significant error was compounded by the following direction:

> "Now it is said that allegations of a kind you've heard here from (the complainant) are easy ones to make, and they are hard, if not impossible, to refute. There is no scope for independent evidence of any kind to support or refute (the complainant's) claims."

[27] This direction was wrong because there was evidence from Mr Wilson which, if accepted, was capable of refuting the complainant's allegations.

[28] In addition, this case was one where the combined circumstances demonstrated a substantial risk of a miscarriage of justice. A warning was required to emphasise the need for the jury to scrutinise the complainant's evidence before convicting: *Robinson v The Queen*[5] and *Longman v The Queen*.[6] The combination of circumstances warranting such a direction in this case were that the complainant was aged 16 at the time of the alleged offences; he was extremely intoxicated when the alleged offences occurred and his memory as to the details of the offences was poor; he did not give evidence of a fourth count of indecent assault which was charged and apparently opened by the Crown Prosecutor;[7] he made no complaint about the offences for a 12 month period; he did not claim he had been threatened or warned not to tell anyone; he continued to maintain a harmonious relationship with the appellant and to accept gifts from him after the alleged offences; there was some evidence supporting the suggestion that he made the complaint for financial reward and there was significant inconsistency between the complainant's evidence and that of Mr Wilson as to whether the appellant had the opportunity to commit the offence.

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1 (1997) 191 CLR 439.
2 (1994) 181 CLR 487; 493-494.
3 (2000) 199 CLR 620, 637.
4 [2000] QCA 244, CA No 317 of 1999, 20 June 2000.
5 (1999) 197 CLR 162, 169, 2171.
6 (1989) 168 CLR 79.
7 The prosecution opening was not included in the appeal book record.

[29] These misdirections are so fundamental that it cannot possibly be said that if these errors had not been made a reasonable jury, properly instructed, would inevitably have convicted the appellant: *Festa v The Queen*.[8]

[30] It follows that the appeal must be allowed and a new trial ordered. It is a matter for the prosecuting authorities whether a new trial is held.

[31] Because of the orders we propose, it is unnecessary to consider the application for leave to appeal against sentence.

ORDER:

Appeal against conviction allowed; new trial ordered.

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[8] (2001) 76 ALJR 291.