SUPREME COURT OF QUEENSLAND

CITATION:	*R v Watson* [2002] QCA 145
PARTIES:	**R** **v** **WATSON, Laurence Arthur** (appellant)
FILE NO/S:	CA No 219 of 2001 DC No 2011 of 2001 DC No 3374 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2002
JUDGES:	Davies and Williams JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – PROOF AND EVIDENCE - where appellant convicted for sexual assault and deprivation of liberty – whether defence case adequately put to complainant – whether appellant's decision not to give evidence was voluntary *Evidence Act* 1977 (Qld) s15
COUNSEL:	The appellant appeared on his own behalf D L Meredith for the respondent
SOLICITORS:	The appellant appeared on his own behalf. Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Williams JA and with the order he proposes.

[2] **WILLIAMS JA:** The appellant, Laurence Arthur Watson, appeals against his conviction on one count of deprivation of liberty, five counts of sexual assault with a circumstance of aggravation and one count of sexual assault. The appellant was found guilty of those charges by a jury in the District Court on 2 August 2001.

[3] The grounds of appeal are:

1. The complainant misled police by deliberately and maliciously lying;
2. The complainant committed perjury at trial.
3. There is available evidence which if tested would:
   (a) raise a reasonable suspicion of collusion between the complainant and another witness;
   (b) show that the complainant possessed an ulterior motive in procuring the conviction of the accused;
   (c) show that the evidence of the two witnesses Tania Young and Natasha Matheson was tainted and unreliable;
4. There has been a substantial miscarriage of justice.
5. Such further grounds as that may exist.

[4] The appellant was represented at trial by a barrister but conducted the appeal on his own behalf. The matter first came before this court on 26 November 2001 but was adjourned to allow material from the appellant's legal representatives at trial to be placed before the court. It had then emerged that the appellant was contending that he was coerced into not giving evidence, that his lawyers did not put his case adequately and did not follow his instructions.

[5] The offences occurred on 9 March 2000. On that day the complainant, a young Japanese woman in Australia on a working holiday and to learn English, was visiting a library in Brisbane. The appellant there spoke to her and later on the same day they again met, apparently by chance, on the corner of Edward and Ann Street as she was returning to her accommodation. He spoke to her on that occasion and expressed an interest in Japan. He suggested that they walk together and in the course of that he went into a TAB where he collected a sign. He gave her his bag to carry as he had the large signboard to carry. He suggested that they have dinner together at Hamilton to which she agreed.

[6] They took the Citycat and went to a hotel at Hamilton where 2 bottles of beer were purchased. They then went back to his nearby unit for dinner.

[7] The complainant's evidence was that following dinner the appellant showed her some photographs, the last of which was of a naked female. She began to feel uncomfortable and indicated that she was going to leave. At this point the appellant said to her that she could go if she sucked his penis. He exposed himself to her. When she refused to do as he requested he started to get angry. He stood over her and put his hands on her shoulders to prevent her from standing up. She again said she wanted to go and he again repeated his demand that she suck his penis if she wished to leave. She tried to scream and he put his hands over her mouth.

[8] The applicant undressed himself so that he was naked from then until the complainant left over an hour later. Over a period of time the applicant removed all of the complainant's clothing so that she also finished up naked. [In his record of

interview which was before the jury he claimed that each undressed the other, but that did not accord with his written statement provided to his solicitors].

[9] Against her will and without her consent, her mouth was brought into contact with his penis a number of times. The entire episode was spread out over some 2 hours. On at least one occasion she screamed. He committed a number of sexual acts on her against her will, the most serious of which was holding her jaw while he ejaculated into her mouth so that she could not spit out his semen.

[10] Throughout her ordeal she pleaded with him to let her go, wept from time to time, and screamed. When he went to the toilet she took the opportunity to grab her underpants and bag containing her mobile phone and flee from the house. In that naked state she fled onto Sir Kingsford Smith Drive where she flagged down a passing truck; she was still holding her underpants and bag in her hand. She telephoned the Japanese manager of a tourism company which assists tourists from Japan who need help. The truck driver phoned the emergency 000 number at about 10.39pm and took her to the nearest police station at Hendra. She then made a formal complaint and was taken to hospital for an examination.

[11] A police officer who searched the appellant's premises and thereafter conducted a record of interview with him gave evidence. In that interview the appellant alleged that there had been consensual sexual activity and that the complainant had told him that she had been using drugs. Upon the search the police officer found clothing belonging to the complainant, including a pair of jeans, a bra, a pair of shoes, socks and a tank top.

[12] The complainant was clearly distressed whilst giving evidence at trial but was described by the learned trial judge as a very impressive witness. She was screened from the appellant and gave evidence through an interpreter. She was cross-examined by an experienced and competent criminal barrister. She denied any consensual sexual activity.

[13] The Crown called a pathologist who had analysed a sample of the complainant's blood and found it contained no traces of any illicit drug. The truck driver who assisted the complainant when she ran onto the road naked to escape from the appellant and the manager of the tourist business whom she called on the telephone both gave evidence and were cross-examined. In addition, the Crown called two witnesses (Young and Matheson) who were staying in an adjoining unit to the appellant and heard a woman's screams apparently coming from the appellant's unit. Under cross-examination each conceded the screams could have come from a television.

[14] The fourth ground of appeal is that there was a substantial miscarriage of justice. No particulars of that were given apart from the matters relating to the appellant's representation at trial. While the prosecution relied heavily upon the evidence of the complainant it was a strong case. The complainant ran totally naked from the appellant's unit into the street and flagged down a passing motorist. The truck driver's evidence was compelling. She complained immediately to police. Her account was capable of being supported by the evidence of two neighbours who heard noises consistent with screams coming from the appellant's residence. On the material before the jury there was nothing to support grounds 1 to 3 of the appeal.

[15] The issues at trial were essentially whether or not the Crown had discharged its burden of proving that the complainant did not consent to what occurred and that the appellant did not hold an honest and reasonable belief that she was consenting. The jury were clearly satisfied beyond reasonable doubt that the prosecution had discharged the onus on it. In the absence of something in the grounds of appeal relating to the appellant's representation and the alleged failure to follow instructions it could not be said that the verdict was unsafe and unreasonable.

[16] The appellant raised three issues with respect to his legal representation at trial. Firstly, he contended that his "conspiracy theory" was not put to prosecution witnesses; secondly, he contends his version of events on the night in question was not adequately put to the complainant; and thirdly, he contends that he was coerced into not giving evidence and that in consequence the jury was deprived of hearing him deny on oath the complainant's allegations. Those issues were raised in affidavits of the appellant filed 26 November 2001 and 5 April 2002.

[17] In response the respondent filed affidavits from the appellant's barrister at the trial, the principal instructing solicitor, and the articled clerk who was present when the appellant signed an acknowledgement that he did not wish to give evidence. The solicitor's affidavit had exhibited to it a 14 page statement relating to the events in question provided by the appellant prior to the trial.

[18] Each of the four deponents were cross-examined before this Court.

[19] There is no doubt that the appellant was a difficult client. A number of solicitors had been engaged and sacked before Legal Aid, Queensland, approached the firm of solicitors who instructed counsel and acted at the trial. From the outset the principal solicitor realised he was dealing with a difficult client. During the first conference when instructions were taken the appellant raised his "conspiracy theory". Apparently he had been involved sometime previously in a civil fraud action which had been unsuccessful from his point of view. A police officer who was on the staff of the Hendra Police Station at the time the complainant made her complaint was in some unspecified way said to be associated with those earlier legal proceedings. There was also some vague, unspecified connection asserted between a solicitor who had formerly acted for the appellant and the landlord of the premises in which he and the prosecution witnesses Young and Matheson resided. Based on those matters there was a contention that there was a conspiracy between the police, the landlord, the truck driver and the complainant to concoct the allegations in question against him. As no hard evidence of any such conspiracy was placed before the solicitor, his advice was that the "conspiracy theory" ought not to be raised at trial.

[20] During conference with counsel the appellant again dwelt at some length on that theory but received similar advice to that previously given by the solicitor. According to both the barrister and solicitor the appellant accepted, prior to trial, that the "conspiracy theory" should not be raised. In consequence counsel for the appellant did not put that theory to the witnesses called on the first two days of the trial, that included the complainant. On the morning of the third day of trial the appellant raised with counsel the "conspiracy theory" and wanted it put. Counsel advised that it was too late to do so, and that it would be counter-productive to then

raise it. The appellant appears to have accepted that advice at that point of time, but now raises it as a ground for complaint against his legal representatives.

[21] Nothing that was said by the appellant in the course of the hearing on appeal indicated that there was any substance in the "conspiracy theory". To the contrary, the theory was so vague and irrational that advancing it would be likely to cause an objective observer to have serious doubts as to the veracity of any of the appellant's contentions about the events of the night in question, including his assertion that the complainant was the instigating and consenting party to the sexual episode.

[22] On the appellant's version of events, which was before the jury in a lengthy statement to police recorded on video, the complainant was a very active and willing participant in performing oral sex on him, whilst he at most only kissed her and fondled her breasts. Given there is no doubt that sexual activity of the type alleged by the complainant occurred the only issue for the jury related to consent. In that context, particularly given the want of particularity, the appellant's "conspiracy theory" was not credible.

[23] Far from detracting from the appellant's case, the decision by the appellant's legal advisers not to raise the "conspiracy theory", if anything, put the appellant in a better light before the jury than otherwise would have been the case.

[24] The morning after the incident occurred investigating police videotaped an interview with the appellant. He indicated at the outset that he had already spoken to a solicitor and was quite happy to make a statement to the police. After being warned he was asked to give his version of the events of the previous night. He then proceeded to do so in an uninterrupted statement which went for at least 10 minutes. It gave a detailed account of the complainant performing oral sex on him, according to the appellant consensually and with vigour over a period approximating 2 hours. That was before the jury as the appellant's version of what had occurred.

[25] Counsel for the appellant at trial had the 14 page statement referred to above. Whilst it purported to detail the actual events of the night in question, it read more like the sexual fantasy of a teenage boy. Taken at face value it recorded a young Asian girl, who had just met the appellant, performing a variety of forms of oral sex on the appellant over a lengthy period of time whilst he adopted a completely passive role with respect to those events. The embellishments contained in that account made it more likely to be a fantasy than the accurately recorded detail of a realistic consensual sexual encounter.

[26] One can well understand counsel for the appellant not wishing to place all that was contained in that statement before the jury. The account recorded in the police interview gave the jury an adequate version of what the appellant claimed happened. When one compares the contents of the 14 page statement with the cross-examination of the complainant it is clear that all essential aspects of the appellant's case were put to the complainant.

[27] Further, the appellant had been convicted in 1996 of an offence against a young girl the facts of which could be described as strikingly similar to the facts of the offences in question. Further, he had been acquitted of another similar offence

some years prior to that. The prosecutor had intimated to counsel for the appellant that if the appellant gave evidence he was contemplating raising either or both of those previous matters either as similar fact evidence because of the striking similarity of the factual situations, or so far as the 1996 matter was concerned with leave of the court pursuant to s 15 of the *Evidence Act* 1977.

[28] Such considerations were taken into account by counsel for the appellant at trial in advising that, given that the version contained in the video recorded interview with police was before the jury, there were real risks associated with the appellant giving evidence. I am however satisfied that counsel referred to both the considerations for and those against the appellant giving evidence.

[29] At the close of the prosecution case there was an adjournment during which the trial barrister and the instructing articled clerk discussed with the appellant the question of his giving evidence. Having regard to the evidence before this Court I am satisfied that the barrister informed the appellant of his rights, that he was not obliged to give evidence, and that he had to make the choice. I am also satisfied that, for the reasons indicated above, the barrister advised that there were risks associated with his giving evidence. The barrister reasonably concluded that the appellant's version of events was before the jury and that his case was not likely to be strengthened by his going into the witness-box. The articled clerk then wrote out in his own hand a document which was presented to the appellant for signature. The first paragraph stated that the appellant understood that he had the right to give and call evidence, the second paragraph recorded an understanding that he was not obliged to do so, and the third paragraph indicated that, acting on the advice of counsel, he did not wish to give or call evidence. The final paragraph recited that such instructions were given of his own free will and that no threat, promise or inducement had been held out with respect thereto. It was duly signed by the appellant. I am satisfied that the document in question substantially follows the form used by the firm of solicitors in question when dealing with such an issue.

[30] In evidence the appellant maintained that all the third substantive paragraph: "I instruct that upon advice from my counsel I do not wish to give or call evidence in my defence" was included at his request. The evidence from the articled clerk was to the contrary; such a paragraph was ordinarily included in the form the firm used. It may well be that the words "upon advice from my counsel" were inserted at the appellant's request, but otherwise I reject the appellant's evidence in that regard. The truth of the matter is that there was advice from counsel that there were risks associated with the appellant giving evidence and the amendment, initialled by the appellant, to that paragraph suggests that some alteration in wording was made as it was being written.

[31] But the inclusion of the words "upon advice from my counsel" do not materially advance the appellant's case. The inclusion of the words does not mean there was no reference to the factors favouring the giving of evidence. The fact that advice was given, particularly when there was reasonable justification for it, is not evidence of coercion. I am satisfied that the appellant made a voluntary decision not to give evidence in the circumstances.

[32] It follows that the appellant has not established that there was anything about the conduct of his legal representatives at trial which resulted in a miscarriage of

justice. Nothing was said during the course of the hearing of the appeal to provide any basis for an assertion that the complainant lied, whether deliberately and maliciously or otherwise. There is nothing in the material before this Court to suggest that the complainant committed perjury. Finally there is nothing in the evidence before this Court suggesting any basis for the allegations contained in ground 3 of the appeal.

[33] It follows that the appeal should be dismissed.

[34] **FRYBERG J:** I agree generally with the reasons for judgment of Williams JA and the order he proposes.