SUPREME COURT OF QUEENSLAND

CITATION:	*R v Oliver* [2002] QCA 511
PARTIES:	**R** v **OLIVER, Dale Andrew** (appellant)
FILE NO/S:	CA No 289 of 2002 DC No 270 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EXTEMPORE ON:	22 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2002
JUDGES:	Davies and McPherson JJA and Philippides 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 - CONSENT - GENERALLY - where appellant convicted of five counts of rape arising out of one incident - where the appellant does not deny he engaged in sexual activity with the complainant - where the complainant was cross-examined at considerable length - whether verdict was reasonable CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant convicted of five counts of rape arising out of one incident - where the only direct evidence was by the complainant - whether verdict was reasonable CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PROSECUTION - VENUE - CHANGE OF - GENERALLY - where appellant convicted of five counts of rape - where before the trial the learned trial judge refused to accede to an application for a change of venue - where argued the appellant would not have a fair trial due to

inaccurate media reporting and members of the jury wanting to discourage crimes of violence because of their effect on tourist revenue - whether learned trial judge erred in refusing to order a change of venue

CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - GENERALLY - where appellant fled after commission of the crime - where bank records showed where the appellant travelled - whether the evidence of flight should not have been admitted

CRIMINAL LAW - EVIDENCE - COMPLAINTS - FIRST REASONABLE OPPORTUNITY - where appellant convicted of rape - where learned trial judge gave a direction with respect to recent complaint - whether the learned trial judge erred in his direction

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - OTHER MATTERS - where appellant convicted of rape - where evidence of the appellant forcing the complainant into a bathroom - whether the learned trial judge's directions on this matter were unfair

COUNSEL: K M McGinness for appellant
P D Kelly for respondent

SOLICITORS: Legal Aid Queensland for appellant
Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The appellant was convicted in the District Court on 29 August 2002 after a three day trial on five counts of rape. All arose out of one incident. He appeals against those convictions. By his notice of appeal he also sought leave to appeal against his sentence but that application has now been abandoned.

The appellant does not deny that early on the morning of 7 January 2002 at his residence at Buderim he engaged in a number of sexual activities with the complainant. The

questions litigated at the trial were whether the jury were satisfied beyond reasonable doubt that the complainant did not consent to what occurred or, if she did not consent, whether they were so satisfied that the appellant did not honestly and reasonably believe that she was consenting. The only direct evidence given on those questions was by the complainant herself. The appellant did not give or call evidence.

The complainant was a Dutch backpacker. She was touring Australia. At the relevant time she was staying at the Mooloolaba Backpacker's Hostel. She had arrived at the Sunshine Coast on about 3 January. On the night of 6 January she had just returned to the Backpacker's Hostel from an aerobics class when she was approached by a woman who, as it turns out, was Heidi Childs. Heidi Childs had been in a relationship with the appellant which she said in evidence had ended by this time "in a way", whatever that means. When she approached the complainant she asked her if she would like to go out with an Aboriginal person whom she described as Dale and who, as it turned out, was the appellant. She told the complainant that she wanted to arrange for someone to go out with Dale, that he was shy, that he ought to go outside and have some fun but that he had some bad experiences in socialising with white people. The complainant asked her why she was not prepared to go out with the appellant herself, to which she replied that she thought she was too old for him and that he needed to go out with people his own age, suggesting that the complainant would be appropriate. She repeated that

he was nice but he was very shy. She even offered to pay for the outing.

The complainant trusted Heidi as a person who wanted to help the appellant and said she was not interested in looking for a boyfriend but that she was interested in the Aboriginal culture and would be quite interested in having a chance to meet an Aboriginal. They then arranged that the complainant would have a shower and come downstairs where she would meet Heidi and the appellant at an appointed time. They exchanged personal details. Heidi provided the complainant with a piece of paper on which she wrote her name, the name of the appellant and her telephone number.

When the complainant arrived downstairs at the appointed time neither Heidi nor the appellant was present. The complainant then decided to eat at the hostel and to have an early night. After eating, however, she decided to give Heidi a ring on the telephone number which she had provided.

It was not Heidi who answered the telephone but the appellant. She and the appellant then became engaged in a conversation which lasted about 20 minutes. He seemed pleasant and she thought generous and invited her over. At this stage it seemed the arrangement was that they would go out together from his place. However he had invited her to stay the night and she took some toiletries with her on the basis that she might do so. She assumed that Heidi would be there also. She then caught a cab to his house. When she got there he was standing outside waiting for her.

They entered the house, sat down inside and commenced talking, mostly it seems about his aboriginality and background. About 2.30 in the morning the complainant said she was tired and would like to go to bed. She asked him to show her to the room where she could sleep, thinking that he would show her to a spare room. In fact he offered her one of two beds in what was his bedroom. She thought this odd but did not demur. There had been no sexual activity between them or any suggestion of it. She changed, went to bed and went to sleep.

She woke with a start to find the appellant sitting on the end of her bed. She was annoyed that he had woken her and asked him what he wanted, what was wrong. He replied that he just wanted to let her know that he really appreciated that she made the effort to come to his place. He asked her if she would come to his bed. She replied that she had no sexual intentions with which he agreed and she then agreed to do so. Again she thought this odd but did not demur. She said she was trying to be polite. He then put his hand on her thigh. She removed his hand and after some time, 10 minutes or a quarter of an hour, he did it again. She again removed his hand. She told him that she did not appreciate this and he replied, "Okay." When he persisted again she jumped out of bed and told him she'd had enough, that she was going to look at the sunrise. She walked out onto the veranda and he appeared to stay behind. It was 5.30 a.m.

She returned to the room and sat on the opposite bed, the one on which she had previously been sleeping. He asked her whether she was staying or leaving and she said that she thought it better that she leave. He responded that she could at least "suck my dick". She became very anxious and worried and started thinking about where the exit was. He, apparently noticing her agitation came straight over to her, blocking her way. She asked why he was doing that and he repeated "I want you to suck my dick." He was then embracing her, blocking her way. They struggled, she asking him to leave her alone, to let her go. He responded in the negative. He had plainly overpowered her physically.

He then dragged her into the bathroom still embracing her. She started to panic again and to fight again. She commenced to scream as loudly as she could and he put his hand over her mouth. He threatened to stab her with a broken mirror which was on the bench in the bathroom. She was frightened he was going to kill her. She was already bleeding from her lip apparently from his forcefully putting his hand over her mouth.

At about this time he said to her, "They won't find any DNA. They won't find any evidence. You don't have any bruises." "They won't believe you. The police won't believe you." She was not sure what he meant.

He then grabbed her by the ponytail very firmly and forced her to lie down on the bed. She did as she was told. He then undressed himself and on his instructions she had taken off

her garment. She performed oral sex on him and he ejaculated into her mouth. She was all this time very frightened. She was disgusted by this incident.

Notwithstanding this after about another 15 minutes he said "I want to fuck you." She remembered that she had a condom in her purse, mentioned this to him, thinking that this might be a chance to escape, her purse being in the other room. But he insisted upon accompanying her by holding her by the ponytail. They returned to the room and he penetrated her on two separate occasions in two different positions. The condom broke. She was concerned about further intercourse and offered to perform oral sex on him instead. He insisted upon mutual oral sex which she tried to resist. At the same time he inserted his thumb in her anus. He then indicated his intention of penetrating her anus which he did.

At the conclusion of this degrading episode the appellant told the complainant to have a shower which she did. They then dressed and he asked her if she wanted to eat something. She said that she was not hungry. She was still thinking of how she might escape.

Some time later Heidi rang. The appellant spoke to her first and permitted the complainant to speak to her. She did not make any complaint to Heidi but that is not surprising, on the evidence that she gave. She was still very frightened.

She persuaded him to let her drive the car with him as a passenger. Their intention was to go to Mooloolaba beach and, on their way there he said that he had to go to the police station. They parked in front of the police station and she went in with him. As soon as she saw a policeman she said, "I need your help. Can you help me". She then entered the police station and told a policeman her complaint. At this point the appellant left hurriedly and was not seen again until 24 January when he was apprehended in Sydney. I shall return later to his movements after this.

The first two grounds of appeal concern the reasonableness of the verdict. It was submitted by Ms McGinness for the appellant that apart from the injury to her lip the complainant did not suffer any other injuries; that she had arrived late at the appellant's house; that the complainant obtained a condom from her purse before engaging in sexual intercourse; and that it was remarkable that the appellant would suggest going to the police station after the events described by the complainant. All of this indicated, Ms McGinness submitted, that the verdict was unreasonable.

On the contrary, it seems to me, all of this is reasonably consistent with acceptance of the complainant's version of what occurred. She did not suffer any other injuries because in the end she could do little else but comply with his demands. The doctor who examined her also said after examining her genitalia that what he saw was consistent with rape having occurred as she described. As to her suggestion

of obtaining the condom, she said she did this partly to give her an opportunity to go to another room and then to escape. But in any event it is unsurprising if she was going to be forced to have intercourse, that she would want to do so in a protected way. Nor is there anything so remarkable, in my opinion, about the appellant suggesting going to the police station. He may well have thought by this time that the complainant was sufficiently subdued not to complain. She had by this time, that is by the time they left the house, recovered her composure sufficiently to appear to be relatively calm though she was always intending to make her escape.

The complainant was cross-examined at considerable length. Any possible weakness in her evidence was explored and the jury had the opportunity of hearing and seeing her subjected to quite rigorous cross-examination. There was nothing in the end improbable about her evidence. On the contrary, it appears to me to have the ring of truth.

The jury were entitled to accept that she intended always to resist. Nor was there any basis, in my opinion, for an honest and reasonable belief that she was consenting. Indeed, I note that the learned trial Judge in sentencing the appellant said: "I fail to understand and the jury failed to understand how any reasonable person, in the circumstances, could have reasonably concluded that [that she was consenting], after what had gone on. Your treatment of her as she said during her evidence I think, reduced her to a sexual object to use as

you saw fit." In my opinion, these grounds of appeal must fail.

The third ground of appeal concerns his Honour's refusal to accede to an application for a change of venue. The application was put on two bases both of which, it was said, showed an unacceptable risk that the appellant would not have a fair trial at Maroochydore. The first of these was the risk of members of the jury favouring the Crown in order to discourage crimes of violence on the Sunshine Coast because of its effect on tourist revenue. And the second was the risk of an unfair trial caused by inaccurate media reporting which erroneously included a claim that the complainant had been held captive with a broken beer bottle.

As to the first of these there was some evidence that, after each of two notorious cases in the last decade, there appeared to be a decline in tourist numbers on the Sunshine Coast. However, as his Honour rightly pointed out, this was not a case of a notoriety of either of those cases and it was most unlikely, his Honour thought, that publicity concerning this case would have any effect on tourist numbers, or that prospective members of the jury would think that.

As to the second, the reporting was several months before the trial, the particular about the broken beer bottle was no doubt, one of many. It was unlikely that it would be remembered by anyone who would be likely to serve on a jury several months hence. Moreover, the learned trial judge directed the jury, as is common, to decide the case solely on

the evidence adduced. There is no reason to think that they might have done otherwise.

It was not argued that his Honour failed to take any relevant matter into account in exercising his discretion in this respect or that he took any matter into account which he should not have. I do not think there is any basis for concluding that his Honour erred in refusing to order a change of venue or that it led to a miscarriage of justice in this case.

Ground 4 concerns the admission of evidence of flight, in particular the admission of bank records showing transactions on the appellant's bank account between 7 and 24 January 2002 on the Sunshine Coast, Brisbane, Helensvale, Tweed Heads, Kempsey, Coffs Harbour and Sydney.

On the morning of 7 January 2002, when the complainant made her complaint to the police the appellant hurried away from the police station without reporting as he intended to do. He left his car at the police station. He did not report again to the police station as he was obliged to do periodically in connection with another matter. He was not seen again until 24 January, notwithstanding that the police were looking for him.

What the evidence of his bank records showed was that someone had operated on his bank account at the locations and dates indicated. They were consistent with the person who operated the account travelling from the Sunshine Coast to Sydney where

the appellant was finally apprehended. It was open to the jury to infer that it was the appellant who had operated on this account. Indeed the woman Heidi gave evidence that the appellant had rung her periodically over this period asking her to put money into this account for him which she had done. In my opinion the evidence was admissible and this ground must therefore fail.

Ground 5 concerns his Honour's direction with respect to recent complaint. When the evidence was given, his Honour in admitting it, explained to the jury that the evidence was not relevant to prove that what the complainant said was true. It was only, as he put it, "a bolster to the credibility of the person who relates how they were attacked. It goes to her consistency."

His Honour expanded on that somewhere and gave a similar direction during his summing up. I can find no error in this direction or in the fact that its purpose was explained when it was admitted. This ground, in my opinion, must also fail.

Grounds 6 and 7 complain about a direction given with respect to what the appellant's counsel described as the bathroom incident; this was when the appellant forced the complainant into the bathroom. Apparently defence counsel relied on what he submitted was the unlikelihood that the complainant would have been dragged by the appellant into the bathroom. The complaint here apparently is that, in dealing with this submission, his Honour said simply that the appellant and the

complainant ended up in the bathroom during the course of a struggle. I cannot see much difference between the two versions. They were struggling, he was stronger and they finished up in the bathroom. Moreover at defence counsel's request, his Honour read the complainant's evidence with respect to this matter to the jury. I can see no unfairness in the direction which was given.

No other complaints were made about the learned trial judge's summing-up and I am unable to see any basis for any such complaint. In my opinion the appeal should be dismissed.

McPHERSON JA: The central issues at the trial were essentially questions of fact for the jury to determine. In reaching their verdict they cannot have overlooked any of the circumstances relied on in support of the appeal against verdict. I agree with the reasons given by Justice Davies for dismissing this appeal.

PHILIPPIDES J: I also agree that this appeal should be dismissed for the reasons given by Justices Davies and McPherson.

DAVIES JA: The appeal is dismissed.
